ENFORCEMENT OF COMETITION LAW IN CARICOM: PERSPECTIVES ON DOMESTIC, REGIONAL, AND MULTILATERAL OBLIGATIONS

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Abstract

Competition law and policy and their enforcement are regarded as important in a liberalized economy to ensure that tariff reduction gains and market access commitments are not nullified or impaired by private restraints. This is true for competition policy arrangements under the Revised Treaty as well as those in the proposed European Partnership Agreements (EPAs), and the WTO agreement, in particular the General Agreement on Trade in Services (GATS).

However, competition law has not got off the ground in some CARICOM countries as a body of law worthy of fidelity in and of itself for the enforcement of obligations specified in governing legislation. The main theory advanced for this state of development is the lack of a competition culture among judges to be observed from a collection of decided cases that have faltered at the altar of traditional principles of statutory interpretation, constitutional law, or other body of law taking precedence to competition law.

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Regional enforcement of competition law has faced similar problems, not least of which is the less than adequate implementation of community competition provisions. At the multilateral level, competition law is yet to be embraced as a pre-condition for effective liberalization to be exemplified in domestic legislation. However, where efforts have failed at the multilateral level gains are being made at the regional level through RTAs that include competition provisions.

The success of the implementation of competition law at the domestic, regional and multilateral level implicate a delicate balancing act of meeting obligations at these various levels whereby multilateral obligations dictate a minimalist approach, regional obligations often go more than multilateral obligations, and domestic enforcement is thwarted by inadequate enforcement measures.

The aim of this paper is to provide a preliminary view of salient issues impacting the enforcement of competition law within CARICOM and the relationship between those issues and international obligations regarding competition law. Issues of decision-making structure, balancing of competing objectives as between, for example, regulation and competition or promotion of intellectual property rights and competition, will impact satisfaction of regional obligations set out in the Revised Treaty of Chaguaramas.

Multilateral obligations on competition law are similarly affected not least because of potential challenges regarding design and structure to be consistent with the GATT requirements of free trade agreements and customs unions.

DOMESTIC ENFORCEMENT OF COMPETITION LAW

One salient issue that may arise with regard to enforcement of competition law is whether the decision making structure of the competition agency comports with constitutional provisions guaranteeing the right to natural justice.

In the case of *The Jamaica Stock Exchange v. The Fair Trading Commission*[1], the Court of Appeal held that the merger of investigative and adjudicative functions reposed in the Jamaica Fair Trading Commission (FTC) by virtue of section 5[2] and 7[3] of the FCA amounted to a breach of section 20(2) of the Jamaican Constitution with regard to the guarantee of the right to natural justice.

The case arose out of a decision by the (FTC) to conduct investigations into, *inter alia*, the criteria for a company to be listed on the Jamaica Stock Exchange, which criteria were alleged to be in breach of the Fair Competition Act, 1993. The FTC proceeded to initiate its investigation and in doing so summoned witnesses from the party allegedly in breach of the FCA (The Jamaica Stock Exchange) whom it questioned, and thereafter submitted an amended complaint by which it sought to conduct a hearing to obtain the information to conclude its investigation.

[1] Supreme Court Civil Appeal No. 92/97.
[2] Section 5 of the FCA stipulates the investigative functions of the FTC.
[3] Section 7 of the FCA includes the power to summon and examine witnesses; to call for and examine documents; to administer oaths; to require that any document submitted to the Commission be verified by affidavit; and to adjourn any investigation from time to time.

Although the Court of Appeal did not define what it meant by a merger of the investigative and adjudicative functions, this may be culled from the judgment and put in the following categories, each of which warrants a different approach to addressing the challenge of de-merger. First, a merger occurs because the FTC may, but not must, hear orally any person against whom a complaint is made under section 7(2) of the FCA.[4]

The merger can occur here because of the possibility of a finding being made without the person against whom the complaint is brought being heard. Given the overall thrust of the court's position, this view is counter-intuitive and at odds with the court's holding since the possible corrective remedy (making the hearing provision mandatory) would not result in a divesting of the investigative and adjudicative functions on the second appreciation of merger.

Second, a merger exists because of the provisions of sections 5 and 7 of the FCA that repose investigative and adjudicative functions in the FTC and (a) there is no express delegation of the investigative functions in the staff of the FTC, and (b) officers may be authorized by the FTC to conduct investigations on its behalf.[5]

Third, a merger exists by virtue of section 7 of the FCA that in and of itself combines investigative and adjudicative functions reposed in the FTC.

[4] Section 7(2) of the FCA provides that 'the Commission may hear orally any person who, in its opinion, will be affected by an investigation under this Act, and shall so hear the person if the person has made a written request for a hearing, showing that he is an interested party likely to be affected by the result of the investigation or that there are particular reasons why he should be heard orally'.

[5] This requires a functional separation between investigation and adjudication whereby both functions are given to different bodies.

Consequently, a merger exists either because there is no mandatory provision in the FCA for an oral hearing to be conducted by the FTC for the benefit of the person against whom a complaint is brought; there is a merger of adjudicative and investigative functions in sections 5 and 7 of the FCA that repose such powers simultaneously in the FTC; and there is a merger of adjudicative and investigative functions in section 7 of the FCA that repose those dual functions in the FTC.

In the main, the *Stock Exchange* decision seems to require an independent tribunal or court to conduct any hearing with respect to matters for which a finding has to be made by the FTC, in order to resolve the apparent functional, or rather legislative, merger of investigative and adjudicative functions reposed in the Commission by virtue of sections 5 and 7 of the Fair Competition Act (FCA).[6]

This has been held by the Court of Appeal (CA) to either (a) likely to be a breach of section 20 (1) of the Constitution, or (b) that it is a breach of section 20 (2) of the Constitution where the investigation results from a complaint made by, **and not necessarily to**, the Commission.

Although the narrow holding is that a breach of section 20 (2) of the Constitution would only arise if the investigation results from a complaint made by the FTC, the court's focus seemed to have been on the legislative merger of provisions implicating adjudication and investigation, and not so much whether the complaint was made by the FTC.[7]

[6]The distinction between functional and legislative merger refers to, on the one hand, the functions as actually performed by the FTC *in fact* and , on the other hand, the functions as the FTC is empowered to carry out whether or not it does so in fact, or, to be more specific, whether or not it merges these functions in practice.

[7] See, for example, page 37 of the judgment (under the heading **'natural justice'**) where the CA begins its analysis of the question of whether permitting a hearing to be conducted by the FTC would constitute a breach of section 20 (1) of the Constitution. It begins thus: ' The fact that the Commission in the same action is as it were, investigating

Short of legislative amendment to these provisions to effect a de-merger, an intermediate solution for investigating authorities to exercise their jurisdiction is for investigations with respect to anti-competitive conduct to be heard by a court pursuant to provisions that permit a court to decide the issues without recourse to a finding by the investigating agency.

The role of competition culture for enforcement of competition law

The *Stock Exchange* decision is often seen as reflecting an inadequate exposure to a competition culture as exists in some developed countries where competition law is applied routinely by competition agencies and the courts. A competition culture is often considered a *sine qua non* for enforcement of competition law. For this reason advocacy and training programmes are encouraged. These focus on the benefits of competition for consumer welfare for dissemination to stakeholders involved in decision making, and to market participants whose conduct is under scrutiny for possible breaches of competition legislation.

While there are some aspects of the *Stock Exchange* decision that belies a misunderstanding of competition law, the decision raised a central issue that had to be resolved before approaching the merits of the competition law claim. For example, the Court of Appeal, in its interpretation of sections 19-20 of the Fair Competition Act, 1993, held counter-intuitively (albeit obiter[8]) that the local stock exchange in Jamaica, the only entity offering that service, cannot be said to be

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and adjudicating, would be, given the specific provisions of the FCA, a clear breach of the principles of natural justice'.

[8] The Court of Appeal held that the Fair Competition Act does not apply to the Jamaica Stock Exchange.

limiting competition 'when there is no evidence of the appellant[9] being in competition with anyone else'.[10] The Court of Appeal, per Panton JA, continued:

"The facts indicate that the field is wide open for the development of another stock exchange. However, there is no evidence of any such entity being even on the horizon. In the absence of such evidence, it is at least unfortunate that the respondent is alleging that the appellant is impeding that maintenance or development of effective competition to itself. The question of competition can only arise if there is another entity, real, or potential, that can offer competition".

On this view, where there is only one player in the market an issue of competition does not arise without actual evidence of other entrants or potential entrants to the market. This formulation of the issue does not contemplate the use of economic theories or economic models to predict market behaviour, although the use of economics is a central component of examining market structure and anti-competitive conduct within markets.

Yet another decision against which a similar criticism may be raised is the recent Privy Council ruling in *National Commercial Bank Ltd. v. Olint Corp. Ltd.*[11] An appeal from the Court of Appeal on, *inter alia*, the question of whether a bank by giving reasonable notice can lawfully close an account that is not in debit where there is no evidence the account is being operated unlawfully, the decision also dealt with sub- issues implicating the interpretation of section 19-20

[9] The Appellant here being the Jamaica Stock Exchange.
[10] *Stock Exchange, supra*, p. 66.
[11] Privy Council Appeal, No. 61 of 2008, 2009 [UKPC] 16, April 28, 2009.

of the Fair Competition Act, 1993, ('the FCA') and minimally, sections 34(1) (b) and section 35 of the FCA.

To be sure, the decision doubtless rests on the premise that, by and large, banking law is the basis on which claims such as these should be resolved. Thus, at paragraph 1 of the decision their Lordships noted that absent an agreement to the contrary or statutory impediment, a contract by a bank to provide banking services is terminable upon reasonable notice. Later, at paragraph 6 of the decision, their Lordships noted that the particulars of claim of the Respondent did not disclose that the period of notice given by the Appellant for the closing of the account was unreasonably short.

Absent a claim that reasonable notice was not provided for closing of the account, their Lordships focused on the other claims of the Respondent that might provide the statutory impediment to which their Lordships referred, namely claims under the Banking Act, and claims under the Fair Competition Act, 1993.

The claims under the Fair Competition Act were that the closing of the account amounted to an abuse of a dominant position contrary to sections 19-20 of the Act; that the closing of the account amounted to a refusal to supply goods or services in breach of section 34(1) (b) of the Act, and that the closing of the account amounted to collusion to injure competition in breach of section 35 of the Act.

At first instance, in *Olint Corp Ltd. v. National Commercial Bank Jamaica Ltd*,[12] the claimant sought an order to extend an interim injunction to prevent the defendant from closing its accounts, claiming, *inter alia*, that there are serious triable issues with respect to the defendant abusing its dominant position in breach of section 19-20 of the FCA. The Court, however, found no evidence that the defendant bank could be in a dominant position.[13] The court observed further that:

"There is, however, evidence that there are five other commercial banks operating in Jamaica and they compete for business. There is also evidence that the Defendant is the second largest bank with assets of between 34% to 37% of total deposits and 30% to 34% of total loans. The largest bank and competitor to the Defendant is the bank of Nova Scotia with over 40% of total deposits and loans. In my judgment there can be no serious issue that the Defendant firstly, occupies such a position of economic strength as will enable it to operate without effective constraints from its competitors in the market under the Fair Competition Act; and secondly, was abusing it in relation to the Claimant".[14]

Here the court did not consider that the relevant market would have to be determined at trial and that given the market share of the Defendant together with the fact that there are other small players in the market, that a triable issue could therefore arise that the Defendant is dominant in the market.

[12] *Olint Corp Ltd. v. National Commercial Bank Jamaica Ltd* , Claim No. 2008 HCV 00118, April, 2008.
[13] Ibid., p.18.
[14] Ibid.

On the other hand, the Court of Appeal in the instant case, per Morrison JA, adopted an enlightened approach in its preliminary appraisal of a section 19-20 claim under the FCA. It opined that it could not conclusively hold that there is no serious issue to be tried, for the purposes of extending the injunction, given the Defendant's market share in excess of 30%,with only one bank similarly circumstanced in a field of six banks, but also because section 19 of the FCA is not a legal term of art, but a provision that involves the intersection of law and economics for which expert evidence would have to be provided to make judgments on concepts such as 'a position of economic strength' and 'effective constraints'.[15]

By contrast, the Privy Council paid short shrift to the appellant's claim of abuse of dominance. Bearing in mind that this is the first statement of the Privy Council on section 19-20 of the FCA, it is worth quoting in full. The Privy Council held the following:

The claims under the Fair Competition Act appear to their Lordships to be equally unpromising. First, it is said that by closing the account, the bank was abusing a dominant position in the market. There appears to have been no evidence to suggest that the bank occupied a dominant position – defined in section 19 as "such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors" – in the market for banking services in Jamaica. The bank is the second-largest in Jamaica, with 34-37% of total loans and 30-35% of total deposits, but the Bank of Nova Scotia is larger and there are four other commercial banks in Jamaica, to say nothing of foreign banks. They are all in competition with each other. It is not easy to acquire a dominant position in the banking market. However,

[15] *Olint Corp Ltd. v. National Commercial Bank Jamaica Ltd* , Supreme Court Civil Appeal no. 40/2008, July 2008, p.34.

even if the bank did occupy a dominant position, their Lordships cannot see how a refusal to be the company's banker can be an abuse of that position. Abuse of a dominant position is normally with a view to securing some advantage in the market. Section 20 defines such abuse as impeding the "maintenance or development of effective competition". It does not appear to their Lordships that the bank's action could have any effect on competition between banks. On the contrary, it enabled competitors to pick up another customer if they felt inclined to do so.[16]

On the basis of the foregoing, a bank's closing of a customer's account, in circumstances where there are many banks with none being dominant, does not affect competition if a competitor bank will pick up that account. This, however, amounts to an *a priori* position without any analysis as to what is the relevant market for purposes of determining if an enterprise is dominant in that market. The Privy Council engaged in no analysis of what the relevant market is or should be, and whether market share by itself can establish either (a) the relevant market, and/or (b) whether the claimant is being or likely to be excluded from that market as a circumstance of abuse. Rather, it assumed that the relevant benchmark for whether competition is affected is that of competition between banks, without an appreciation of the likelihood of the claimant being a part of the relevant market from which it could be excluded.

Although the Privy Council's decision may be read as indicating an inadequate appreciation of competition law, it is arguable that the Privy Council was not persuaded that enough evidence was advanced at the stage of the application for the injunction sought with respect to the closing of the account for abuse of dominance to be regarded as a triable issue.

[16] *National Commercial Bank Jamaica Limited v. Olint Corp. Limited, Privy Council* Appeal No. 61 of 2008, paragraph 8.

To be sure, the check list of cases does not reveal a complete pessimistic account of the enforcement of competition law if one regards the *Stock Exchange* decision as signalling the impotence of investigating authorities governed by similar legislative provisions for investigation and adjudication, and similar constitutional provisions, on which basis a successful challenge can be mounted.

For example, in *Infochannel Limited v. Telecommunication of Jamaica Limited*[17] the Court of Appeal held that an individual who suffered damage as a result of an abuse of dominance can obtain an interlocutory injunction directly in the court and that there need not be a prior finding of breach of the FCA before a private individual can pursue a claim for breach of the FCA.[18]

Therefore, the enforcement of competition law is not necessarily frustrated by constitutional challenges regarding the appropriate structure for investigating agencies to investigate breaches of competition legislation.

[17] SCCA No. 99 of 2000.

[18] For a similar position see, also, *Cybervale Limited v. Cable and Wireless Jamaica Limited*, Claim No. HCV 02945/2008. at pages 5-6. See also, *Olint Corp Ltd. v. National Commercial Bank Jamaica Ltd* , Supreme Court Civil Appeal no. 40/2008, July 2008 where Morrison JA noted at page 42 that:

'While it is obviously correct that the only reference to an injunction in the Act is Section 47 (1) (b) which gives the court the power to grant an injunction at the instance of the Fair Trading Commission, in respect of uncompetitive conduct in breach of certain provisions of the Act, it does not necessarily follow from this in my view that a citizen whose statutory rights have been infringed is precluded from seeking injunctive relief under the court's general equitable jurisdiction in a proper case (See Duchess of Argyll v Duke of Argyll (1967) Ch 302 per Ungoed Thomas J at page 346). "I see no reason why the court should refuse to protect a right by injunction, merely because it is a statutory right."'

Striking a balance between Intellectual Property Rights and Competition

Finding the right balance between Intellectual Property (IP) rights and competition is one of the central challenges of competition law. On the one hand, IP rights confer exclusive use of an IP right to the rights holder for a minimum period for the enjoyment of that right to the exclusion of others. On the other hand, competition law is concerned with ensuring that the competitive process is not harmed by the exercise of such rights.

Neither the Revised Treaty nor Fair Competition Act of Jamaica provides for this balance to be struck. For instance, Article 179(3) (b) of the Revised Treaty provides that an enterprise shall not be treated as abusing its dominant position if it shows that it '*reasonably enforces or seeks to enforce a right under or existing by virtue of a copyright, patent, registered trademark or design'*.

Similarly, the FCA exempts from its application '*the entering into of an agreement in so far as it contains a provision relating to the use, licence or assignment of rights under or existing by virtue of any copyright, patent or trademark*'.[19]

This means that the limited flexibility identified in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), for balancing these rights may not be exploited under the current competition regime. For example, Article 40 of the TRIPS Agreement allows

[19] Section 3(c) of the Fair Competition Act, 1993. Section 20 (2) (b) of the Fair Competition Act also provides a similar exception with respect to an allegation of an abuse of dominance.

for competition principles to restrain certain abuses such as exclusive grant back conditions, conditions preventing challenges to validity, and coercive package licensing.

On the other hand, in Barbados the exercise of IP rights is not shielded from a challenge with regard to a claim for abuse of dominance. Such a claim may be pursued if the exercise of IP rights has the effect of lessening competition substantially in a market and impedes the transfer and dissemination of technology.[20]A similar position is taken in Trinidad and Tobago but there are no criteria for when an abuse of a dominant position occurs where IP rights are exercised as exists in Barbados.[21]

Competition and regulation

One issue often overlooked in enforcement of competition law is the interplay between competition law and regulation. These terms are but arbitrary distinctions since competition law is a form of regulation-an attempt to regulate the operation of markets.[22] The terms are used here, however, to distinguish between those markets in which competition law operates or is given

[20] Fair Competition Act, 2002, Barbados, section 16 (4) (c).
[21] Fair Trading Act, 2006, Trinidad and Tobago, section 21 (3) (b).
[22] Both competition law and regulation *per se* are governed by statutory instruments which seek to regulate conduct of market participants and to that extent the distinction is one maintained for the purposes of delineating competition law as primarily regulating anti-competitive conduct in a market *ex post* as opposed to regulation which seeks to preempt anti-competitive conduct or, more specifically, regulates market conduct *ex ante*. Maintaining an arbitrary distinction between competition and regulation enables one to think of competition and regulation as polar opposites and to advance a discourse about the implications for market structure or market behaviour when seeking to regulate conduct under either regime.

some primacy and those markets in which the discipline of competition law is subordinated to specific legislation to govern the operation of a particular sector.[23]

Admittedly, in neither case is competition law excluded totally from a regulated industry or regulation excluded from industries in which competition law governs. Thus, under the Telecommunications Act, 2000 of Jamaica, competition issues in the sector can be referred to the FTC[24] although the Office of Utilities Regulation (OUR) is charged with the overall mandate for regulation of the telecommunications sector under that specific legislation. Similarly, under section 3 of the FCA '*combinations or activities of employees for their own reasonable protection as employees*' are exempted from the operation of the FCA, but the FCA arguably applies to such activities if they are not for the reasonable protection of employees.

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.

[23] This is not to suggest any necessary conflict between competition law and regulation. Regulation and competition may seek to achieve the same outcome (for example, the highest welfare for citizens of a country), but this is not often achieved from a competition law and policy perspective, as one may deduce from the outcome of cases such as the *FTC v. The General Legal Council and The Jamaica Stock Exchange v. FTC*. In these cases the doctrine of implied repeal has been used to defeat the application of competition legislation where the impugned conduct falls under a specific legislation or is specifically regulated thereunder and whereby the same conduct, because of the general provisions of the competition legislation, can conceivably be 'regulated' or disciplined within the context of the competition legislation.

[24] Section 5 of the Telecommunications Act, 2000. Section 5 of the Telecommunications Act provides as follows: 'Where after consultation with the Fair Trading Commission the Office determines that a matter or any aspect thereof relating to the provision of specified services-

(a) is of substantial competitive significance to the provision of specified services; and
(b) falls within the functions of the Fair Trading Commission under the Fair Competition Act,

the Office shall refer the matter to the Fair Trading Commission'.

Consequently, competition legislation may be drafted in general terms to cover particular activities but it may not be possible 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*[25], the CA found 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.

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.

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

Conduct vs. classification of conduct

In the cases considered no distinction is 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:

73 (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.[26] 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

[26] It is arguable that ministerial exemptions could be pursued as an option to avoid the possibility of competition law trumping other values of governance. But exemptions are hardly justifiable on a non-discriminatory criterion thereby prompting applications for exemptions from other firms similarly situated, in terms of their capacity to influence an affirmative outcome for an exemption by justifications that accord with executive policy, that may be difficult to ignore, with the result that competition law and policy could be subordinated to other competing goals manifested in sector specific legislation shielded from competition law. This result would doubtless be an unacceptable trade off from the point of view of competition law and policy. Or, an alternative position could arise whereby the executive is pressured into rescinding previously granted exemptions by similarly situated firms.

Further, ministerial exemptions to pursue competing policy goals are limited in the context of multilateral obligations. See discussion on multilateral obligations, *Infra*.

The minimalist approach to competition law adopted by developing countries may suggest a policy option that puts a premium on negotiating leverage on such issues at the multilateral level in bargaining for concessions that is in their particular interest.

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*'.[27]

This doctrine was recently applied in *Thoburn v. Sunderland City Council*[28] where 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

27 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.
28 *Thoburn and Others v. Sunderland City Council and Others* [2002] 3 WLR, 247.

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*.

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.[29] 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.[30] However, this position is not yet recognized in local jurisprudence.

29 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.

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

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 CC. Where the matter has been addressed by the CC 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 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 questions like these 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.

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.

REGIONAL OBLIGATIONS

A precondition for enforcement of regional obligations regarding competition law for the CARICOM Single Market is the implementation of domestic legislation to give effect to community competition law and policy and the decisions of the Community Commission.

Consistent with this obligation, several CARICOM countries have passed legislation to give effect to the Revised Treaty 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 Revised Treaty.

This is because some provisions of the Revised Treaty are drafted in mandatory terms that would take effect on the promulgation of the relevant law to give effect to the Revised Treaty and other provisions, although 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'*.[31]

In this context consider Article170 (b) of the Revised Treaty.

(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:

[31] 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'*.

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 Revised Treaty 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.

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 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 Revised Treaty excludes negative clearance rulings and collective bargaining arrangements.

To ensure community competition law and policy is harmonized, Article 174(6) of the Revised Treaty 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).[32]

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

Additionally, Article 171 of Chapter Eight of The Revised Treaty refers to the establishment of a Competition Commission (CC) to implement the Community Competition Policy. The primary goal of this policy is to ensure that "the benefits expected from the Caricom Single Market and Economy (CSME) are not frustrated by anti-competitive business conduct".[33] To ensure this objective is met, Member states are enjoined to, *inter alia*, to put in place the necessary legislative measures for compliance with competition rules, provide penalties for anti-

[32] 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.
[33] Article 169 of the Revised Treaty.

competitive conduct, and to establish the requisite institutional arrangements and administrative procedures to enforce competition law.[34]

Further, Article 170(3) provides for cooperation with the CC and other regional competition authorities by stipulating that Member States are to:

(a) co-operate with the Commission in achieving compliance with the rules of competition;
(b) investigate any allegations of anti-competitive business conduct referred to the authority by the Commission or another Member State;
(c) 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.

Regarding investigations to be conducted by the CC, this can be done pursuant to a request by The Council for Trade and Economic Development (COTED)[35] where COTED has reason to believe that business conduct by an enterprise in CSME prejudices trade and prevents, restricts or distorts competition within the CSME and has or is likely to have cross-border effects. The CC then consults with the interested parties on receipt of the request for an investigation to be launched. On the basis of such consultations the Commission determines whether (a) the investigation is within the jurisdiction of the Commission, and (b) the investigation is justified in all the circumstances of the case.[36]

[34] Article 170 of the Revised Treaty.
[35] Article 175(2) of the Revised Treaty.
[36] Article 15(4) of the Revised Treaty.

Further, Article 176 provides that the CC shall request a national competition authority to conduct a preliminary investigation where the Commission has reason to believe that the business conduct of an enterprise in the Caricom Single Market and Economy (CSME) prejudices, prevents or restricts trade in the CSME. Article 176(2) provides that where a request is made of the national competition authority that authority shall investigate the matter.

Jurisdictional challenges at the regional level

At the regional level one of the central questions for determination to establish the jurisdiction of the CC in a particular matter is when may a competition issue be said to have cross-border implications. Articles 173 and 174 of the Revised Treaty seem to establish that the primary concern of the CC in exercising jurisdiction in competition matters is whether the anti-competitive conduct complained of involves cross-border effects.

For example, Article 173 of the Revised Treaty (with respect to the function of the CC) provides that:

The Commission shall:

(a) *apply the rules of competition in respect of anti-competitive cross border business conduct*;[37]
(b) promote and protect competition in the Community and coordinate the implementation of the Community Competition Policy; and

[37] Emphasis added.

(c) perform any other function conferred on it by any competent body of the Community.

Article 174 of the Revised Treaty (with respect to the powers of the CC) provides that:

Subject to Articles 175[38] and 176[39], the Commission may, in respect of cross-border transactions or transactions with cross-border effects, monitor, investigate, detect, make determinations or take action to inhibit and penalize enterprises whose business conduct prejudices trade or prevents, restricts or distorts competition within the CSME.

The Revised Treaty does not define what constitutes cross-border effects or cross-border transactions. This may conceivably include conduct that has an effect in the market of another Member state where the firm engaging in the allegedly anti-competitive conduct also sells in the market of that other Member. This notwithstanding, delineating what conduct does or does not fall within the 'cross-border effects' or 'cross border transactions' category may be difficult to unravel in practice.

For example, it is conceivable that an allegedly anti-competitive conduct that takes place within one Member state and engaged in by a firm that sells only in the domestic market of that Member state may have cross-border effects. This may be the case where the effect of the allegedly anticompetitive conduct prevents entry to the market by firms of other Member states. Indeed, the single market concept embraced by the Revised Treaty makes it difficult to

[38] Article 175 of the Revised Treaty also provides for cross-border effects as a trigger to the exercise of the CC's jurisdiction with respect to a Member state's request to it that an investigation be conducted.

[39] Article 176 also has cross-border effects as a trigger for the exercise of the CC's jurisdiction in terms of the requesting a national competition agency to conduct a preliminary investigation into allegedly anti-competitive conduct.

distinguish between exclusively domestic conduct and conduct that has an effect on another Member state or conduct that affects the operation of the single market since the economic space created by the single market concept would also include the domestic market of a Member state.

Moreover, competition law concepts such as actual and potential competitors,[40] when used in relation to determining whether a firm has abused its dominance in the context of a single economic space would not necessarily be limited to actual or potential domestic competitors. Given the internal liberalization requirement for RTAs, it is to be expected that fewer barriers to internal trade would make it easier for firms from a Member state to enter the market of another Member state. On this view actual and potential competitors would perforce include potential rivals in other Member States.

In the EU context, were guidance to be sought there, the European Court of Justice has rendered a liberal interpretation to what constitutes an effect on the trade of another Member in the Community. In one case it held that:

…it must be possible to foresee with a sufficient degree of probability in the basis of a set of objective factors of law or fact that it may have an influence direct or indirect, actual or potential on the pattern of trade between Member States such as might prejudice the aim of a single market in all the Member States.[41]

[40] The concept of potential competitors refers to firms that do not sell in a market but would do so if the market price were higher or if the cost of doing business were lower. This concept does not require that the firm be in existence at the time of the alleged anti-competitive conduct. See, for example, Richard A. Posner, Economic Analysis of Law, (4th edn.), 1992, p.303.

[41] This test was first stated in Case 56/65 Societé Technique Minière [1966] ECR, 235, 249, 251, and reiterated in Consten and Grundig [1966] ECR, 299, 341.

This liberal interpretation means any actual or potential effect on cross-border trade that is envisaged by the allegedly anti-competitive conduct would be caught as likely to affect trade within the single market Community.

In an apparent effort to avoid protracted disputes on this jurisdictional issue, the Revised Treaty provides for such matters to be resolved by way of consultation in the event that there is disagreement as to the exercise of jurisdiction between the CC and a national competition agency[42], and for COTED to make a decision on the issue where consultations have not resolved the disagreement.[43]

However, the decision of COTED is not necessarily final on the issue of jurisdiction. Article 176(6) of the Revised Treaty permits a Member State to bring proceedings before the CCJ to resolve disputes which would include disputes concerning the interpretation of the Revised Treaty.[44]

MULTILATERAL OBLIGATIONS

The enforcement of competition law and policy in domestic legal systems and within regional trading arrangements is subject to multilateral obligations both in terms of whether, in the one, competition provisions are consistent with concessions regarding competition law and policy

[42] Article 176(4) of the Revised Treaty.
[43] Article 176(5) (b) of the Revised Treaty.
[44] Article 176(6) of the Revised Treaty provides that '*Nothing in this Article shall prejudice the right of the Member State to initiate proceedings before the Court at any time*'.

made at the multilateral level and, in the other, whether the competition provisions in RTAs are such as to give rise to claims of inconsistency with GATT Article XXIV.

Even though a ruling from a multilateral body such as the WTO is not binding on, and may not be applied or used as persuasive authority by, domestic or regional administrative bodies or courts, satisfaction of multilateral obligations for enforcement of competition law and policy at the domestic and regional level is crucial because legislation can be challenged 'as such' before the WTO which can frustrate decisions of domestic or regional authorities on how competition law is to be enforced.[45]

Moreover, what may be permitted by domestic legislation in the context of the policy framework for enforcement of competition law[46] is subject to revision and redesign if there is an adverse ruling from the WTO regarding the compatibility of domestic practices with multilateral obligations.[47]

[45] As far as current WTO jurisprudence goes the 'as such' challenge applies to legislation and not to treaties, but this can still have a chilling effect on regional competition law and policy where the RTA requires domestic legislation to be consistent with its provisions to ensure harmonized competition law and policy.

[46] The policy framework includes what sectors may be exempted under competition law in pursuit of other objectives and what practices are permitted under sector specific legislation.

[47] See Panel Report of *Mexico-Measures Affecting Telecommunications Services* WT/DS204/R, April 2, 2004,((hereafter, the *Telmex* decision). The decision arose out of a complaint by the United States against Mexico that it violated its GATS commitments by failing to ensure that Telmex, the once state owned but dominant telecommunications company in Mexico, provide interconnection to U.S. telecommunications suppliers at 'cost oriented' rates and not engage in anti-competitive practices. The U.S. also alleged that Mexico did not provide U.S. telecommunications suppliers 'reasonable and non-discriminatory access' to public telecommunications networks and services as required by the GATS Annex on Telecommunications.

The U.S.'s complaint arose from Mexico's International Long Distance Rules (ILD) that permitted Telmex to set and charge a uniform interconnection rate for terminating calls to Mexico from the U.S. at prices that were considered excessive and which, because Telmex was authorized to set a settlement rate that was binding on other telecom suppliers in Mexico, was alleged to be a price –fixing cartel operated at the behest of the Mexican government.

This not to suggest, of course, that recommendations from a WTO panel are binding in an external legal order since panels may merely suggest recommendations for compliance but cannot impose such recommendations.[48]

Although Telmex's practice was supported by legislation in Mexico (i.e. the ILD rules promulgated under Mexico's Federal Telecommunications Law and issued by the Federal Telecommunications Commission), the Panel regarded the uniform settlement rate fixed by Telmex and financial compensation agreements as a horizontal price fixing and market sharing arrangement tantamount to a cartel. The compensation agreements were designed to ensure that carriers accepted no more than their proportionate share of incoming calls as related to their outgoing calls unless they paid for the right to accept more than their quota.

It is interesting to note that although one of the stated purposes of the Federal Telecommunications Law (Article 7) is "to promote a healthy competition among the different telecommunications service providers in order to offer better services, diversity and quality for the benefit of the users and to promote an adequate social coverage", and this is supported by a competition law framework reflected in Mexico's Federal Law of Economic Competition and its accompanying Code of Regulations, this had no bearing on the Panel's finding that Telmex engaged in anti-competitive practices inconsistent with Mexico's commitments under GATS. See for example, Panel Report, paras. 7.229 -7.269, and para. 8.1 Mexico notified the WTO Secretariat of its implementation of the Panel's recommendations on August 31, 2005.

[48] Article 19.1 of the DSU confirms that " the panel or the Appellate Body may suggest ways in which the Member concerned could implement the recommendations". It is readily observed that Panels are under no obligation to make such suggestions. See, for example, Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R, adopted 20 May 2008, as modified by Appellate Body Report WT/DS344/AB/R (*US – Stainless Steel (Mexico)*, at paras 8.4-8.5; Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008(*EC – Salmon)*, at paras 6.31-6.32; Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 [of the DSU]*, WT/DS257/RW, adopted 20 December 2005 , as upheld by Appellate Body Report WT/DS257/AB/RW (*US – Softwood Lumber IV Article 21.5 – Canada)*, at para 5.7. This does not mean, however, that a WTO Member has absolute discretion with respect to adopting the recommendations of a Panel or the Appellate Body. In the context of Article 21.3(c) DSU arbitrations, one arbitrator has said that:

I am in agreement with previous arbitrators that it is not "the role of the arbitrator under Article 21.3(c) to identify [or select] a particular method of implementation and to determine the 'reasonable period of time on the basis of that method'". Rather, the choice of the method of implementation rests with the implementing Member. *However, the implementing Member does not have an unfettered right to choose any method of implementation. Besides being consistent with the Member's WTO obligations, the chosen method must be such that it could be implemented within a reasonable period of time in accordance with the guidelines contained in Article 21.3(c).* Award of the Arbitrator, *European Communities – Export Subsidies on Sugar – Arbitration under Article 21.3(c) of the DSU*, WT/DS265/33, WT/DS266/33, WT/DS283/14, 28 October 2005, (*EC – Export Subsidies)*, at para 69. Emphasis added. More generally, the Appellate Body has noted that "the WTO dispute settlement system is neutral in terms of the breadth of the actions to be adopted by the implementing Member, provided the changes are sufficient to bring that Member into compliance with its WTO obligations". Appellate Body Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008(*US – Upland Cotton (Article 21.5 – Brazil)*, at para 206; see also Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/AB/RW, adopted 11 May 2007(*US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, at para 184.

Under the WTO Agreement there is no express obligation on WTO Members to introduce comprehensive competition law provisions. The General Agreement on Trade in Services (GATS) provides what may be regarded as a piecemeal approach to the adoption of competition law to govern the removal of internal barriers to trade that may frustrate liberalization efforts at the multilateral level.

Notwithstanding the absence of an obligation for promulgation of domestic competition law there are some provisions of GATS that suggest that a body of competition law must be in place in domestic legal systems to give effect to certain provisions of GATS. How these provisions are to be implemented is relevant for the satisfaction of regional obligations if, as is being argued, competition law can be regarded as either other restrictive regulations of commerce or other regulations of commerce in terms of Article XXIV of GATT 1994.

COMPETITION LAW AS OTHER RESTRICTIVE REGULATIONS OF COMMERCE (ORRCS) AND OTHER REGULATIONS OF COMMERCE (ORCS)

Obligations for RTAs are set out in GATT Article XXIV regarding internal and external liberalization requirements. The latter obligation provides that duties and other regulations of commerce shall not on the whole be higher or more restrictive than what existed before the formation of the customs union or free trade area.

The question of whether competition law can be classified as ORRCS or ORCS becomes relevant in the context of obligations to be met regarding the establishment of free trade area (FTAS) or customs unions.

Although there is no requirement for RTAs that there be harmonization of regulations of commerce to be applied to third parties (as distinct from the situation with customs unions under Article XXIV), harmonization or the maintenance of particular measures by member states may present problems with respect to compliance with international obligations in the WTO.

Harmonization of ORCs, for example, must not on the whole be higher or more restrictive than existed before the FTA came into being. Whether this means that all ORCs must be grouped and then a weighting is conducted to see if they are 'on the whole' higher or more trade restrictive is not clear.[49] Some have argued that this view is not tenable in cases where the ORC applies to FTA Members but not to non-Members (as distinct from ORCs that apply to both Members and third parties).[50] As an example, it is argued that harmonization of sanitary and phyto-sanitary (SPS) and technical barriers to trade (TBT) measures which apply lower standards to FTA members than are applied to third parties could be an ORC that is higher or more trade restrictive than what existed before the formation of the FTA.

A similar position is taken with respect to contingent measures such as trade remedies (or what is now called trade defence measures or TDIs). These include measures to combat dumping,

[49] By this I mean that individual ORCs may be higher or more trade restrictive than what existed before the formation of the FTA, but taken together are not 'on the whole' higher or more trade restrictive than what existed before the formation of the FTA.

[50] See Nicolas JS Lockhart and Andrew Mitchell, '*The Interface Between RTAs and the WTO*', in Challenges and Prospects for the WTO, Andrew Mitchell ed., Cameron May 2005.

subsidies, and surges in imports causing injury to domestic producers or safeguard measures. One issue regarding the enforcement of competition policy is whether the replacement of contingent remedies with competition law is consistent with WTO rules. In some RTAs contingent remedies such as antidumping or safeguard measures are removed or not applied with respect to its members, though it may be applied against non-parties to the RTA. This is one area about which there is no convergence at regional levels. For example, the Revised Treaty provides for the use of these measures by individual member states, but not all member states have the institutional framework in place for the application of these measures. On the other hand, MERCOSUR Members need not apply contingent remedies to their members but can do so with respect to third parties.

If this view is correct (that is, that one may select one among many ORCs to make the determination as to whether they are more trade restrictive after the formation of an RTA) harmonization of competition policies that afford lower standards for Caricom Members than are applied to third parties may run afoul of Article XXIV of GATT 1994. At time of writing, this does not appear to be a specific issue worth noting since we are yet to move into the zone of a customs union as may be contemplated by a Caricom Single Market and Economy as opposed to a Caricom Single Market.

However, the notion that competition law can be an ORRC is perhaps counter-intuitive since it is regarded by and large as a market liberalizing device, reducing or eliminating private barriers that undercut market access commitments. This can be seen from provisions on abuse of

dominance, proscription of agreements that substantially lessen competition in a market, and merger notification and review provisions.

Conceptually we may regard competition law as an ORRC for the purposes of the internal liberalization requirement if they are GATT inconsistent with core obligations such as MFN or national treatment. The original formulation of GATT 1947 did not address domestic competition law principles and the appropriate legal obligation is therefore to be found in GATS, in particular Articles VIII and IX. For example, Article VIII (1) and (2) provide as follows:

1. Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II and specific commitments;
2. Where a member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments.

Article IX, on the other hand, covers practices that restrain competition but which are not covered by Article VIII.

At the very least, these provisions require that WTO Members should put competition laws in place to address these concerns in order to avoid the costly procedure of dispute settlement at the multilateral level where there is an abuse of a monopoly position.[51]

Therefore, we may take as a convenient starting point of our analysis that competition law as an ORRC is such if it violates or is inconsistent with the specific obligations in GATS, namely Articles VIII and IX. Here, inconsistency is addressed in terms of a conflict between domestic competition laws and international obligations. Conflict can be seen in terms of a regulation authorizing what another forbids. By contrast, conflict may be defined as existing whereby one law requires what another forbids. In WTO jurisprudence it is the latter formulation of conflict that is accepted.[52]

In the context of domestic competition law this may arise whereby the law requires sectors for which multilateral commitments (for our purposes commitments made specifically under GATS) have been made to be shielded from the obligations incurred.

In the case of the first version of conflict mentioned (a law authorizing what another forbids), this can arise whereby the law permits sectors for which multilateral commitments have been

[51] This view accords with Article XVI.4 of the WTO Agreement that provides that a WTO Member "*is to ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed agreements*". With regard to the specific discipline of competition law, the contrary view may be that there is no duty to implement competition laws since there is no multilateral agreement to this effect. However, Article VIII of GATS does not require that there be a multilateral agreement on competition law as a precondition for a WTO Member to ensure that a monopoly service supplier does not abuse its dominant position. In any event, it would be difficult to conceive of this requirement being met (i.e. ensuring no abuse of a monopoly position) without the promulgation of some body of law designed to determine if and when a particular conduct constitutes an abuse of a dominant position.

[52] See for example, *Guatemala-Antidumping Investigation regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted November 25, 1998, paras. 14.29-14.36 and 14.97 to 14.99; *United States-Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted August 23, 2001, paras. 52 and 62.

made to be shielded from domestic competition law through the use of broad exempting provisions that are not necessarily sector specific as in the latter formulation of conflict. For example, blanket exemptions for otherwise anti-competitive conduct that is in pursuance of the protection of intellectual property rights.

Exempting provisions which are not sector specific are subject to interpretation as to the exact scope of their application moreso than a law specifically excluding certain sectors from its application. In this sense an exemption unrelated to a specific sector could be seen as permitted violation and not a required violation.

Whether the application of these exemptions amount to a breach of WTO obligations for the purpose of determining when and under what circumstances domestic competition law can be deemed ORRCS depends to a large extent on the distinction between mandatory and discretionary legislation. As articulated in the case of *United States- Sections 301-310 of the Trade Act of 1974*[53] mandatory legislation refers to legislation mandating a breach of WTO law and can be challenged as such; discretionary legislation, on the other hand, reposes discretion in the executive as to whether the application of the law will breach WTO rules, and can only be challenged when applied.[54]

[53] *United States-Sections 301-310 of the Trade Act of 1974*, WT/DS162/R, December, 22, 1999.
[54] Although the Panel and the Appellate Body recognized the distinction between mandatory and discretionary legislation, the Appellate Body went farther than the Panel in the implication of the distinction. The Appellate Body cited, with approval, previous Panel decisions including the practice of GATT panels as summarized in *United States – Tobacco* (Panel Report, adopted 4 October 1994, BISD 41S/131) as follows:
"… panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the *executive authority* of a contracting party to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge. (Ibid. para. 118).

An exempting provision that exempts sectors for which market access commitments have been under GATS can amount to mandatory legislation because it requires the domestic competition legislation to exclude those sectors from its purview. Can a non-specific sector exempting provision in competition legislation be so classified? Given the premise that such provisions would be subject to interpretation to determine their exact scope[55], it would seem that it is in the application of such provisions that a clear view may be formed as to whether there is a breach of WTO obligations and to that extent such exempting provisions could constitute discretionary legislation.[56]

This would be so by virtue of the discretion exercised by an instrumentality of the state (the competition authority) in pursuing a claim that is based on the argument that the exempting provision does not apply to the impugned conduct or that the impugned conduct is not contemplated to be covered; *and not* on the basis of the interpretation that the court may provide as to whether the conduct falls within the exempting provision. In other words, the relevant

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The Panel, however, did not take the position that discretionary legislation can only be challenged when applied, but noted that the content of legislation can be challenged if inconsistent with an obligation to ensure that domestic legislation complies with the WTO Agreement. (para. 6.189). Here the Panel focused on Article 18.4 of the WTO Antidumping Agreement which establishes that domestic legislation must be in compliance with WTO rules governing antidumping disciplines. Moreover, the panel seems to regard executive discretion as irrelevant in determining whether domestic legislation is to be subject to scrutiny. As the Panel observed:

"We therefore conclude that the discretion enjoyed by the US Department of Justice to initiate a case under the 1916 Act should not be interpreted as exempting the 1916 Act from scrutiny under Article VI of the GATT 1994 and the Anti-Dumping Agreement." (para. 6.191).

[55] Interpretation on the exact scope of non-sector specific exemption could relate to questions such as the meaning attributable to combinations or activities for the 'reasonable protection of employees'. See for example, section 3(a) of the Fair Competition Act, 1993, exempting from the application of the Act 'combinations or activities of employees for their own reasonable protection as employees'.

[56] It bears noting, however, that the relevant criterion for assessing whether legislation is mandatory or discretionary is the discretion reposed in the executive and not necessarily how domestic courts have interpreted the provision. See AB Report, para. 101.

consideration would be the discretion reposed in the competition authority in deciding whether to pursue a claim against conduct that it regards as potentially anti-competitive.[57]

Therefore, the application of the domestic competition law with exempting provisions would be required to determine whether the scope of the exemption is absolute and by extension whether such legislation may be seen as ORRCS.

If classifiable as an ORRC, would domestic competition law have to satisfy the internal liberalization requirement for substantially all trade under GATT Article XXIV or GATS Article V, regarding substantial sectoral coverage; or would the elimination of conflicting exempting provisions in competition legislation arise only in respect of obligations incurred under GATS Article VIII and IX?

This is an unresolved question. The inconsistency between the internal liberalization requirement under GATT Article XXIV and that under GATS Article V can be resolved by the Interpretive Note to Annex IA to the WTO Agreement that provides that 'in the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex IA to the Agreement establishing the World Trade Organisation (referred to in the agreements in Annex IA as the "WTO Agreement"), the provision of the other agreement shall prevail to the extent of the conflict'. Therefore, GATS Article V would prevail over GATT Article XXIV to the extent of any inconsistency.

[57] This is to be contrasted with a private cause of action provided for under competition legislation whereby the court has to give effect to provisions of that statutory obligation when a private party invokes the relevant provision. In this case, there is no discretion given to the executive. Once the provision is invoked a judge has to apply the legislation and the legislation would therefore be classifiable as mandatory legislation in this respect.

SCOPE OF SUBSTANTIAL SECTORAL COVERAGE

The scope of the substantial sectoral coverage under GATS Article V permits the exclusion of sectors, assuming that no specific multilateral commitments were made for them. To be consistent with GATS obligations therefore, domestic exempting provisions have to relate to the GATS sectoral exemptions.

It is noteworthy that the typical domestic competition law exempting provision does not refer to sectoral coverage but is drafted in broad language that is often not sector specific.

Therefore to the extent that the exemptions are broader than the sectors for which commitments have been made the exempting provisions may be deemed an ORRC for the purposes of the internal liberalization requirement, which, by extension, would require reform of the exempting provision.

COMPETITION LAW AS ORCS

Turkey-Textiles defines ORCS broadly in the following terms:

'While there is no general agreed definition between Members as to the scope of this concept of 'other regulations of commerce', for our purposes, it is clear that this concept includes quantitative restrictions. More broadly, the ordinary meaning of the terms 'other regulations of

commerce' could be understood to include any regulation having an impact on trade (such as measures in the fields covered by WTO rules, e.g. sanitary and phyto-sanitary, customs valuation, antidumping, technical barriers to trade; as well as other trade related domestic regulation, e.g. environmental standards, export credit schemes). Given the dynamic nature of regional trade agreements, we consider that this is an evolving concept'.[58]

It is significant that the definition makes no distinction between border regulations and those governing internal sale of goods and services. These must not be higher or more restrictive than what existed before the formation of the FTA or customs union.

Where no competition law existed before the formation of the FTA or customs union, it may be difficult to argue that the introduction of competition law after its formation is more restrictive than what existed before. This conclusion warrants a comparison of competition law before and after the formation of the customs union or FTA, and secondly, competition law by its nature and scope as trade liberalizing and its inclusion after the formation of a customs union or FTA would not be presumptively trade restricting. In this sense the idea of competition law being an ORC not to be more restrictive to parties external to the FTA would likely not arise.

However, one notable exception is where a country in an FTA is negotiating to be included in another FTA or customs union. In this event, the competition law in existence is to be compared with competition law that is the result of modification. (.e.g. where harmonization is required because of a commitment to a common competition policy). Here, the harmonized competition

[58] *Turkey-Textiles*, Panel Report, para. 9.120.

law should not be more restrictive than what existed before. Arguably, this arises if it is more GATS inconsistent than what existed before.

For practical purposes, a more restrictive competition law regime may either arise whereby the harmonized competition regime for parties external to the RTA or customs union has more obligations to be met than what existed before or fewer exemptions of sectors from the operation of competition law. Given that, conceptually, competition law is seen as trade liberalizing it is questionable whether either formulation is capable of denoting what may be deemed a more restrictive other regulation of commerce.

In sum, competition law may be deemed an ORRC or ORC. If the former, it is to be eliminated with regard to sectors for which liberalized commitment have been made at the multilateral level under GATS; if an ORC, on the other hand, it is to be no more restrictive than what existed before the formation of a FTA or customs union.

CONCLUSION

The enforcement of competition law in CARICOM is yet to be realized due to many factors including challenges regarding the decision making structure of investigating agencies, the subordination of competition law to other areas of law, but also to the incomplete incorporation of provisions of the Revised Treaty in the domestic law of several CARICOM countries.

The issue of meeting multilateral obligations regarding enforcement of competition law is yet to surface given that the minimalist obligations set out in GATS have largely been met by provisions in CARICOM legislation protecting against abuse of dominance. The question of harmonization of regional competition law remains as one with implications for the extent to which the competition law regime adopted is consistent with GATT obligations for RTAs.