

WTO AGREEMENT ON TRADE FACILITATION AND IMPLICATIONS FOR INTRA-REGIONAL TRADE: THE CASE OF CARICOM

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INTRODUCTION

The WTO Agreement on Trade Facilitation (TFA) is being hailed as a significant milestone in the endeavour to increase global trade by virtue of simplifying customs procedures for clearance of goods and to provide for more WTO-compliant border measures by minimizing non-tariff barriers associated with infrastructural prerequisites.

At the global level, trade facilitation has been one of the elements of the WTO Doha Round of trade negotiations. Negotiations on trade facilitation started in July 2004 and on 7 December 2013, at the Ninth WTO Ministerial Conference in Bali, WTO members reached an agreement on the so-called Bali package, a selection of issues from the broader Doha round negotiations that includes trade facilitation, agriculture and provisions for least developed countries and development in general.

The trade facilitation decision is perhaps the most significant for global trade, as it is a multilateral deal to simplify customs procedures by reducing costs and improving their speed and efficiency, while also aiming to enhance technical assistance and support for capacity building in this area. The WTO Trade Facilitation Agreement clarified and further improved aspects of relevant articles of GATT 1994, namely freedom of transit (Article V), fees and formalities connected with importation and exportation (Article VIII), and publication and administration of trade regulations (Article X).

Existing data on the TFA's likely impact on global trade is positive and an extrapolation to intra-regional trade may suggest a similar conclusion, given that several preferential trade agreements include provisions similar to those in the TFA.

The positive impact on global trade which the TFA portends is predicated on the notion that the TFA in its operation in a regional context would be trade enhancing and not trade diversionary, but as is often

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known the debate on whether preferential trade agreements are trade diversionary or trade enhancing for global trade is far from settled despite the internal and external liberalization requirements of such agreements for consistency with Article XXIV of GATT.

The operation of the TFA in a regional context assumes that GATT Article XXIV obligations regarding liberalization are met since the TFA can only be seen as a necessary but not sufficient condition for enhancing intra-regional trade.

Still, the implications for global and intra-regional trade are, however, premised on a number of assumptions, namely that the TFA will be implemented consistent with the WTO Agreement, the status of implementation of current WTO Agreements, flexibilities for implementation of the TFA, and flexibilities for implementation of RTA obligations.

This paper aims at elaborating on some of the assumptions for the implementation of a TFA suggesting, in the main, that the TFA's impact on intra-regional trade regarding CARICOM is far from clear or certain given the current regime for flexible application of multilateral and regional trade rules.

DEFINITION OF TRADE FACILITATION

There is no standard definition of the term 'trade facilitation'. In 2001 the OECD referred to the term as a 'simplification and standardisation of procedures and associated information flows required to move goods internationally from seller to buyer and to pass payments in the other direction'. The United Nations Economic Commission for Europe (UN/ECE) defined it as a 'comprehensive and integrated approach to reducing the complexity and cost of the trade transaction process, and ensuring that all these activities can take place in an efficient, transparent, and predictable manner, based on internationally accepted norms, standards and best practises'. On the other hand, the WTO has defined the term as the 'simplification and harmonization of international trade procedures, including activities, practices, and formalities involved in collecting, presenting, communicating, and processing data required for the movement of goods in international trade' (WTO 2001). Much of the WTO Agreement with its trade enhancing focus suggests that in a generic sense the agreement is a trade facilitation device. Yet, for our purposes, we adopt the definition of the WTO in the limited sense in which the term is used.

Typical trade facilitation measures include the (Single Window), IT solutions (EDI), standardisation (electronic or paper-based) or simplified procedures (Authorised Economic Operator [AEO]). Furthermore,

customs techniques such as risk analysis can speed up customs procedures and thereby facilitate global trade.

The Single Window, for example, is a concept based on the idea that a trader undertaking to move goods internationally needs to engage one government agency only, which then forwards the required information provided by the trader to all other relevant government agencies. Such a single entry point simplifies the process for the trader who oftentimes has to engage several different agencies in order to comply with national trade regulations.

MEASURING TRADE IMPACT FROM THE TFA

Measuring trade impact from the TFA when implemented is a task fraught with uncertainty. Much depends on several factors not least being the definition of trade facilitation employed, the category of commitments undertaken to be enforceable when the agreement takes effect, the pace at which the various commitments are to be undertaken, the relationship between commitments undertaken and the trade in sectors likely to be impacted by those commitments, and the production infrastructure of the relevant trading partners.

The last of these suggest that the TFA is not a sufficient condition for enhancing global or regional trade. For countries specializing in primary commodities whose producers have an established trading relationship with their trading partners a TFA may add little value as opposed to a new producer trying to enter a particular market. And then, a TFA may not boost exports if there are inadequate domestic incentives for potential exporters to engage in productive activity.

Moreover, even with a TFA implemented, private restraints, the nature and scope of which competition law is meant to address, may exist to deter exports or imports as in the case of exclusive distribution agreements, or a non-existent or insufficient enforcement mechanism for competition law.

Measuring the impact of a TFA has largely been done from the perspective of economics, but with no less precision than the qualitative exercise involved in legal analysis. The gravity model is often used to predict trade flows in the context of an implemented TFA, but the gravity model is subject to several criticisms, including assumptions indicating that impediments to trade can be fully removed, that the extrapolation

of global trade flows from a selected sample is justifiable, and that factors other than GDP, distance and similarity in economies are of less significance in assessing trade flows.¹

The gravity model holds that that the larger, the richer, and the closer together two countries are, the more they are likely to trade, and that trade is enhanced when trading countries have more things they have in common, such as currency, language, and shared political histories. or

One criticism of the gravity model is that it discounts the importance of comparative advantage as a determinant in trade flows,² resulting in incorrect calculations on the impact of trade flows using the usual factors of GDP, distance and the similarity of the economies being investigated.

It may also be difficult to assign specific values, for quantification, of TFA measures such as a single window or an appeal process for advanced rulings whereby structural or subjective factors will often influence the effectiveness of such measures, such as lack of coordination among the involved regulatory agencies or delay in the administrative or judicial appeals process.

However, the majority of studies suggest positive implications of a TFA on the assumption that simplified procedures at the border for the clearance of goods will enhance trade.

TFA and WTO Agreement

Implementation of the trade facilitating provisions of the WTO Agreement is to be considered a necessary condition for the benefits of a TFA to be observed within regional trading blocs since the TFA is premised on the clarification of existing GATT disciplines for trade facilitation.

Implementation of WTO Obligations

¹ See, for example, Marco Mele and Paola Allegra Baistrocchi 'A Critique of the Gravitational Model in Estimating the Determinants of Trade Flows: International Journal of Business and Commerce Vol. 2, No.1: Sep 2012[13-23], explaining that other factors, such as culture, are of significance in explaining trade flows but that this factor is overlooked by the gravity model.

² See, for example, Dan Ciuriak and Shinji Kinjo 'Trade Specialization in the Gravity in the Gravity Model of International Trade, available at <http://ssrn.com/abstract=1549323>, last visited August 25, 2014.

Implementation of WTO commitments is significant for giving effect to the TFA within CARICOM Member states. These WTO commitments often require amendments to existing legislation or promulgation of new legislation.

Pursuant to Article XVI: 4 of the WTO Agreement, for example, WTO Members are enjoined to implement their WTO obligations in good faith and to 'ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements'.

In addition, the jurisprudence of the WTO in clarifying commitments arguably represents a source of obligation beyond disputants. Thus, the adoption of panel and Appellate Body Reports may be seen as representing secondary obligations for the implementation of the rulings and recommendations arising from such reports and measures found inconsistent with the WTO Agreement must be withdrawn immediately or within a reasonable time frame.³

In the case of advance rulings under the TFA, these are likely to be based on domestic law with the result that if WTO obligations are not incorporated in domestic law an advance ruling may not reflect the international obligations assumed.

Consider, for example, a request for an advance ruling as to the applicable duty to goods subject to an anti-dumping duty whereby the administrative decision is subject to judicial review proceedings on the basis of the non-application of WTO law because the requisite amendment to domestic law did not occur. A domestic court would likely resolve the issue not on the basis of the non-application of WTO law, but on whether the administrative body complied with domestic law.

Or consider, as another example, a request for an advance ruling on valuation of goods whereby the Agreement on Customs Valuation has not yet been implemented in domestic legislation.

These two examples indicate that the benefits to be derived from the TFA are interlinked with the nature and scope of the implementation of existing WTO obligations bearing upon the TFA.

Flexibilities for Implementing the TFA

The flexibilities in the TFA also suggest uncertainty as to the immediate benefits of the agreement when it enters into force since countries are able to self designate the category of obligations to be assumed on

³ Article 21.3 of the DSU.

the entry into force of the agreement. These involve so-called category A, category B, and category C commitments.

- (1) Category A commitments are those that a Member State has designated for implementation upon entry into force of the agreement;
- (2) Category B commitments are those that a Member State has designated for implementation on a date after a transitional period;
- (3) Category C commitments are those that a Member State has designated for implementation on a date after a transitional period and the acquisition of implementation capacity through the provision of technical assistance and support for capacity building.

In assisting developing countries and least developed countries (LDCs) to implement trade facilitation reforms the agreement provides for staged implementation of commitments, and over long periods if necessary. This is expected to be based on national needs assessments to determine technical assistance requirements and attendant costs. Developing countries are therefore able to tie their promised commitments to technical assistance acquired for giving effect to their commitments. This permits movement between categories of commitments if the required technical assistance is not received, for example, shifting a commitment from category B to category C status.

GIVING EFFECT TO TFA WITHIN CARICOM

Before addressing the question of the likely effect of the TFA within CARICOM consideration is to be given to the likely mode of giving effect to the agreement. CARICOM countries may choose to undertake their own domestic initiatives to give effect to the agreement as individual states, as a customs union within CARICOM (as is the case with the OECS), or at the regional level through the CARICOM Secretariat.

It is to be expected that coordination of efforts will occur particularly to avoid duplication of efforts and to explore the flexibilities within the Revised Treaty for WTO-plus and WTO-minus commitments for the differentiated territories within CARICOM regarding the TFA. In addition, Article 80 of the RTC provides for coordination of external trade policy, obligating CARICOM Member states to '*coordinate their trade policies with third States or groups of third States*':⁴

⁴ Article 80(1) of the RTC.

Where individual states in CARICOM undertake the TFA commitments without recourse to regional initiatives the obligations become WTO obligations, not necessarily enforceable under the Revised Treaty without a corresponding Protocol to amend the Revised Treaty to give effect to the TFA.

To the extent that the TFA builds on GATT disciplines for trade facilitation in Articles V, VIII and X of the GATT, already incorporated in the RTC, the impact on intra-regional trade regarding CARICOM may be limited if the TFA is to be implemented without recourse to regional initiatives under the RTC.

This would be because of the limited avenue for enforcement of the TFA in CARICOM,⁵ leaving CARICOM Members the option of the WTO dispute settlement system which they may be averse to engaging in preference for a political solution or a more gradual implementing legal framework in CARICOM incorporating the TFA.

However, this last is based on two arguably assailable premises, namely that obligations assumed by CARICOM Members at the multilateral level will not be met within the regional framework unless there is a regional enforcement mechanism with respect to those obligations, and that a rules based system in the context of an enforcement mechanism is a necessary condition for obligations to be met.

Regarding the latter, it is readily observed, for example, that there are aspects of the TFA which are already being put in practice by some CARICOM Members. Trinidad and Tobago, for example, has already put in place the provision for advance rulings, and Jamaica has moved ahead in the implementation stage for a single window access point. In addition, RTAs have to varying degrees incorporated various provisions of the TFA.

Nonetheless, RTAs have varying degrees of flexibility in pursuing multilateral obligations, whether as WTO-minus or WTO plus commitments. Article XXIV of GATT provides one basis for this possibility of deviating from multilateral obligations, but the Enabling Clause allows another. This last permits special and differential treatment for developing countries regarding tariff and non-tariff measures, thereby opening the possibility for further flexibility in the application of the TFA.

Thus, beyond flexibilities for market access, if conditioned on objective criteria, as noted in *EC-Tariff Preferences*, RTAs involving developing countries, as is the case with CARICOM under the RTC, permit

⁵ The RTC does not confer jurisdiction on the CCJ for the enforcement of non RTC provisions in other agreements or for the enforcement of the WTO Agreement in particular. There is some reference to court being able to rely on international law in resolving disputes but this is limited to the clarification of obligations in the RTC as opposed to determining whether obligations extra the RTC can trump RTC provisions.

special and differential treatment in other areas for least developing within such RTAs, giving rise to the possibility of differences in TFA implementation outside of the agreed targets at the multilateral level.

The RTC reflects this flexibility by providing a special regime for disadvantaged territories in CARICOM with respect to satisfying the RTC obligations.

In accordance with Chapter VII of the RTC, for example, there is provision for special and differential treatment for disadvantaged countries in CARICOM⁶ which may operate as an exception to core obligations under the RTC including MFN and national treatment.

The Revised Treaty defines 'disadvantaged countries' to mean:

- (a) the Less Developed Countries within the meaning of Article 4; or*
- (b) Member States that may require special support measures of a transitional or temporary nature by reason of:*
 - (i) impairment of resources resulting from natural disasters; or*
 - (ii) the adverse impact of the operation of the CSME on their economies; or*
 - (iii) temporary low levels of economic development; or*
 - (iv) being a Highly-Indebted Poor Country designated as such by the competent inter-governmental organisation;*

Pursuant to Article 4 of the Revised Treaty, the list of disadvantaged territories identified in the Revised Treaty includes the following:

Members of the Community consist of:

- (a) Antigua and Barbuda
- (d) Belize
- (e) Dominica
- (f) Grenada
- (g)
- (i) Montserrat

⁶ Chapter VII of the RTC covers Articles 142-167.

(j) St. Kitts and Nevis

(k) Saint Lucia

(l) St. Vincent and the Grenadines

Under Article 160 of the RTC, less developed countries in CARICOM can request the imposition of duties on goods eligible for Community treatment if the country has suffered or is likely to suffer loss of revenue resulting from the importation of goods eligible for Community treatment. This means that despite the possibly trade enhancing nature of the TFA this may be undercut to the extent that this provision is invoked.

WTO-minus and WTO plus commitments

The possibility of WTO-plus and WTO-minus commitments is ever present in RTAs and no less so in the case of the RTC. One cannot, therefore, discount the probability of WTO-minus application of the TFA within CARICOM, especially in view of the special regime or disadvantaged territories permitting deviations from RTC obligations.

Whether WTO-minus commitments are permissible within an RTA is not settled. The WTO may be seen as providing a floor of obligations below which WTO Members may not go,⁷ but this depends on how the particular obligation representing the WTO-minus commitment is characterized. Is it an 'other regulations of commerce', the external liberalization obligation for RTAs, or an 'other restrictive regulations of commerce' the internal liberalization obligation for RTAs?

Other restrictive regulations of commerce must be eliminated with respect to substantially all trade, but other regulations of commerce must not be higher or more restrictive than what existed before the RTA. The TFA as a trade enhancing device⁸ may be classified as an 'other regulations of commerce' and not as an 'other restrictive regulations of commerce' such as an export prohibition or quantitative restriction inconsistent with Article XI of GATT.

On this view, the TFA representing a new trade enhancing obligation to be incorporated within the RTA would not be an 'other regulations of commerce' capable of being higher or more trade restrictive for

⁷ On the possibility of this being the case see, for example, Armand C.M. de Mestral, 'Dispute Settlement Under the WTO and RTAs: An Uneasy Relationship', *JIEL*, vol. 16. No. 4. December 2013., p. 813. This view may also be based on the presumption that deviations from WTO law in RTAs must generally be trade enhancing within the RTA and not trade restricting owing to the requirements of Article XXIV:8 of GATT 1994 regarding the obligations for the elimination of 'other restrictive regulations of commerce' within an RTA.

⁸ The TFA is largely conceived of as building on Articles V, VIII and X of GATT as trade facilitating provisions. See, for example, the preamble of the TFA., WT/L/931 at page 1.

parties external to the RTA. In short, the external liberalization requirement for RTAs is more properly applicable generally to trade restrictive measures and not to trade enhancing measures.⁹

For a new trade enhancing measure building on other measures for trade facilitation, the issue arises as to what extent the new trade enhancing measure could be seen as being capable of violating the external liberalization requirement since the regulation or measure existing before the formation of the RTA would be the less trade enhancing measure.

It is possible to conceive of the new measure as imposing more restrictions than what existed before if, for example, there is a breach of MFN in its application compared to the previous less trade enhancing measure, assuming the latter was applied consistent with MFN principles regarding parties external to the RTA.

The better view, it appears, is that WTO-minus commitments are permissible within an RTA provided these do not impact parties external to the RTA. An RTA, for example, cannot, consistent with WTO rules, apply safeguard measures to parties external to the RTA and not to the parties within the RTA.¹⁰

On this view, the TFA is capable of being applied within an RTA at less than the obligations assumed by the RTA members at the multilateral level. This possibility engenders uncertainty as to the precise impact on intra-regional trade with the implementation of the TFA.

GATT Article XX exceptions and the TFA

Yet another issue of uncertainty regarding the impact of the TFA is the availability of GATT Article XX exceptions to its application. There is of course the likelihood of disagreement as to whether Article XX exceptions in GATT are applicable to the TFA if there is no explicit reference to Article XX in the TFA.

⁹ This is not to suggest that a trade enhancing measure cannot be a candidate for classification under 'other regulations of commerce'. The definition of other regulations of commerce proffered in *Turkey-Textiles(WT/DS34/R)* is sufficiently broad to cover any regulation affecting commerce. As the Panel noted in *Turkey-Textiles* on the definition of 'other regulations of commerce' "While there is no 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 phytosanitary, customs valuation, anti-dumping, technical barriers to trade; as well as any 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." (para. 9.120). Moreover, it is conceivable that a trade enhancing measure can be more restrictive than what existed before the formation of the RTA whereby the trade enhancing measure is applied discriminatorily as against parties external to the RTA.

¹⁰ See, for example, *Brazil-Retreaded Tyres*, WT/DS332/AB/R and *Argentina-Footwear*, WT/DS121/AB/R

In *China-Raw Materials*¹¹ the absence of a specific reference to Article XX of GATT in Article 11.3 of China's Protocol of Accession to the WTO Agreement or to GATT 1994, in contrast to Article 5.1 of the Accession Protocol and other provisions examined,¹² rendered the defence unavailable on the ruling of the panel and the Appellate Body. The Appellate Body also suggested that the availability of Article XX as a defence to an annexed agreement must be assessed on a case by case basis as opposed to relying on an interpretive technique regarding the covered agreements as a single package undertaking whereby GATT provisions would be applicable to them whether expressly or by implication, if, for example, annexed agreements are to be regarded as part of the WTO Agreement consistent with Article II:2 of the WTO Agreement.¹³

A narrow reading of *China-Raw Materials* suggest that the particular provision of a WTO annexed Agreement not being applied, or for which an exemption or exception is invoked, must refer to GATT or GATT exceptions or exemptions for these to be available and that reference to GATT exceptions generally in the agreement may not suffice.

Article 24(7) of the TFA does not refer to GATT Article XX expressly and this throws doubt on the availability of Article XX. However, unlike the situation in *China-Raw Materials* whereby the references to GATT exceptions was included expressly in provisions of the Accession Protocol and not in others, thereby prompting the Appellate Body to prefer a textual interpretive approach to suggest that the absence of GATT exempting provisions in those provisions must have some meaning,¹⁴ the TFA contains a general reference to GATT exemptions applicable to all the provisions of the TFA.

¹¹ WT/DS394,395,398/AB/R

¹² These provisions include Articles 1.2, 5.1, 11.1 and 11.2 of the Accession Protocol.

¹³ Article II:2 of the WTO Agreement provides as follows: The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.

¹⁴ One may take issue with the Appellate Body's ruling on the meaning to be ascribed to the absence of permissive or obligatory conduct in a covered WTO Agreement. In *China-Raw Materials*, the absence of a specific reference to GATT 1994 exceptions was interpreted to mean that Article XX is not available as a defence to obligations assumed by China under Article 11.3 of its Accession Protocol. In previous decisions, however, the Appellate Body has reversed panel decisions interpreting the absence of a specific reference to an obligation as between a provision in GATT and an annexed agreement as indicating that the GATT provision is not included by implication. See, for example, *Argentina-Footwear*, on the issue of whether the requirement for 'unforeseen developments' in the application of a safeguard measure is an obligation to be met under the Agreement on Safeguards which contains no specific reference to Article XIX of GATT. The panel read the absence of the 'unforeseen developments' requirement from the Agreement on Safeguards as meaning something-it was not meant to be applicable to that agreement-, while the Appellate Body took a purposive approach in its interpretation, adopting a cumulative reading of Article XIX of GATT and the Agreement on Safeguards and reading the obligation as being included by implication in the Agreement on Safeguards. This difference in approach raises another issue, whether the difference in treatment in the cases, *Argentina-Footwear* and *China-Raw Materials*, represent developments in WTO jurisprudence further clarifying the interpretive technique to be employed consistently in future disputes of this nature or whether the one is distinguishable from the other by virtue of the particular provision being interpreted, the one being a positive obligation, the other being an exception to the positive obligation which, on the basis of WTO jurisprudence are often, arguably, interpreted restrictively, that is, exceptions or exemptions are to be interpreted restrictively.

Article 24(7) of the TFA provides for example that:

All exceptions and exemptions under the GATT 1994 shall apply to the provisions of this Agreement. Waivers applicable to the GATT 1994 or any part thereof, granted according to Article IX:3 and Article IX:4 of the Marrakesh Agreement Establishing the World Trade Organization and any amendments thereto as of the date of entry into force of this Agreement, shall apply to the provisions of this Agreement.

The better view, therefore, is that Article XX GATT exceptions or exemptions would be applicable to the TFA though not expressly included in the provision. That being the position, the TFA, even when implemented in accordance with the flexibility for assuming category A, B and C obligations consistent with the provision of technical assistance, can be implemented consistent with GATT Article XX exemptions, in addition to similar Article XX exceptions included in RTAs as an independent and separate basis for deviation from the multilateral commitment assumed under the TFA.

Thus, the availability of GATT Article XX exceptions may play a negative role in the application of the TFA diminishing the trade facilitation role it is meant to engender. This negative role must not, however, be given more weight than necessary. Typically, under WTO jurisprudence the applicability of a measure to GATT Article XX exceptions is not difficult or not as difficult as satisfying the Chapeau test, that is, the measure must not constitute a means of arbitrary or disguised restriction of international trade. Indeed, the invocation of GATT Article defences usually fall prey to the Chapeau test, prompting some scholars to suggest that the defence is largely unavailable.¹⁵

GATT Article XX exceptions in the RTC and the public interest exception

The RTC contains a similar GATT Article XX exception to core obligations that is applicable to RTC obligations. A TFA agreement incorporated in the RTC would likely be subject to these exceptions as an additional basis for possible selected application of the TFA.

However, with respect to the latter, the Appellate Body, despite academic views to the contrary, has clarified that exceptions are not to be construed restrictively merely because they are so characterized. As the Appellate Body noted in *EC-Hormones*, 'merely characterizing a treaty provision as an 'exception' does not by itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words...'(*EC-Hormones*, Appellate Body Report, para. 104)

¹⁵ See, for example, Sanford Gaines 'The WTO'S Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures', 22:4 *U. Pa. J. Int'l Econ. L.* 739 (2001), at 775-777, arguing that the text of Article XX of GATT permits rational and justifiable discrimination which can be based on the policy objective of the measure, but that WTO jurisprudence rejects this approach and does not clarify precisely and acceptably when a measure satisfies the rational and justifiable threshold.

The caveat relating to the application of GATT Article XX exceptions in terms of meeting the requirements of the Chapeau also applies with respect to the Chapeau of Article 226 of the RTC, drafted in similar terms as the Chapeau of GATT Article XX.

There is yet no decision from the Caribbean Court of Justice (CCJ), charged with the interpretation of the RTC, on how this exception is to be applied and whether WTO jurisprudence would be dispositive in the application of the provision.

This development raises the question of when are WTO obligations enforceable generally and in particular under the RTC.

Enforcement of WTO Obligations under the RTC

Under the RTC, there are several provisions allowing for the application and enforcement of WTO rules. These arise particularly in areas of similarity between the WTO obligation and the obligation under the RTC.

This is seen particularly in the case of trade remedies whereby the obligations under the RTC bear some similarity with WTO obligations.¹⁶

This similarity in the obligations would at the very least suggest that the CCJ may, in taking into relevant rules of international law under Article 217 of the RTC, refer to WTO jurisprudence in interpreting similar provisions of the RTC which could doubtless result in the indirect enforcement of WTO obligations.

When are WTO Obligations enforceable?

Generally, WTO obligations would become enforceable in individual CARICOM countries with a common law tradition where there is incorporation of the WTO obligation in domestic law because of the dualist principle of the enforcement of international obligations.

Particular WTO Agreements have been incorporated by amendments to existing legislation or promulgation of new legislation.¹⁷ For example, the WTO Agreement on Customs Valuation providing for, inter alia, the application of the transaction value for duty purposes is reflected in amendments to the Customs Act of Jamaica.

¹⁶ See, for example, Parts II, III, and V, of the RTC.

¹⁷ Incorporation of an international agreement into domestic law is seen as transforming the international law instrument into a municipal law instrument subject to the ordinary rules of statutory interpretation. See, for example, *Fothergill v. Monarch Airlines Ltd* (1981) AC, 251.

A margin of appreciation is also permitted for CARICOM countries to prefer implementation of WTO obligations to those existing under their other treaty commitments (e.g. under the Revised Treaty of Chaguaramas or the European Partnership Agreement) where either WTO rules are chosen as the applicable rule to examine a measure or the WTO forum is chosen to settle a dispute that simultaneously arises under more than one treaty regime.

WTO obligations would also be applicable to the extent that the CCJ determines that the resolution of a particular dispute requires recourse to international law or WTO law.¹⁸ Much depends on how the CCJ characterizes WTO law.

The CCJ may, for example, treat WTO law as a species of obligations that are not to be considered as international law *per se* for application to a particular dispute if such obligations are neither general customary international law nor a specific obligatory type of customs such as *jus cogens*,¹⁹ and if the WTO Agreement is not binding as such in the RTC legal order when the CCJ exercises its original jurisdiction.

The reference to international law in Article 217 of the RTC may also be interpreted by the CCJ as referring only to principles of interpretation in the Vienna Convention on the Law of Treaties (VCLT), in particular Articles 31-32, similar to the approach taken by the Appellate Body in *Japan-Taxes on Alcoholic Beverages*²⁰ and *United States-Standards for Reformulated and Conventional Gasoline*,²¹ and not to other rules (for example, Article 30 of the VCLT relating to successive treaties, and despite the VCLT being regarded as customary international law) which could result in another treaty taking precedence to obligations under the RTC.

The existence of WTO-plus, WTO-minus and WTO consistent provisions suggest, however, that some reference may be made to similar provisions and the interpretation of those provisions as guidance in the interpretation of provisions in the RTC which could result in an indirect application and enforcement of WTO law.

¹⁸ Article 217 of the RTC gives the CCJ discretion to apply international law to resolve disputes under the RTC in its original jurisdiction.

¹⁹ For a general discussion on the rejection of the notion of WTO obligations as either general customary international law or *jus cogens* see, for example, Joost Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?', 14 EURO. J. INT'L L. 907, 937 (2003). This observation, however, does not undercut the notion of WTO as a branch of public international law.

²⁰ WT/DS8, 10, 11/AB/R, at 17, adopted March 20, 1997.

²¹ WT/DS2/AB/R, at 17, adopted May 20, 1996.

In the case of WTO-plus provisions, WTO obligations are usually considered as a starting point for negotiators as opposed to the provision being an entirely new concept.²² And even in the case of provisions independent of the WTO, many of the concepts used are common to WTO jurisprudence.²³

In the case of WTO-minus provisions, there is arguably some room for an interpretation independent of WTO law, but concepts embodied in the obligation may also be common to WTO law separate from the issue of the enforceability of the alternative WTO consistent obligation if the parties choose the WTO forum to resolve the dispute on the basis of a measure inconsistent with the WTO obligation and not the WTO-minus provision in the regional trade agreement or the RTC in particular.

WTO consistent provisions or those confirming WTO obligations (as in the case of trade remedies) may be typical candidates for the application of WTO law under Article 217 of the RTC.

At the time of writing there is yet no decision of the CCJ on whether WTO law is to be dispositive in interpreting similar or identically worded WTO provisions in the RTC. This may suggest some interpretive margin of appreciation whereby there is independent strand of RTC jurisprudence on these provisions.

Public Interest Exception under the RTC

At the time of writing no decision has been taken by the Council for Trade and Economic Development (COTED) regarding how the TFA is to be implemented in CARICOM. Noteworthy, however, is the public interest exception in Article...of the RTC permitting deviation from RTC obligations in the public interest as determined by COTED or the CARICOM Member requesting the exemption.

The term 'public interest' is not defined in the RTC and, more importantly, decisions made on this basis, whether by COTED under Article 183 of the RTC or by individual Member States under Article 31 of the RTC, appear not to be justiciable because such decisions are within the purview of policy and not subject to any specific legal criteria for their exercise.²⁴ This would doubtless provide some basis for differential application of the TFA.

²² I G Bercero, 'Dispute Settlement in European Union Free Trade Agreements: Lessons Learned?' in L. Bartels and F. Otino (eds), *Regional Trading Agreements and the WTO Legal System* (2006) 383, 400.

²³ Ibid.

²⁴ This is not to suggest that an exception in a treaty can be so applied as to do violence to the underlying purpose of a treaty as this would clearly be in conflict with Article 26 (*pacta sunt servanda*) of the Vienna Convention on the Law of Treaties.

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

Cooperation on customs matters: Article 95 of the RTC

Article 95 of the RTC, however, provides for cooperation of CARICOM Members in customs matters suggesting some positive basis for the application of the TFA.

Article 95 of the RTC provides as follows:

The Member States shall co-operate with each other to ensure that their interpretation and application of Articles 82, 83, 84, 86, 87, 88, 89, 90, 93 and Schedule I are effectively and harmoniously applied, particularly with respect to provisions relating to:

(a) effective customs systems and procedures governing the movement of goods, people and conveyances across customs borders;

(b) maximising the effectiveness of co-operation among customs administrations and with international agencies to combat customs and other cross-border offences.

2. The Member States undertake to establish harmonised customs legislation and customs procedures in accordance with the provisions of this Chapter.

3. COTED shall establish procedures for co-operation in customs administration as described in paragraph 1 of this Article.

Importantly, the provision does not require unification of customs laws and administration opening the possibility for differences in the application of customs laws in the CARICOM territories. It requires instead, harmonization in customs legislation and administration.

It is to be expected then that the TFA is to be implemented in accordance with this provision perhaps providing little variation as between the different states in CARICOM however classified as developing or disadvantaged as a separate category.

There is also no additional Protocol on customs matters to clarify the scope of this provision and when harmonization is to be achieved.

Despite this, there are encouraging developments in CARICOM regarding aspects of the implementation of the TFA. Since 2008, for example, Trinidad and Tobago has instituted an advanced rulings procedure whereby an application can be made for such rulings regarding tariff classification of the goods to be imported. The advanced ruling is valid for 6 months and is published on the Customs Department's website to facilitate transparency and predictability for traders.²⁵

In Jamaica, on the other hand, while there is yet no amendment to the Customs Act providing for advanced rulings, the Customs Department has embarked on the implementation of the Authorized Economic Operators (AEO) facility whereby designated importers and customs brokers are categorized into tiers based on their compliance record, thereby permitting less burdensome import procedures for those with a satisfactory compliance record.²⁶

Yet the general exception provisions in Article 226 of the RTC and the special regime for disadvantaged countries in CARICOM alluded to above permit deviations from obligations assumed in the RTC.

Concluding Remarks

The TFA is hailed as heralding positive developments for enhanced global and regional trade initiatives given its provisions building on and further clarifying GATT Articles V, VIII and X.

The indicia for correct measurement, though largely accepted, are based on premises difficult to quantify and are in this sense no less precise than a qualitative analysis of the likely impact of the TFA under GATT and specific RTA provisions.

The flexibilities for implementing the TFA within the TFA, the existence of provisions permitting deviations from the TFA within the WTO framework and in RTAs with similar exempting or excepting provisions suggest caution in an overly-optimistic approach in concluding on the likely trade benefits of the TFA.

Beyond assumptions on the trade enhancing character of the TFA, it is yet too early to assess its true impact given the many variables involved in its implementation at the multilateral and regional level, and in particular with respect to its impact on trade within CARICOM.

²⁵ See, for example, Deryck Cateau 'Trade Facilitation Case Study: Implementation of Advance Rulings in Trinidad and Tobago', available at http://www.wto.org/english/tratop_e/tradfa_e/casestudies_reports_e.htm

²⁶ See, for example, 'Trade Facilitation Implementation of Authorized Traders', available at http://www.wto.org/english/tratop_e/tradfa_e/casestudies_reports_e.htm

To be sure, there are already positive signs for the implementation of the TFA in CARICOM as some countries have already instituted some of its provisions. This development, however, does not give any clear indication of the likely impact on CARICOM trade within the short run though the assumptions for trade enhancement appear positive.

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