UNHEALTHY DIETS IN THE CARICOM

THE ROLE OF THE CARIBBEAN COURT OF JUSTICE

GLOBAL CENTER FOR
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Authors: Andrés Constantin, Global Center for Legal Innovation on Food Environments. Nicole D. Foster, University of West Indies, Cave Hill.

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Global Center for Legal Innovation on Food Environments

The Global Center for Legal Innovation on Food Environments, housed at the O'Neill Institute for National and Global Health Law at Georgetown University, serves as a transnational venue for the study, research, training, education and publication on the different aspects of healthy food law and policy.

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INTRODUCTION

In 2016, an estimated 71% of global deaths were from non-communicable diseases (NCDs).[1] Of these, approximately 38% occurred in people aged between 30 and 70 years, and 58% in people aged 70 and older.[2] During this time, NCDs accounted for at least 25% of all deaths in every age group above 10 years and for more than half of deaths in age groups above 40 years.[3]

Within the Caribbean Community (CARICOM), with the exception of Haiti, NCDs account for 62%-80% of all premature deaths (30-70 years), with prevalence rates tending to be higher than in low- and middle-income countries in the Americas, as well as higher than global averages.[4] As NCD risk factors such as tobacco, alcohol consumption, physical inactivity, and unhealthy diets within the region are increasing, the region's prevalence rates seem set to remain above average for the foreseeable future.[5] Moreover, as the region seeks to come to grips with the magnitude of its NCD epidemic, and bearing in mind the fact that overweight adolescents have a higher risk of becoming overweight or obese adults with, in turn, a higher risk of developing a NCD, childhood obesity has recently emerged as an area of particular concern for the region. Prevalence rates for overweight and obesity in children are as high as 28%-35% in some Caribbean countries.[6] For example, in Barbados in 2011, 65.3% of students surveyed had a sedentary lifestyle after school hours, 31.5% were overweight, 14.4% were obese, and 70% engaged in low levels of physical activity.[7]

CARICOM is paying a significant economic price for its high NCD prevalence and premature mortality rates. A recent Pan-American Health Organization (PAHO)/Harvard study found that the impact of NCDs and mental health on Jamaica's GDP was approximately $17.22 billion, or 3.9% in GDP annually, over the 15-year period from 2015 to 2030.[8] In addition, the 2015 Barbados NCD investment case study found that Bds$64 million was spent on the treatment of cardiovascular diseases and diabetes and that the economy could be losing as much as Bds$146million annually due to missed work days, low productivity, and reduced workforce participation.[9] In the Eastern Caribbean, the aggregate economic burden of NCDs is conservatively estimated at around 3% of GDP.[10]

Unless the region has the capacity to make significant headway in reducing current levels of childhood obesity (and therefore reducing the potential NCD prevalence rates in the next generation), the costs associated with NCDs will continue to escalate to even further unsustainable levels. Urgent action is therefore needed to halt this alarming trend. CARICOM governments have the primary role and responsibility to act, including by creating healthier environments for the region's children, particularly within schools, and by ensuring that the easiest and most affordable choice is that which is healthiest.

The CARICOM Heads of Government Summit on NCDs in 2007, termed the *Port-of-Spain Summit*, was the first meeting of its kind globally. The Port-of-Spain Declaration *'Uniting to Stop the Epidemic of Chronic Non-Communicable Diseases'* called for a 'whole of society' approach to tackling NCDs. It addressed both NCD prevention and control and contained 15 actionable mandates and 27 commitments. Among these mandates were calls by CARICOM Heads of Government for: promotion of programmes for healthy

school meals and healthy eating in education sectors; mandatory labelling of foods (or other measures to indicate food nutritional content); pursuit of trade policies allowing for greater use of indigenous agricultural products and foods; and elimination of trans-fats from diets of Caribbean citizens.[11]

In the on-going battle to articulate effective responses to the global NCDs epidemic, law has emerged as an important and previously underappreciated tool. In particular, there is increasing awareness of law's role in regulating the common risk factors for NCDs, thereby contributing to healthier environments and lives. In fact, a number of the recommended actions identified in key policy documents, such as the 2004 WHO Global Strategy on Diet, Physical Activity and Health and its associated 2013 Action Plan, rely on law for effective implementation. The regulation of the marketing of unhealthy food and beverages to children is one such area since in many instances implementation of the recommended policies will involve amendment of existing legislation or passage of new legislation. In seeking to realise the potential of law as a tool to support NCD prevention and control, one must also bear in mind the potential constraints or impediments that the law may pose to the formulation and/or implementation of new measures and the process by which outcomes can be achieved.

With this in mind, the purpose of the following document is to explore the functioning of the Caribbean Court of Justice (CCJ) and its potential role in the support of regulatory interventions on food and healthy diets in the CARICOM. After a brief introduction to the Court and the composition of its judiciary, the document will proceed to discuss the entry points into the CCJ by elaborating on the scope of both its original and appellate jurisdictions and the standing required within each jurisdiction respectively, as well as its power to issue advisory opinions and consider claims pertaining to international human rights law. To conclude, the document will elucidate on potential functional avenues through which the CCJ can be approached with the health-protective claims to protect and/or respect diet-related NCDs regulatory measures.

"Within the Caribbean Community (CARICOM), with the exception of Haiti, NCDs account for 62%-80% of all premature deaths (30-70 years), with prevalence rates higher than global averages."

THE CARIBBEAN COURT OF JUSTICE

The CCJ has been described as "the ultimate interpreter and change agent of Caribbean law." While located in Port of Spain, Trinidad and Tobago, it is an itinerant court and can travel to operate in any Member State to which it has jurisdiction.[14] It is the main judicial institution for the CARICOM, which is comprised of fourteen nations and dependencies in the Americas, including Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and Grenadines, Suriname, and Trinidad and Tobago.[15]

The *Revised Treaty of Chaguaramas* (RTC) and the *Agreement Establishing the Caribbean Court of Justice (the 'Agreement')* are the founding treaties of the CCJ. The Agreement is devoted entirely to the establishment of the CCJ and defining its jurisdiction,[16] bringing the CCJ into being in 2001 and beginning operation in 2005.[17] The RTC is the treaty having established the CARICOM, often referred to as the "Constitution of the Caribbean Community."[18]

The establishment of the CCJ is defined as a "collective exercise of national sovereignty in the governance of CARICOM."[19] While the nations forming the CARICOM are independent sovereign states, they recognize that "regional integration requires the effectiveness of Community law within their national legal orders,[20] with the Court defining "Community law" as encompassing "the provisions of the RTC, the decisions adopted by competent Organs and Bodies for its further development and implementation, and the judgments of [the CCJ] pertaining to the interpretation and application of the Treaty."[21] Similarly, the RTC provides for important institutional arrangements that "enhance the effectiveness of decision-making and implementation processes of the Community."[22] Amongst these arrangements is the assignment of the CCJ, in article 211 of the RTC, as the court of compulsory and exclusive jurisdiction for disputes concerning the interpretation and application of the RTC.[23]

JUDICIARY OF THE CCJ

The CCJ is composed of seven judges from Member States of the CARICOM as well as the United Kingdom. At any given point in time, at least three of the judges must be competent in international law.[24] *The Regional Judicial and Legal Services Commission* (RJLSC) is responsible for the selection and appointment of CCJ judges.[25] Once appointed, a judge can sit until they reach 72 years of age, but can be extended by up to three months in order to enable the judge to deliver a judgment or do "any other thing" in relation to a proceeding they were involved in hearing.[26]

As per article IX(4) of the *Agreement*, a CCJ judge can be removed from office "only for inability to perform the functions of his office, whether arising from illness or any other cause, or for misbehaviour, and shall not be so removed except in accordance with the provisions of this Article." Paragraph 5(2) states that removal of a judge is to be done by the Commission "if the question of the removal of the Judge has been referred by the Commission to a tribunal; and the tribunal has advised the Commission that the Judge ought to be removed from office for inability or misbehaviour referred to in paragraph 4."[27] Further, paragraph 6 provides for instruction as to how to remove judges, followed by paragraph 8 stating that the Commission may suspend a judge from performing their functions in office "if the question of removing [...] [a] Judge of the Court from office has been referred to a tribunal under paragraph 6 of this Article."[28] To summarize, even if the judge displays an inability to perform their function or misbehaves, they will only be removed after a "majority vote of all members of the RJLSC, having first been referred to a tribunal, consisting of a chairman and not less than two other members selected by the RJLSC from among persons who have held a senior judicial appointment."[29]

CARICOM actively incorporates mechanisms into the CCJ to help ensure the independence of and lack of political influence on its judges. Such methods are incorporated out of "concern about the excessive politicisation of relations between the executive and the judiciary featured prominently in the debate which raged across the region about the desirability of replacing the [Judicial Committee of the Privy Council] with the CCJ as the region's final appellate court"[30] (a concept that will be explained later in this document). For example, the funding of judges' salaries purposely flows from more than one Contracting Party state.[31] Further, the responsibility for selection and appointment of judges is vested in the RJLSC, as opposed to being part of the role of the executive, in an effort to keep the appointment process "as far as possible from political interference."[32] This process has been described as "unusual," as for international courts such as the CCJ, the normal procedure is for judges to be appointed by governmental nomination or by election.[33] Additionally, the independence of the RJLSC is protected by ensuring that membership of the RJLSC is not "dominated by politicians or lawyers," but rather includes other sections of the wider community. As such, the RJLSC is composed of 11 members, including the President of the CCJ, and two of each of the following: lawyers, lay people, academics, representatives of the regional Bar, and chairs of the Public Service Commissions and the Judicial and Legal Services Commission of the Member States who are appointed by rotation according to alphabetical order.[34] Appointments of the CCJ's judges are then made by a majority of votes of all members.[35]

ENFORCEMENT OF CCJ DECISIONS

By Article XIV of the *Agreement*, all member states, organs, bodies of the Community, or people to whom a judgment of the CCJ applies, are to comply with the judgment at hand.[36] In fact, CCJ judgments, binding on the Member States, the Community, and any other person to whom the judgment applies, must be complied with promptly, and form legally binding precedents for Member States who were not party to the proceeding at hand (*stare decisis*).[37]

As per article XXVI of the *Agreement*, Member States who ratify the *Agreement* establishing the original jurisdiction of the CCJ in their nation agree to enforce the CCJ's decisions within their jurisdictions as though they were decisions of their own courts. As such, they are obliged to take all of the necessary steps, including enacting necessary legislation, to ensure that decisions of the Court are enforced by national courts and authorities. As mentioned by the Honourable Mr. Justice Winston Anderson, Judge of the CCJ, "Each Member State has enacted legislation incorporating this provision into its national law and it therefore seems entirely feasible that judgments in the CCJ's original jurisdiction will carry the force of judgments given by national courts."[38] Anderson went on to state that "the machinery and mechanisms available to enforce domestic judgments are the same machinery and mechanisms available to enforce the original jurisdiction judgments of the Court."[39] In fact, for the most part, Member States have accepted the role of the CCJ and have complied with its judgments or have given effect to them.[40]

However, there is an "implementation deficit" with regards to Community law, in that a commission with executive power to enforce Community law or decisions does not exist.[41] While the Court has emphasized that the obligation of CARICOM Member States to carry out treaty obligations "promptly" and to "take all necessary steps" to do so are binding, and that there exists liability under Community Law in the case of breach, "there has been no occasion for the Court to pronounce upon the implication of such breaches for domestic law."[42] This deficit has led to "chronic frustration and disillusionment among significant segments of the Caribbean population."[43] Further hindering the "supra-nationality" of the CCJ in the CARICOM is the fact that Constitutions of Member States announce their superiority over all other law, including regional integration law such as that coming from the CCJ. "Such other [laws] are void to the extent they are inconsistent with the Constitution and must to that extent be struck down by the national courts."[44] Justice Anderson elucidated that this rule of constitutional supremacy over regional integration law is "but another application of the dualist tradition [...] which affirms that international and domestic law are separate and independent systems of law with each supreme in its own sphere of operation."[45] In such countries, the particular provisions of their legal system related to a given case are to be considered before a definitive judgment can be rendered by the Court on the point.[46] However, recent development has helped to "soften" the power of this duality, as will be discussed later in this document.

PERTINENCE OF THE RTC TO HEALTH

The CCJ as an avenue for using the law as a response to the NCD epidemic in the CARICOM is of particular interest given the mention of "health" in the RTC. What follows is a summary of the RTC provisions that pertain to health, while potentially not being exhaustive.

Article 6 – Objectives of the Community

(i) enhanced functional co-operation, including –

[...]

(iii) intensified activities in areas such as health, education, transportation, telecommunications.

Article 17 – The Council for Human and Social Development

(2) Subject to the provisions of Article 12, COHSOD shall be responsible for the promotion of human and social development in the Community. In particular, COHSOD shall:

(a) promote the improvement of health, including the development and organisation of efficient and affordable health services in the Community;

(d) establish policies and programmes to promote the development of youth and women in the Community with a view to encouraging and enhancing their participation in social, cultural, political and economic activities;

(f) promote the development of special focus programmes supportive of the establishment and maintenance of a healthy human environment in the Community.

Article 65 – Environmental Protection

(1) The policies of the Community shall be implemented in a manner that ensures the prudent and rational management of the resources of the Member States. In particular, the Community shall promote measures to ensure:

(b) the protection of the life and health of humans, animals, and plants.

Article 184 – Promotion of Consumer Interests in the Community

(1) The Member States shall promote the interests of consumers in the Community by appropriate measures that:

(a) provide for the production and supply of goods and the provision of services to ensure the protection of life, health and safety of consumers.

Article 226 – General Exceptions

(1) Nothing in this Chapter shall be construed as preventing the adoption or enforcement by any Member State of measures:

(a) to protect public morals or to maintain public order and safety;

(b) to protect human, animal or plant life or health.[47]

ORIGINAL JURISDICTION

The CCJ is considered a hybrid institution. It has two types of jurisdiction: (1) an original, exclusive, compulsory jurisdiction as an international court, including its capacity to issue advisory opinions, and (2) an appellate jurisdiction as a municipal court of final resort.[48]

In its original jurisdiction, the CCJ is the judicial body for the CARICOM. This jurisdiction is established and circumscribed by the parameters set forth by the *Agreement* and the RTC.[49] In this jurisdiction, the CCJ acts on treaty disputes between Member States. With the main driving force for establishing the CCJ being "the need to provide for binding judicial determination of disputes under the [RTC],"[50] article 211 of the RTC, as well as article XII of the Agreement, dictate the Court's jurisdiction as interpreting and applying the RTC,[51] a power in which it has compulsory and exclusive jurisdiction. As such, Member States are required to accept the original jurisdiction competence of the Court, and national courts are "proscribed from competing with the CCJ as the forum for determining the rights and obligations arising under the regional treaty arrangements."[52] In this jurisdiction, the CCJ also applies CARICOM Single Market and Economy (CSME) law,[53] and has exclusive jurisdiction to deliver advisory opinions concerning the interpretation and application of the RTC.[54]

As per article XXII(1) of the *Agreement*, the Court must exercise its original jurisdiction in accordance with the rules of international law that are application to the case at hand, which "are derived from treaties accepted by the contesting states, international custom as evidence of a general practice accepted as law, and general principles of law recognized by the States of the Community."[55] Further, original jurisdiction CCJ rulings, as well as advisory opinions which will be discussed later in this document, are published as a single judgment, meaning no other opinion or judgment will be given or delivered.[56]

Issues arising between member states, CARICOM nationals, or between the state and nationals, will all fall under the CCJ's original jurisdiction.[57] As per article 211 of the RTC, repeated in article XII of the *Agreement*,[58]

> "the Court shall have compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Treaty, including:
>
> (a) Disputes between the Member States parties to the Agreement;
>
> (b) Disputes between the Member States parties to the Agreement and the Community;
>
> (c) Referrals from national courts of the Member States parties to the Agreement;
>
> (d) Applications by persons in accordance with Article 222, concerning the interpretation and application of this Treaty."[59]

The court further addressed the issue of who can be sued using the CCJ's original jurisdiction in *Johnson v CARICAD*, in which they stated that only the Community or Member States can be sued.[60]

In terms of standing, as will be discussed, both Member States and the Community can bring claims before the CCJ. Depending on the circumstances, applications can also be made by private entities. However, it is important to mention that the original jurisdiction of the CCJ is not highly used. In fact, of the 32 cases decided in the Court's original

jurisdiction since its first in 2008, 15 of them were filed by a single Trinidadian company[61] and only 9 by nationals of CARICOM states.[62] This lack of usage has been explained to be a potential result of a local preference to resolve disputes with the government of a Member State at the ministerial level, rather than resorting to legal proceedings.[63]

Myrie's Expansion of Jurisdiction

In the case of *Myrie v The State of Barbados*, Ms. Shanique Myrie claimed damages against the state of Barbados for having treated her unfairly upon her arrival to an airport in Barbados, in that she was subject to a cavity search, detained, and deported contrary to article 45 of the RTC. She further claimed violation of her article 7 and 8 RTC rights to non-discrimination on the ground of nationality alone and to treatment no less favourable than that given to nationals of other CARICOM states or Member States.[64] In this case, the Court in a sense expanded the scope of its jurisdiction to include any "secondary legislation emanating from the Treaty," where the CCJ declared that article 222 of the RTC, granting *locus standi* to Community nationals and discussed further in this document, "is not confined merely to a right conferred by a specific treaty provision but also speaks to 'a right or benefit conferred by or under this Treaty.'"[65] This decision thus "implied that the various forms of secondary legislation authorized by the RTC 'are in principle part and parcel of Community law the content of which encompasses the provisions of the RTC,'" including "decisions and other determinations made by the relevant authorities under the RTC."[66]

Further, the CCJ found that their powers of interpretation "necessarily [extend] to the decisions and other determinations made by relevant authorities in the exercise of their functions to fulfill or further the goals and objectives of the Treaty."[67] Formally, the objectives of the Community outlined in the RTC are listed in article 6 of the Treaty.[68] Although freedom of movement is not included in article 6 of the Treaty, in Myrie, the CCJ referred to freedom of movement both as a '*fundamental Community goal' and as 'a fundamental principle'*.[69] The scope of the original jurisdiction of the CCJ that stems from what is necessary to "fulfill or further the goals and objectives of the Treaty" was recently elaborated upon in the CCJ's first issued advisory opinion. In delivering this advisory opinion, one of the conditions examined by the CCJ was whether the Member State's action being questioned on its lawfulness prejudiced the fundamental objectives of the RTC. In assessing this factor, the Court turned to *Myrie* to help determine what constitutes a fundamental objective of the Treaty. As the Court mentioned in the advisory opinion, "The RTC does not explicitly 'lay down' any 'fundamental objectives' of the Community. What is properly to be regarded as 'a fundamental objective of the Community' that is 'laid down in the

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treaty' must ultimately be culled from the treaty by the Court."[70] The advisory opinion clarified that this decision is one to be made by the Court on a case-by-case basis.[71] The Court proceeded to describe fundamental objectives as issues lying at the "core of the spirit, nature and aspirations of the Community," topics that indicate "what the establishment of CARICOM aims to achieve."[72] An intervening party added in their written submission that "[...] Article 6 is not exhaustive of all the fundamental objectives of the Community."[73] The Court considered in the advisory opinion that, "there may also be an unstated objective or goal that is so inextricably central to and indispensable for the full attainment of one or more of the objectives or goals specified in the treaty that it can itself properly be described as being both fundamental and an objective in its own right."[74]

The caveat here is that there has yet to be a legal dispute between parties presented before the CCJ requiring interpretation of article 6. As such, there is little guidance as to what the Court is referring to in terms of objectives or goals that are so "inextricably central to and indispensable" for the attainment of the enumerated RTC objectives. Further, we do not yet know how the Court would manage a case where parties are each presenting with different but opposing article 6 objectives. Whether the Court would need to create a sort of hierarchy between Community objectives, with some objectives acquiring a form of primacy, is not yet known.

Standing

(i) Standing of Member State Parties

Member States are able to use the tribunal to allege violation of the RTC by another Member State.[75] In fact, the original jurisdiction is mainly established for Contracting Parties or the Community, in that following the *CCJ Original Jurisdiction Rules*, they can commence proceedings simply by filing an Originating Application, the contents of which are outlined in Rule 10.2.[76] However, CARICOM states have been described to be reluctant to exercise their right of action against one another.[77]

(ii) Standing of Private Entities

Private entities, such as individuals, can be given standing to take actions before the CCJ to protect their rights enshrined in the RTC, however on a limited and discretionary basis.[78] Standing for private entities is governed by articles XXIV of the *Agreement* and 222 of the RTC, with article 222 of the RTC stating that:

> "Persons, natural or juridical, of a Contracting Party may, with the special leave of the Court, be allowed to appear as parties in proceedings before the Court where:
>
> (a) The Court has determined in any particular case that this Treaty intended that a right or benefit conferred by or under this Treaty on a Contracting Party shall ensure to the benefit of such persons directly; and
>
> (b) The persons concerned have established that such persons have been prejudiced in respect of the enjoyment of the right or benefit mentioned in paragraph (a) of this Article; and
>
> (c) The Contracting Party entitled to espouse the claim in proceedings before the Court has:
>
> (i) Omitted or declined to espouse the claim, or
>
> (ii) Expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party so entitled; and
>
> (d) The Court has found that the interest of justice requires that the persons be allowed to espouse the claim."[79]

In general, a person or private company must be given permission by the CCJ to bring a proceeding before it pursuant to article 222.[80] This process is governed by Rule 10.4 of the *CCJ Original Jurisdiction Rules*, dictating the procedure for applying for special leave, which includes setting out the facts that are necessary to establish the conditions included above in article 222.[81] Important to note is the fact that the burden is on the alleging party to make an arguable case that the conditions in article 222 have been established.[82] This right has been exercised effectively in a number of cases.[83]

In the case of *Trinidad Cement Limited v. the Caribbean Community*, the CCJ held that article 211 of the RTC stipulating the jurisdiction of the Court, combined with article 222, gave the Court the "power [...] to enable private entities to appear before it in all manner of disputes concerning the interpretation and application" of the RTC.[84]

In the case of *Trinidad Cement Limited v. Republic of Guyana*, the CCJ considered the requirements for standing outlined in article 222 of the RTC. The Court concluded that in order to fall within the meaning of the phrase "persons, natural or juridical, of a Contracting Party", and to therefore have standing under article 222 of the RTC, it is sufficient that the party be "an entity to be incorporated or registered in a Contracting Party."[85] Next, regarding specifically article 222 (a) and (b), the Court determined that "it is sufficient for the applicant merely to make out an arguable case that each of these two conditions can or will be satisfied since they are substantive requirements an applicant must in any event fully satisfy in order ultimately to obtain relief." The Court further elaborated that "To require the applicant to meet a threshold of proof greater than 'an arguable case' could prolong the special leave procedure unnecessarily and prejudice the submissions that must be made at the substantive stage of the proceedings if the application was successful and an Originating Application is ultimately filed."[86] This was again more recently reaffirmed by the CCJ in the cases of *Tomlinson v Belize and Tomlinson v The State of Trinidad & Tobago*, as well as in the case of *Tamika Gilbert et al. v. The State of Barbados*.[87] Lastly, regarding article 222 (c), Guyana argued that the Contracting Party always had to have the option of bringing the proceeding that the private entity wanted to bring, and that the provision therefore had to be interpreted as "restricting a private entity from bringing proceedings against its own State."[88] The CCJ rejected this argument, finding that Guyana's interpretation would "place an unduly restrictive limitation on the category of persons entitled to complain about the conduct of a Contracting Party or of the Community" and that this was not the intention of the signing Member States.[89] In particular, the Court outlined that using Guyana's proposed interpretation would "frustrate the goals of the RTC" and would "undermine access to justice, a 'fundamental principle of law subscribed to by all the Contracting Parties.'"[90]

(iii) Standing of Groups of Nationals

Despite not having been explored yet, a literal reading of Article 222 and the plural formulation of "persons" may suggest that cases could be filed by a group of people. If so, an argument could be made that government inaction on regulating NCD risk factors is infringing on the right to health of citizens, thus asking the Court to urge Member States to take affirmative regulatory measures on this regard.

Intervention by Other Parties

The fact that CCJ judgments constitute *stare decisis* has led the court to be "scrupulous in ensuring that all Member States and the Community have the opportunity to participate in the original jurisdiction proceedings even if they are not formally parties to the particular dispute."[91] Intervention by third parties with a substantial interest of a legal nature that may be affected by a decision of the CCJ when exercising its original jurisdiction may apply to the CCJ to intervene in the given case. Intervention by non-parties to the proceedings will be permitted under both the RTC and the Agreement, as well as under the *CCJ Original Jurisdiction Rules*.[92] As is stipulated by article XVIII(1) of the *Agreement*:

> "Should a Member State, the Community or a person consider that it has a substantial interest of a legal nature which may be affected by a decision of the Court in the exercise of its original jurisdiction, it may apply to the Court to intervene and it shall be for the Court to decide on the application."

Further, the RTC stipulates in article 208 that:

> "A Member State which is not a party to a dispute, on delivery of a notification to the parties to a dispute and to the Secretary-General, shall be entitled to attend all hearings and to receive written submissions of the parties to a dispute and may be permitted to make oral or written submissions to the arbitral tribunal."[94]

Proceeding, the *Rules* provide for instructions on how to apply to intervene, procedures on application for leave to intervene, procedures after grant of leave to intervene, and so on, ending with a note in Rule 14.7 that "The intervener shall accept the case as the intervener finds it at the time of the intervention so that the intervention shall have prospective effect only."[95]

In *Myrie*, Jamaica was permitted to intervene in proceedings it had allowed one of its nationals to initiate against Barbados. The CCJ allowed Jamaica to intervene on the basis that the nation had "substantial legal interests beyond outcome of the dispute for its national," given that the decisions of the Court were "capable of providing an authoritative and binding precedent to guide the conduct of *all* Member States."[96]

Original Jurisdiction with Regards to International Human Rights Law

The original jurisdiction of the CCJ is said to not extend to human rights in general.[97] As Justice Anderson stated, there is doubt around the use of the CCJ's original jurisdiction for human rights claims, including as a reason the fact that "the regime of human rights is conspicuous by its absence from the [RTC], which is overwhelmingly preoccupied with regional economic integration and development." As he mentioned, the rights conferred in the RTC tend to be economic or financial in nature, and rather, when the Court has cited judicial precedents from the adjudication of international human rights, "the citation has helped to clarify the economic rights of the private litigant specified in the [RTC] rather than been accepted as the basis for independent human rights found in any of the constitutional Bills of Rights". He states that for these and other reasons, "it has now been recognized that a significant human rights deficit exists" in the CARICOM.[98]

For example, in *Johnson v CARICAD*, the CCJ found that they did not have the required jurisdiction to hear the given claim about employment discrimination.[99] Similarly, in *Myrie*, the complainant sought a declaration that her treatment in the incident at hand had been in violation of her fundamental human rights under numerous universal instruments, such as the *Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights*, and the *American Convention on Human Rights*[100]—but unfortunately, the CCJ established that they do not have the jurisdiction to adjudicate under international human rights law. In fact, it has been said that the CCJ's original jurisdiction "is not to be understood as constituting a tribunal within the scheme of international human rights law."[101] As such, while the CCJ's jurisdiction established and limited by articles 211 of the RTC and XII of the *Agreement* allows for the CCJ to apply secondary legislation emanating from the RTC, the CCJ "has no jurisdiction to adjudicate violations of international human rights treaties and conventions."[102] Instead, the Court in *Myrie* stated that these international instruments tend to provide for their own dispute resolution mechanisms, and that these "must be the port of call for an aggrieved person who alleges a breach of those treaties."

However, again in *Myrie*, the CCJ did make an important statement regarding their duty to rule on the basis of international law, in that "in the resolution of a claim properly brought in its original jurisdiction, the Court can and must take into account principles of international human rights law when seeking to shape and develop relevant Community law."[103] This statement falls in line with the older Caribbean decisions of *Spence v. The Queen* and *Hughes v. The Queen*, where Mr. Justice Dennis Byron, former President of the CCJ and Judge on the case, "accepted that human rights agreements such as the American Convention could not have the effect of overriding the domestic law or the Constitutions of the sovereign independent states of the Caribbean."[104] However, in this same decision, Justice Byron "also accepted that these agreements, in the absence of clear legislative enactment to the contrary, could be used to interpret domestic provisions, whether in the Constitution or statute law, so as to conform to the state's obligations under international law." The result of this approach, as pointed out by Justice Anderson, was that the court relied on the jurisprudence from the Inter-American Human Rights System to decide on the meaning of the provision at hand from the Constitution of St-Vincent and the Grenadines.[105]

Advisory Opinions

According to articles XIII of the *Agreement* and 212 of the RTC, the CCJ has exclusive jurisdiction to deliver advisory opinions on the application and interpretation of the RTC, at the request of either the Member States or the Community.[106] Other than these two articles, very little information is provided on how the CCJ is to proceed with requests for advisory opinions in either the *Agreement* or the RTC. Most information on the procedure surrounding advisory opinions is found in Part 11 of the *CCJ Original Jurisdiction Rules*.[107] Rule 3.4 stipulates that advisory opinions are published as a single judgment of the Court, with the conclusion reached by the majority of the Judges after final deliberation.[108] Rule 11.3 describes the proceedings for advisory opinions, with differences for advisory opinions initiated by a Member State party versus by the Community. As per rule 11.3(2):

> "Where Member States parties to a dispute request an advisory opinion, they shall make a joint request which shall include:
>
> (a) A clear and succinct statement of the point on which the opinion is sought;
>
> (b) An agreed statement of the facts including specifying those in dispute; and
>
> (c) Their respective legal submissions on the issue raised."[109]

Whereas rule 11.3(3) stipulates that:

> "Where the Community requests an advisory opinion, the request shall include:
>
> (a) A clear and succinct statement of the point on which the opinion is sought;
>
> (b) A statement of the facts including specifying those in dispute; and
>
> (c) A statement of the legal aspects of the case."[110]

The first advisory opinion of the CCJ was only just recently issued in March 2020, in response to two questions posed in relation to the RTC by CARICOM. In the case at hand, the questions asked by the heads of CARICOM pertained to free movement and employment rights for workers from St-Kitts-Nevis and Antigua and Barbuda. Of particular importance is the fact that this advisory opinion offered the CCJ the opportunity to elaborate on the concept of the "fundamental objectives" of the Community, as discussed earlier in this document.[111]

An informative piece was written with respect to the influence of advisory opinions on treaty interpretation. Advisory opinions by courts typically operate to "provide guidance to settling future activities concerning international disputes, despite their non-binding nature," as well as contribute significantly towards the interpretation of treaties. In these judgments, the court can ascribe "novel meanings" to treaty terms, which can have a "domino effect" on the future applications of the given treaty provision. As such, the advisory opinion is said to determine the outcome of future applications of a treaty by Member states. However, as was pointed out, since the advisory opinion delivered in March 2020 was the first of its kind by the CCJ, "the interpretative authority of [the CCJ] over a long period of time still remains to be seen."[112]

APPELLATE JURISDICTION

Purpose of the Court's Appellate Jurisdiction

A strong perceived need for a regional, "indigenous" court as a tribunal of final resort for civil and criminal cases existed among CARICOM member states, eventually leading to the creation of an appellate jurisdiction for the CCJ as a municipal court of final instance for each CARICOM state choosing to partake.

Behind the purpose of its creation was an obligation on the part of the CCJ to promote the development of a Caribbean body of jurisprudence, while keeping in mind that legal precedents that were made before the founding of the CCJ, including those made by final courts of Commonwealth countries as well as judgments of the *Judicial Committee of the Privy Council* (JCPC), continue to be binding on Caribbean states until they are overruled by the CCJ.[113] It is in fact the appellate jurisdiction of the CCJ that is considered its most distinctive aspect.[114] The vast majority of cases heard by the CCJ continue to be in its appellate jurisdiction, rather than its original jurisdiction.[115]

Functioning and Application of the Court's Appellate Jurisdiction

In its appellate jurisdiction, the CCJ can act as a traditional court of final instance. As per Article XXV(2) of the *Agreement*, appeals will lie as of right with the CCJ from decisions of the Court of Appeal of a Contracting Party to the *Agreement* for certain limited issues falling under Article XXV(2)(a)-(f), or with permission of the court for civil or criminal matters. The substantive law thus applying in the CCJ's appellate jurisdiction is the municipal law of the court of the nation from which the case is being appealed. Appellate decisions from the CCJ are structured much like regular municipal court decisions, in that they contain majority, concurring, and dissenting opinions, along with a record of which judges voted for or against the ruling.[119]

As its mandate, the CCJ in its appellate function decides disputes that raise a significant legal issue that is considered to be of "general and public importance". This is dictated by article XXV(3) of the *Agreement*, stipulating that an appeal shall lie to the CCJ with the leave of the appellate court of the Contracting Party for:

> "(a) final decisions in any civil proceedings where, in the opinion of the Court of Appeal, the question involved in the appeal is one that by reason of its great general or public importance or otherwise, ought to be submitted to the Court.
>
> (b) such other cases as may be prescribed by any law of the Contracting Party."[120]

While little guidance has been provided by the Court as to what entails an issue of "general and public importance", the CCJ discussed this matter briefly in *BCB Holdings Limited & The Belize Bank Limited v. The Attorney General of Belize*. The Court noted that there were "no relevant disputes of fact" and that the issues to be decided did not derive from particular legislative

or constitutional provisions in Belize. However, the issues at hand were "quintessentially matters of judicial policy" and thus "of broad significant public importance to the Caribbean polity as a whole." As such, "the Court decided that the balance was tilted in favour of deciding the outstanding issues in dispute rather than remitting them to the Court of Appeal."[121]

The CCJ's appellate jurisdiction only applies to CARICOM Member States who have replaced the appellate jurisdiction of the JCPC, the typical highest court of appeal for many British territories and Commonwealth countries, with that of the CCJ. While each member state must subscribe to the original jurisdiction of the CCJ as per the *Agreement*, acceptance of the appellate jurisdiction is only optional.[122] Doing so is seen as breaking the "historical links with London and to complete the political independence of those Commonwealth Caribbean member states."[123] Currently, only Barbados, Belize, Guyana and Dominica have replaced the appellate jurisdiction of the JCPC with the CCJ. The other Caribbean territories continue to cede full appellate jurisdiction to the JCPC, meaning they can hear appeals from their domestic courts and allow them to render the final, binding decision on both civil and criminal issues.[124] The appellate jurisdiction of the CCJ could also be available to any other state in the Caribbean that should become a party to the *Agreement*. However, requisite steps are involved to ratify the *Agreement* and to implement it into domestic law, which typically involves two steps: "cutting off the jurisdiction of the [JCPC] [...], and the amendment of existing laws governing the appellate process in civil, criminal and constitutional matters."[125]

Replacing the appellate jurisdiction of the JCPC with that of the CCJ is considered to increase access to justice for nationals of the state party at hand. For example, after having abolished appeals to the JCPC, appeals from Barbados to the CCJ were triple what they had previously been to the JCPC.[126] Using the CCJ as an appellate court has thus increased the opportunity for citizens to be heard and obtain justice through further appeals. Interestingly, the number of civil cases that have been filed through the appellate jurisdiction of the CCJ is greater than the total of all criminal and constitutional cases filed combined, implying that the majority of cases filed are between individuals rather than cases in which the State is a party.[127]

Subject Matter of Cases—Protection of Human Rights and Constitutional Matters

Generally, a broad right of appeal is said to exist to the CCJ, with the CCJ being granted "considerable discretionary authority to allow other appeals."[128] As was previously mentioned, the right to appeal to the CCJ is governed by article XXV of the *Agreement*, with section (2) stipulating the types of cases in which appeals shall lie as of right to the CCJ from decisions of the appellate court of the Contracting Party.[129] In its appellate jurisdiction, the subject matter of appeals that have been heard include property disputes between indigent tenants, admissibility of testimony from police officers in criminal cases, governmental takings, and wrongful dismissal of civil servant employees, as well as appeals that were formerly to be heard by the JCPC such as capital punishment and high finance appeals.[130]

In relation to constitutional matters, article XXV(2) allows for an appeal as of right to the CCJ for:

> "(c) final decisions in any civil or other proceedings which involve a question as to the interpretation of the Constitution of the Contracting Party;
>
> (d) final decisions given in the exercise of the jurisdiction conferred upon a superior court of a Contracting Party relating to redress for contravention of the provisions of the Constitution of a Contracting Party for the protection of fundamental rights [...]."[131]

Importantly, it has been suggested the appellate function of the CCJ can lead it to consider claims based on international human rights standards arising under international law and that are common to all CARICOM Member States.[132] In fact, as explained by Justice Anderson, "the original jurisdiction of the CCJ is of limited relevance to human rights litigation at the present time, but in its appellate jurisdiction the Court has the opportunity and responsibility to engage in human rights adjudication."[133] The CCJ's appellate jurisdiction is considered "a more fertile area for human rights adjudication" because of

the fact that in its role as a final court of appeal, it oversees the interpretation of the Constitution and laws of the State at hand.

The case of *The AG General Superintendent of Prisons Chief Marshal v Jeffrey Joseph and Lennox Ricardo Boyce* serves as a strong example of the court addressing human rights issues in its appellate jurisdiction. Mr. Justice Dennis Byron discussed the significance of the decision, a case said to have clarified and strengthened the protection of human rights in the Caribbean.[135] In the case at hand, one of the two issues raised and addressed was whether the failure of the Barbados Privy Council to await the outcome of proceedings against their death sentence constituted a contravention on the respondents' right to constitutional protection of the law, a human right as per the Inter-American Convention on Human Rights.[136] The approach taken and the decision of this case will be discussed later in this document, as it pertains strongly to the concept of legitimate expectations in nations following a dualist tradition. However, of importance with regards to subject matter is its demonstration that the CCJ in its appellate jurisdiction can hear cases dealing with the protection of human rights.

"Unless the region has the capacity to make significant headway in reducing current levels of childhood obesity (and therefore reducing the potential NCD prevalence rates in the next generation), the costs associated with NCDs will continue to escalate to even further unsustainable levels."

THE CCJ AS APPLYING INTERNATIONAL HUMAN RIGHTS LAW

Justice Anderson summarized the sources of international human rights at play in the CARICOM, including that the majority of CARICOM states are signatories to or have accepted or adopted a combination of the United Nations Declaration on Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on Civil and Political Rights.

In fact, the statements of human rights within Caribbean constitutions are heavily based on the European Convention on Human Rights, which is in turn influenced by the above documents. Further, being members of the Organization of American States (OAS), all CARICOM Member States are subject to the OAS Charter and the American Declaration of the Rights and Duties of Man, as well as having accepted the jurisdiction of the Inter-American Commission on Human Rights, which in itself is "competent to make recommendations and issue reports regarding alleged violations of human rights occurring in the territories of Member States." Lastly, several of the States have accepted the American Convention on Human Rights, with some having accepted the binding jurisdiction of the Inter-American Court of Human Rights.[137]

The Dualist Tradition and the Doctrine of Incorporation

(i) With Respect to International Human Rights Norms

There are several situations in which international human rights norms might surface at the CCJ in its appellate jurisdiction and where the CCJ may be called upon to consider the impact of treaty-based human rights where the treaty has been accepted by the State but has not been incorporated into its domestic law by legislation.[138] Scholars have stated that many CARICOM Member States "cling fast to the doctrine of incorporation whereby a Treaty has no effect in domestic law unless it is first transformed or incorporated by an Act of Parliament."[139] As such, the previously mentioned international human rights commitments at play in the CARICOM would be of "no direct effect in domestic law except to the extent that they embody rules of customary international law."[140] However, when the CCJ is faced with needing to interpret existing domestic human rights, Justice Anderson concluded that the Court's interpretation of rights codified within the Bill of Rights of Member States "will clearly be open to influence by international conventions on human rights as well as judicial decisions taken under those conventions."[141]

(ii) With Respect to CCJ Decisions, Both Original and Appellate

The doctrine of incorporation comes into play with regards to CCJ decisions as well, both appellate and original. Article XXVI of the *Agreement* states that parties contract to the *Agreement* accept to take all the necessary steps to ensure that any decisions made by the CCJ will carry equal weight within the contracting nation as any of their own judgments.[142] Likewise, article 240 of the RTC states that:

> "(1) Decisions of competent Organs taken under this Treaty shall be subject to the relevant constitutional procedures of the Member States before creating legally binding rights and obligations for nationals of such States.
>
> (2) The Member States undertake to act expeditiously to give effect to decisions of competent Organs and Bodies in their municipal law."[143]

While the wording "subject to the relevant constitutional procedures" may appear as a limiting factor by article 240, Justice Anderson said that "it is not obvious that the framers of the [RTC] intended to subject CARICOM law to the national legal system because Article 240 RTC speaks only in terms of 'decisions' of the competent Community Organs." He points out that a "more important" source of Community Law than the 'decisions' is the actual treaty provisions of the RTC themselves.[144]

With regards to the CCJ's original jurisdiction, unlike is the case with many other international tribunals, as a compulsory jurisdiction all original jurisdiction judgments are automatically binding and do not require an additional pre-existing agreement to state so.[145] This was later reinforced in *Myrie*, where the Court held that regarding article 240(1) of the RTC, in order to ensure efficacy of the CARICOM regime, domestic incorporation of CCJ decisions locally by the State is not a "condition precedent to the creation of Community rights."[146] The effect of *Myrie* has been described as a "diffident assertion of the direct effect doctrine."[147] Particularly in states with a dualist approach to international law, where for a decision taken under a particular treaty to be enforceable at the domestic level it is needed that the state incorporate the decision by enacting it into municipal law, "it is inconceivable that such a transformation would be necessary in order to create binding rights and obligations *at the Community level*."[148] As the Court in *Myrie* went on to clarify,

> "Article 240 RTC is not concerned with the creation of rights and obligations at the Community level. The Article speaks to giving effect to such rights and obligations in domestic law. [...] If binding regional decisions can be invalidated at the Community level by the failure on the part of a particular State to incorporate those decisions locally, the efficacy of the entire CARICOM regime is jeopardized [...]."[149]

"The law has emerged as a tool for action in creating healthier environments and populations, and thus contributing towards the regulation of common NCD risk factors. In particular, law is necessary for effective implementation of regulations surrounding the marketing of unhealthy foods and beverages."

In other words, article 240 is to be understood as "requiring Member States to give domestic effect to the decisions of the Community subject to their constitutional procedures, not as a requirement for the creation of any rights and obligations which follow naturally from Community law."[150]

The Power of 'Legitimate Expectation'

There remains concern that "the dualist tradition will interfere with the application of Community law,"[151] particularly given that the Commonwealth CARICOM Member States are all dualistic states following British tradition, as was affirmed in *Attorney General v. Joseph*.[152] However, the concept of legitimate expectations has been seen to "soften" the approach of dualist traditions towards international treaties in recent years. This concept has been described by the Court where "in some circumstances, ratification of a treaty could give rise to the *legitimate expectation* that the treaty will apply in some respects on the domestic plane, even if legislation has not brought the treaty into force locally."[153]

This matter was discussed in *Attorney General v. Joseph*,[154] considered the "most authoritative decision on the use of unincorporated human rights treaties to create new rights in Caribbean domestic law,"[155] where the Court contemplated the "legal force of a ratified, but legislatively unincorporated international human rights treaty in a dualist tradition – in this case the Inter-American Convention on Human Rights."[156] The Court concluded that "a ratified but unincorporated treaty could give rise to certain legitimate expectations" and thus "the constitutional protection of the law gave the defendants, both condemned to death, a legitimate expectation that the process of appeal to the Inter-American Committee on Human Rights would be respected by the state."[157] As explained by Justice Anderson in writing about the Joseph judgment, it was the "treaty-compliant behaviour" of the Government of Barbados that gave rise to this legitimate expectation, and that "such an expectation was in keeping with the increasing grant of rights to individuals under treaties and the corresponding promotion of universal standards of human rights."[158] As such, the government was held to the legitimate expectation that it created in two accused citizens "that their sentence of death would not be carried out until the Barbados Mercy Committee, deciding whether or not to commute the death sentences to life imprisonment, had received and considered a clemency report from the *Inter-American Commission on Human Rights*." Further, the legitimate expectation was said to not be affected by the fact that the Treaty had not been incorporated into domestic law. The CCJ sees this case as an example demonstrating their tendency to "put fairness at the heart of [their] judgments."[159]

However, interestingly, the Court in *Attorney General v. Joseph* claimed that the question of whether a court should give effect to a substantive legitimate expectation "is still a matter of ongoing judicial debate."[160] When determining whether or not to give effect to substantive legitimate expectations, the CCJ concluded that:

> "In matters such as these, courts must carry out a balancing exercise. The court must weigh the competing interests of the individual, who has placed legitimate trust in the State consistently to adhere to its declared policy, and that of the public authority, which seeks to pursue its policy objectives through some new measure. The court must make an assessment of how to strike the balance or be prepared to review the fairness of any such assessment if it had been made previously by the public authority."[161]

This approach taken by the Court in *Attorney General v. Joseph* has been critiqued, given that "the debate relating to whether the English common law should recognise substantive legitimate expectations had ended in favour of allowing such expectations."[162] However, further reasons have also been cited that may "limit the utility of the decision and relegate it to being little more than a case decided on its special facts." Examples include the emphasis placed by the Court on the government treaty-compliant behaviour suggesting "that conduct to the contrary would [...] defeat such an expectation," as well as the fact that "the Court refused to pronounce upon the question of whether the doctrine of legitimate expectation applies with respect to other human rights issues."[163]

POSSIBLE CCJ AVENUES FOR HEALTH PROTECTION

Following the above examination of how the CCJ operates, its jurisdiction in relation to particular matters, and how standing can be acquired, a few avenues stand out as having the potential to be used in health-protective claims in the context of supporting different regulatory interventions on food and healthy diets.

The Court's "furthering the goals of the treaty or the Community" Approach from *Myrie*

As was previously explained, the CCJ found in *Myrie* that their powers of interpretation "necessarily [extend] to the decisions and other determinations made by relevant authorities in the exercise of their functions to fulfill or further the goals and objectives of the Treaty."[164] The formal objectives of the Community are outlined in article 6 of the Treaty, and while none of them explicitly provide for health protection, article 6(a) has a connection to the health and wellbeing of the public, stipulating "improved standards of living" as an objective.[165] However, as was expressed in the CCJ's recently issued advisory opinion, the first decision attempting to explain how to interpret article 6, the provision is not held to act as an exhaustive list of all fundamental objectives of the community. Rather, a fundamental objective is to be understood as an issue lying at the "core of the spirit, nature and aspirations of the Community," or one that is "so inextricably central to and indispensable for the full attainment of one or more of the objectives or goals specified in the treaty."[166] As such, one can argue that ensuring the health and wellbeing of the citizens of the Community by supporting health-protective regulatory interventions on food and healthy diets can fit within the realm of what is to be considered a "fundamental objective" following the 2020 advisory opinion. Should this be the case, the party bringing the claim forward would of course first have to fulfill the requirements for standing outlined in article 222 of the RTC.[167]

While the CCJ has clarified that they do not have the jurisdiction to apply and interpret human rights law, they did proclaim in *Myrie* that they have a duty with respect to international law that "in the resolution of a claim properly brought in [our] original jurisdiction, [we] can and must take into account principles of international human rights law when seeking to shape and develop relevant Community law."[168] As such, while the potential case brought forward would need to carefully steer clear of being founded solely on the question of a violation of human rights, the Court cannot ignore international human rights law when deciding on the issue at hand.

Government Inaction

A potential claim that can be made in front of the CCJ is one of government inaction on regulating NCD risk factors infringing upon the right to health of CARICOM citizens, urging Member States to take affirmative regulatory measures on this regard. The following section will outline such a claim.

In terms of the feasibility of having this claim accepted by the CCJ, article 222 for standing of persons is likely to be satisfied, as the Court clarified in *Trinidad Cement Limited v Republic of Guyana* (2010) that it is sufficient for the applicant to "merely make out an arguable case" that each condition outlined under article 222 would or could be met.[169] Further, this type of claim can be filed regardless of whether the Member State at hand has constitutionalised a right to health for its citizens, and despite issues that can present themselves regarding enforcing the right to health flowing from international treaties in countries following dualist traditions. For example, in the previously discussed *Trinidad Cement Limited v Republic of Guyana*, the CCJ introduced the concept of "correlative rights" into the CARICOM legal regime. It ruled that when the RTC imposes an obligation on Member States, individuals have a correlative right if nonfulfillment of that obligation damages their interests. The CCJ stated at paragraph 32:

> "Rights and benefits under the RTC are not always expressly conferred although some of them are... Many of the rights, however, are to be derived or inferred from correlative obligations imposed upon the Contracting Parties."[170]

To the issue of healthy diets, article 184 RTC is of particular interest in that it provides:

> "The Member States shall promote the interests of consumers in the Community by appropriate measures that:
>
> (a) provide for the production and supply of goods and the provision of services to ensure the protection of life, health and safety of consumers;
>
> (b) ensure that goods supplied and services provided in the CSME satisfy regulations, standards, codes and licensing requirements established or approved by competent bodies in the Community
>
> (c) provide, where the regulations, standards, codes and licensing requirements referred to in para (b) do not exist, for their establishment and implementation; ..."[171]

The question to be asked here is, in light of the approach taken in Trinidad Cement Limited v Republic of Guyana, "can one read these provisions, particularly article 184, as imposing a duty to act in this area and therefore giving rise to a correlative right on the part of CARICOM citizens that is legally enforceable through the CCJ's original jurisdiction?"

In *Myrie*, the CCJ ruled that decisions of the Conference of Heads of Government (or other CARICOM organs) give rise to binding, legally enforceable obligations under the RTC without the need for those decisions to be incorporated into domestic law. As was referred to earlier in this document, the CCJ explained the situation in these terms:

> "The RTC [...] and more particularly the 2007 Conference Decision brought about a fundamental change in the legal landscape. [...] Although it is evident that a State with a dualist approach to international law sometimes may need to incorporate decisions taken under a treaty and thus enact them into municipal law in order to make them enforceable ***at the domestic level***, it is inconceivable that such a transformation would be necessary in order to create binding rights and obligations ***at the Community level***. [...] If binding regional decisions can be invalidated at the Community level by the failure of the part of a particular State to incorporate those decisions locally the efficacy of the entire CARICOM regime is jeopardized and effectively the States would not have progressed beyond the pre-2001 voluntary system that was in force."[172]

The questions that arise here are "to what extent can the 2007 Port-of Spain Declaration,[173] discussed earlier in this document, be considered a 'decision' by the Conference of the Heads of Government such as to fall within the scope of the *Myrie* reasoning?" Equally, "can it be said that the Conference of Heads took a 'decision' when they met in 2016 and first issued the call for regulation of the marketing of unhealthy food and beverages to children such as to also fall within the scope of the Myrie reasoning?" These questions require further thought and investigation, particularly as they relate to the actual language used by the Conference of Heads in 2016.

Further, to the extent that it is determined that an original jurisdiction claim is feasible, the key question is "What is the nature of relief being sought?" While the CCJ does have the authority to award damages against a CARICOM Member State as was seen in the *Myrie* decision, the more appropriate remedy would be an order of mandamus requiring that the necessary steps be taken to put regulations in place in this area.

Lastly, in turning to the CSME, some standards do exist in relation to regulating food safety. Namely, the *Caribbean Agricultural Health and Food Safety Agency* (CAHFSA) exists to "provide regional and national support to the Community in the establishment, management and operations of its national agricultural health and food safety systems."[174] Albeit related to the sanitary aspects of food systems and trade, "their implications for trade are more serious given the growing demand for increased food safety [and] heightened public interest", that has led consumers to show "unprecedented interest in how their food supplies are produced, processed, and distributed."[175] These concerns and public interests are likely to translate to the methods with which foods are dangerously marketed and labelled as well, with the risks to public health and safety that these practices can bring.

"The CCJ has ruled that they are to take principles of international human rights law into account in making original jurisdiction decisions and that they can address international human rights issues in their appellate jurisdiction despite the international human rights treaty at hand not being incorporated into the domestic law of the given Member State, through principles, such as that of 'legitimate expectations.'"

Requesting an Advisory Opinion

Should an advisory opinion be requested on a question pertaining to the health of CARICOM citizens in relation to the need for or lack of sufficient regulatory interventions on food and healthy diets, this judgment is likely to carry influential weight. As was explained previously, the CCJ can, in an advisory opinion, ascribe "novel meanings" to treaty terms, which is said to have a potential "domino effect" on the future interpretation and application of the given treaty provision.[176] As such, provided the requirements for standing to request an advisory opinion as per article 212 of the RTC are met, as well as the conditions for advisory opinions set out in rule 11.3 of the *CCJ Original Jurisdiction Rules*, an advisory opinion could be requested on the question of whether the health and wellbeing of citizens of the Community, or something of this sort, is to be interpreted to be amongst the "fundamental goals" of the Community or the RTC, and whether the achievement of "enhanced functional co-operation, including intensified activities in areas such as health" requires of States the adoption of diet-related regulatory measures. Another potential question could entail what the "right to health" means for the CARICOM, and other such topics.

Using the Court's Appellate Jurisdiction

The CCJ's appellate jurisdiction serves as a promising avenue for settling health-protective claims, given its role in cases pertaining to constitutional matters and the protection of human rights,[177] as well as the role of "public importance" in expanding the scope of the Court's appellate jurisdiction. Further, it has been acknowledged that the CCJ is even granted "considerable discretionary authority to allow other appeals"[178], outside of those governed by article XXV of the *Agreement*.[179] Importantly, the notion of "legitimate expectation" helps bring domestic weight to human rights contained within international treaties that have been ratified by the Member State at hand but that have yet to be incorporated into domestic law, as was the case in the CCJ's appellate jurisdiction case of *Attorney General v. Joseph*.[180]

Using the avenue of "public interest" is of particular hope for legal actions pertaining to regulating common risk factors for NCDs. With the Secretary General of the Caribbean Community having conveyed that there are "areas of significant concern with regard to risk factors for NCDs, particularly childhood obesity,"[181] it can be understood that a claim brought to the CCJ pertaining to the proper regulation of food and healthy diets is likely to be seen as being in the public's interest.

However, the use of this avenue is not without limiting factors. Local remedies first need to be exhausted, even for nations having accepted the CCJ as their final appellate court, as the *Agreement* stipulates that the CCJ's appellate jurisdiction stems from decisions of the appellate court of the Contracting Party.[182] Further, the pertinence to health protection of using the CCJ's appellate jurisdiction with respect to constitutional claims,[183] human rights claims, or claims of public importance,[1184] of course depends on whether the Member State at hand has either (1) constitutionalized a right to health or contains provisions within its constitution that can be interpreted as being health-protective, (2) has at least ratified (but not necessarily incorporated domestically) an international treaty pertaining to health rights, or (3) considers, as a nation, for the health claim being made to be of general or public importance.

In sum, the Appellate Jurisdiction's potential can be characterized as both a "sword" and a "shield".[185] As a *shield* to protect and defend strong state action in the regulation of unhealthy products with a likelihood that the Court will engage in a substantive examination of rights;[186] and be deferent to State action in relation to the scope of the general public interest limitation and public health. Furthermore, as a sword, the Appellate Jurisdiction can be used to challenge state inaction, where the Court could potentially order governments to adopt specific steps within a detailed timeframe.

CONCLUSION

Within the CARICOM, NCDs account for a significant percentage of premature deaths, with an increasing prevalence that is forecasted to remain high given the increasing rates of NCD risk factors, including unhealthy diets. This high prevalence has a significant economic burden on CARICOM nations. There is an urgent need to stop this increasing trend, with CARICOM governments having a primary role and responsibility to act by formulating effective responses.

The law has emerged as a tool for action in creating healthier environments and populations, and thus contributing towards the regulation of common NCD risk factors. In particular, law is recommended as being necessary for effective implementation of regulations surrounding the marketing of unhealthy foods and beverages. With this in mind, the CCJ emerges as an interesting avenue for supporting regulatory interventions on food and healthy diets within the CARICOM.

The CCJ can have significant influence on Member States in its original jurisdiction, either through the application and interpretation of the RTC, or, as was more recently recognized by the Court, through the interpretation of other determinations and decisions made by authorities exercising a function that is required to fulfill or further the goals of the RTC. Additionally, in nations having accepted the Court's appellate jurisdiction, the CCJ can act as a traditional court of final instance hearing a range of matters coming from the courts of Member States, including claims related to human rights.

Despite the high prevalence of Member States following a dualist tradition, recent developments have been said to "soften" the power of this duality. The CCJ has ruled that they are to take principles of international human rights law into account in making original jurisdiction decisions and that they can address international human rights issues in their appellate jurisdiction despite the international human rights treaty at hand not being incorporated into the domestic law of the given Member State, through principles, such as that of "legitimate expectations." As such, with there being provisions in the RTC that are pertinent to health, and with CARICOM nations respectively being a party to either one or several international treaties recognizing health rights and health protection, the potential for this Court to act in favor of preventing NCDs amongst CARICOM states is hopeful.

There exist several interesting avenues to access the CCJ – there is flexibility for private parties to gain standing and have the subject matter of their claim be interpreted as falling within the CCJ's jurisdictions or for intervening parties to participate in hearings, and there is the possibility of requesting an advisory opinion of the CCJ, which can help to clarify the relevance of RTC treaty provisions to health for the CARICOM. As such, while barriers remain regarding the efficacy and use of the CCJ as an avenue for health protective claims, its potential utility is of great hope for the fight against NCDs and is one that should continue to be explored.

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157 De Mestral, *supra* note 16, at 68, referencing The Attorney General, Superintendent of Prisons and Chief Marshal v Jeffrey Joseph and Lennox Ricardo Boyce, Caribbean Ct. of Justice, CCJ Appeal No CV 2 (2006) at ¶ ¶ 103-132.
158 Anderson, *supra* note 50, at 22.
159 The Caribbean Court of Justice, *Mission & Vision*, https://www.ccj.org/about-the-ccj/mission-vision/ (last visited Dec. 14, 2020).
160 EDDY VENTOSE, COMMONWEALTH CARIBBEAN ADMINISTRATIVE LAW 223 (Routledge, 2013). *See also* The Attorney General, Superintendent of Prisons and Chief Marshal v Jeffrey Joseph and Lennox Ricardo Boyce, Caribbean Ct. of Justice, CCJ Appeal No CV 2 ¶ 119 (2006).
161 The Attorney General, Superintendent of Prisons and Chief Marshal v Jeffrey Joseph and Lennox Ricardo Boyce, Caribbean Ct. of Justice, CCJ Appeal No CV 2 ¶ 124 (2006).
162 EDDY VENTOSE, *supra* note 160, at 223.
163 Anderson, *supra* note 50, at 22.
164 Shanique Myrie v. The State of Barbados, Caribbean Ct. of Justice, CCJ Application No OA 2, ¶ 8 (2013).
165 Revised Treaty of Chaguaramas, art. 6 (a), Jul. 4, 1973.
166 Caribbean Ct. of Justice, CCJ Advisory Opinion No AOOJ2019/001 (2020).

167 Revised Treaty of Chaguaramas, art. 222, Jul. 4, 1973.

168 Shanique Myrie v. The State of Barbados, Caribbean Ct. of Justice, CCJ Application No OA 2, ¶ 10 (2013).

169 Trinidad Cement Limited v Republic of Guyana, Caribbean Ct. of Justice, CCJ Application No OA 2, ¶¶ 28 and 33 (2009). *See also* De Mestral, *supra* note 16, at 55-56.

170 Trinidad Cement Limited v Republic of Guyana, Caribbean Ct. of Justice, CCJ Application No OA 2, ¶ 32 (2009).

171 Revised Treaty of Chaguaramas, art. 184, Jul. 4, 1973.

172 Shanique Myrie v. The State of Barbados, Caribbean Ct. of Justice, CCJ Application No OA 2, ¶¶ 50-52 (2013).

173 CARICOM, *Declaration of Port-Of-Spain: Uniting to Stop the Epidemic of Chronic NCDs* (Sept. 16, 2007).

174 Food and Agriculture Organization of the United Nations (FAO), *Caribbean Agricultural Health and Food Safety Agency* (CAHFSA), https://www.ippc.int/en/external-cooperation/regional-plant-protection-organizations/cahfsa/ (last visited Dec. 14, 2020).

175 Caribbean Agricultural Health and Food Safety Agency (CAHFSA), *Good Agricultural Practices*, https://www.cahfsa.org/10-sps (last visited Dec. 14, 2020).

176 Prasanna Mahat, *supra* note 112.

177 Agreement Establishing the Caribbean Court of Justice, art. XXV (3), April 16, 2005. *See also* The Attorney General, Superintendent of Prisons and Chief Marshal v Jeffrey Joseph and Lennox Ricardo Boyce, Caribbean Ct. of Justice, CCJ Appeal No CV 2 (2006).

178 Anderson, *supra* note 13, at 16.

179 Agreement Establishing the Caribbean Court of Justice, art. XXV, April 16, 2005.

180 The AG General Superintendent of Prisons Chief Marshal v Jeffrey Joseph and Lennox Ricardo Boyce (Overall Summary) (2006) CCJ 3 AJ.

181 CARICOM Single Market and Economy, *CSME remains best vehicle for sustainable economic growth in the Region – CARICOM SG* (Jul. 05, 2017), http://csme.caricom.org/press-releases/csme-remains-best-vehicle-for-sustainable-economic-growth-in-the-region-caricom-sg.

182 Agreement Establishing the Caribbean Court of Justice, art. XXV, April 16, 2005.

183 *Id*, art. XXV (2).

184 *Id*, art. XXV (3).

185 We owe this point and characterization to Rashad Brathwaite, who provided excellent suggestions to improve the report.

186 The Court opened the door to non-traditional uses of the right to life in its Nervais decision. A state seeking to regulate unhealthy products may argue that it is complying with a positive obligation to fulfil such right. *Jabari Sensimania Nervais v. The Queen*, Caribbean Ct. of Justice, CCJ Appeal No BBCR2017/002 (2018).

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