THE CARIBBEAN AGRICULTURAL HEALTH AND FOOD SAFETY AGENCY: IMPLICATIONS FOR REGIONAL AND INTERNATIONAL TRADE

The Honorable Mr. Justice Winston Anderson[*]

TABLE OF CONTENTS

INTRODUCTION

An important objective of the Revised Treaty of Chaguaramas Establishing the Caribbean Community (CARICOM) Including the CARICOM Single Market and Economy (the Revised Treaty)[1] is the development of the food and agricultural sector, and a corresponding expansion in the regional trade of products within that sector among the twelve states participating in the CARICOM Single Market and Economy

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1. Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy, July 5, 2001, 2259 U.N.T.S. 293 [hereinafter Revised Treaty]. The Revised Treaty was signed by the Heads of Government of the Caribbean Community on July 5, 2001 at their Twenty-Second Meeting in Nassau, The Bahamas. *Id.* at 411–13. It entered into force on January 1, 2006 by virtue of the Agreement to Enable the Entry into force of the Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy (adopted Dec. 21, 2005, entered into force Feb. 9, 2006).

(CSME).[2] However, the Jagdeo Initiative[3] identified agricultural health and food safety standards as a key constraint to the further development of the region's agricultural and food processing sector. The likely validity of this assertion was recently illustrated by the *Tastee Patties* dispute.[4] A shipment of patties from Jamaica was held at a port in Trinidad for several weeks on the basis that the patties did not meet Trinidadian health standards.[5] Trinidad and Tobago authorities insisted that they needed to visit the processing facility in Jamaica in order to inspect and evaluate the standards there before an import license could be issued.[6] The shipment was cleared only after several weeks of consultations and the completion of a favorable report by the Sanitary and Phytosanitary (SPS) Inspection Team of CARICOM.[7]

This and similar incidents have made it clear that any expansion in regional and international trade in the food processing and agricultural sector is reliant upon "common SPS standards being accepted within the regional bloc."[8] There is also the consideration that, with the increase in international travel and the movement of people and cargo globally, the incidents of pests and diseases entering the Caribbean will increase.[9]

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2. Namely, Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago. The three other Caribbean states that are members of CARICOM—The Bahamas, Haiti, and Montserrat—are not participants in the CSME. *See The Importance of, and State of Implementation of The CSME*, CARIBBEAN COMMUNITY (CARICOM) SECRETARIAT (Aug. 25–26, 2003), http://www.caricom.org/jsp/speeches/csme_importanceandimplementation_blake.jsp (describing the importance, potential, and state of implementation of the CSME) [hereinafter *Caribbean Community (CARICOM) Secretariat*].

3. This is the name that was given to the presentation on agriculture and fisheries by President Bharrat Jagdeo of Guyana, made to the Heads of Government at their Twenty-Fifth Conference held in Grenada from July 4–7, 2004.

4. *See Tastee Patties Said to be at the Heart of Jamaica-Trinidad Dispute*, CSMENEWSNETWORK.COM, May 27, 2009, [hereinafter *Tastee Patties*] http://csmenetwork.com/index.php?option=com_content&view=article&id=3925:tastee-patties-said-to-be-at-the-heart-of-jamaica-trinidad-dispute&catid=138:business-opportunities&Itemid=357.

5. *See id.* ("[T]he issue of standards has been central to the use of sanitary and phytosanitary (SPS) measures to block or delay the entry of Jamaican meat and meat products in Trinidad.").

6. *Id.*

7. *See Tastee Gets Full Clearance from Caricom*, JAMAICA OBSERVER, May 19, 2010, http://www.jamaicaobserver.com/Tastee-gets-full-clearance-from-Caricom_7626812 (reporting that at a meeting on February 8 and 9, 2010 and acting upon the recommendations of the CARICOM SPS Inspection Team, which visited the site in Jamaica, CARICOM decided to permit Tastee to export its patties to all CARICOM Member States).

8. *Tastee Patties*, *supra* note 4.

9. *See, e.g.*, Press Release, Caribbean Cmty. (CARICOM) Secretariat, Remarks by His Excellency Edwin W. Carrington, Secretary-General, Caribbean Community (CARICOM) on the Occasion of the Inauguration of the Caribbean Agricultural Health and Food Safety Agency (CAHFSA),

Climate change may also enhance the ability of vermin to migrate and establish throughout the region.[10] Satisfactory SPS standards are required, therefore, for regional and international trade.

The Agreement Establishing the Caribbean Agricultural Health and Food Safety Agency (the CAHFSA Agreement), which attempts to implement common SPS standards, was originally adopted by the Member States of CARICOM in Roseau, Dominica, on March 12, 2010 but has now been replaced by the CAHFSA Agreement adopted on February 25, 2011 at St. George's, Grenada.[11] Among the Caribbean Agricultural Health and Food Safety Agency's (CAHFSA or the Agency) primary objectives is the provision of regional and national support to the community in the establishment and management of National Agricultural Health and Food Safety Systems (NAHFSS) as they relate to SPS measures promulgated by the World Trade Organization (WTO).[12] CAHFSA is specifically intended to "execute on behalf of those countries such actions and activities that can be more effectively and efficiently executed through a regional mechanism" than by unilateral action.[13]

There are several perspectives from which to consider the likelihood that the CAHFSA Agreement will achieve its objectives. In the first place, there is the question of internal coherence. The focus here is two-fold: (1) whether the objectives as set out in the Agreement are capable of being achieved on the basis of the prescribed institutional and administrative arrangements; and (2) whether the nature of the relationship between CAHFSA and other regional institutions that are involved in standard-setting presents a platform for collaborative endeavors in adopting appropriate SPS measures. In the latter regard, the CARICOM Regional Organization for Standards and Quality (CROSQ) and the Caribbean Agricultural Research and Development Institute (CARDI) are among the most pertinent. Here, internal coherence considers the broader question of the rationalization of the institutional arrangements within CARICOM.

A second consideration for the likelihood that the CAHFSA Agreement may or may not achieve its objectives is the existence of sufficient legislative and regulatory authority to guarantee national compliance with

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18 March 2010, Paramaribo, Suriname (Mar. 19, 2010) [hereinafter CAHFSA Inauguration Remarks], http://www.caricom.org/jsp/speeches/cahfsa_inauguration_carrington.jsp.

10. *Id.*

11. *See* Agreement Establishing the Caribbean Agricultural Health and Food Safety Agency (CAHFSA), February 25, 2011 (art. XXVII replaces the earlier CAHFSA which had been adopted Mar. 12, 2010). The current CAHFSA entered into force on February 25, 2011 with the signature of The Bahamas, Grenada, Haiti, Guyana, St. Lucia, St. Kitts and Nevis, and Suriname.

12. *Id.* art. 3, ¶ 1.

13. *Id.*

regional and global standards so as to facilitate international trade. The Revised Treaty requires the establishment of "an effective regime of sanitary and phytosanitary measures"[14] and the harmonization of "laws and administrative practices in respect of . . . sanitary and phytosanitary measures."[15] WTO commitments make similar requirements of Member States to apply "international standards, guidelines, and recommendations" in the conduct of trade in agricultural products.[16] These regional and global obligations are recognized in the preamble to the CAHFSA.[17] A legitimate question is, therefore, whether the institutional and administrative arrangements, together with the legislative nature of the decision-making processes prescribed for the Agency, are sufficient to implement or otherwise satisfy these international legal obligations.

The third and final issue of significance to the likely success of the CAHFSA Agreement to be considered relates to the regime for the settlement of disputes. Contracting Parties to the CAHFSA Agreement are obliged, ultimately, to submit differences for final decision by an arbitral tribunal.[18] This provision, which is by no means uncommon in regional agreements that are subsidiary to the Revised Treaty,[19] raises the question of the role of the Caribbean Court of Justice (CCJ or the Court), the primary function at the regional level of which is to exercise compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Revised Treaty.[20] Therefore, whether and how the Court may exert jurisdiction over CAHFSA raises questions of fundamental importance to the regional integration movement.

I. THE PURPOSE OF SANITARY AND PHYTOSANITARY MEASURES

The central concern of the CAHFSA Agreement is with the adoption of appropriate SPS measures which, reflecting the definition used in the WTO

14. Revised Treaty, *supra* note 1, art. 57, ¶ 1(k).

15. *Id.* art. 74, ¶ 2(e).

16. *See* WTO Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, 1867 U.N.T.S. 493 (entered into force Jan. 1, 1995) [hereinafter SPS Agreement].

17. CAHFSA Agreement, *supra* note 11, pmbl.

18. *Id.* art. 20, ¶ 1.

19. *See, e.g.*, Agreement Establishing the Caribbean Environmental Health Institute, art. 17, ¶ 1, *opened for signature* July 10, 1980, 2247 U.N.T.S. 275 ("[D]ispute[s] shall be submitted to arbitration.").

20. Agreement Establishing the Caribbean Court of Justice, Feb. 14, 2001, 2255 U.N.T.S. 319 [hereinafter CCJ Agreement].

SPS Agreement,[21] are said to include all relevant laws, decrees, regulations, requirements, and procedures applied to one or more of several objectives.[22] These objectives are:

> (a) Protect[ion of] animal or plant life or health within the territory of the Contracting Parties from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
>
> (b) Protect[ion of] human or animal life or health within the territory of the Contracting Parties from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
>
> (c) Protect[ion of] human life or health within the territory of the Contracting Parties from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
>
> (d) Prevent[ion] or limitat[ion of] other damage within the territory of the Contracting Parties from the entry, establishment or spread of pests.[23]

II. TRANSPARENCY

The CAHFSA of 2011 contains a new Article on the important issue of transparency, which attempts to ensure compliance with the obligations on transparency in keeping with the Revised Treaty and the WTO Agreement on the Application of Sanitary and Phytosanitary Measures. Accordingly, Article VIII provides as follows:

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21. SPS Agreement, *supra* note 16, annex A, ¶ 1. The WTO SPS Agreement states that sanitary or phytosanitary measures:

> [I]nclude all relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labeling requirements directly related to food safety.

Id.

22. CAHFSA Agreement, *supra* note 11, art 1.

23. *Id.*

> Members shall comply with the requirements of transparency as mandated by the Community and the SPS Agreement including –
>
> (a) the prompt publication of information on the sanitary and phytosanitary measures of members and the prompt notification of changes in these measures; and
>
> (b) the allowance of a reasonable interval, except in urgent circumstances, between the publication of a sanitary or phytosanitary regulation and its entry into force in order to allow time for producers in exporting Members to adapt their products and methods of production in the requirements of the importing Member.

III. INSTITUTIONAL AND ADMINISTRATIVE ARRANGEMENTS

The institutional and administrative architecture of the CAHFSA Agreement is designed to ensure the facilitation of its objectives and purposes. Article II establishes CAHFSA as having the membership, objectives, functions, and composition set out in the Agreement.[24] It is specifically provided that CAHFSA is established as an institution of CARICOM pursuant to Article 21 of the Revised Treaty.[25]

A. Membership

Full membership of CAHFSA is open to all Member States of the Caribbean Community.[26] This would appear to allow for membership by Haiti, Montserrat, and The Bahamas which are all members of the Community but which are not presently participants in the CSME.[27] It is not altogether clear whether this was unintended since participation in the CAHFSA Agreement allows for financial and technical contributions to be

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24. *Id.* art. 2, ¶ 1.

25. *Id.* art. 2, ¶ 2. CARICOM has deferred for the time being consideration of whether CAHFSA should be designated as the Caribbean Plant Protection Commission ("CPPC"); one difficulty is that the membership of CPPC is much wider than CARICOM since it includes the United States and some South and Latin American countries.

26. *Id.* art. 4, ¶ 1. The members of CARICOM are listed in Article 3(1) of the Revised Treaty as: Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago. Revised Treaty, *supra* note 1, art. 3(1).

27. *See Caribbean Community (CARICOM) Secretariat*, *supra* note 2.

made by the non-CSME CARICOM Member States while benefiting from technical advice and assistance with regard to their international trade.[28] Similar discontinuities are evident in other CARICOM agreements.[29]

Associate membership of CAHFSA is open to Associate Members of the Community,[30] that is, any Caribbean state or territory admitted by the Conference of Heads of Government of the Community to associate membership of the Community.[31] Associate members have wide rights of participation in the work of CAHFSA contingent upon compliance with their financial obligations.[32]

The original CAHFSA Agreement made provision for a third category of membership. The class of "Affiliated Members,"[33] which does not exist in the Revised Treaty,[34] was open to States and Territories of the Caribbean which are not Members or Associate Members of the Community provided they were so designated by the ministerial Council for Trade and Economic Development.[35] In this way, Caribbean states and territories not otherwise associated with CARICOM could nevertheless have participated in the work of CAHFSA provided they met their financial obligations to the Agency. However, this category of membership was abolished in the current CAHFSA in the interest of consistency with the scheme of the Revised Treaty.[36] The participation of third parties must now occur through the Technical Advisory Committees.

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28. *See* CAHFSA Agreement, *supra* note 11, art. 18, ¶ 1 (stating that a source of CAHFSA revenue derives from Members who are then able to benefit from the objectives to be carried out in Article 3).

29. *See, e.g.*, CCJ Agreement, *supra* note 20 at art. II (allowing other, non-Member Caribbean countries to become a Party to the agreement, subject to invitation by the Conference).

30. CAHFSA Agreement, *supra* note 11, art. 4, ¶ 2.

31. *See* Revised Treaty, *supra* note 1, art. 231; *see also CARICOM Member States and Associate Members*, CARIBBEAN COMMUNITY (CARICOM) SECRETARIAT, http://www.caricom.org/jsp/community/member_states.jsp?menu=community (noting when Associate Members joined CARICOM: Anguilla (July 4, 1999), Bermuda (July 2, 2003), British Virgin Islands (July 2, 1991), Cayman Islands (May 15 2002), and Turks and Caicos Islands (July 2, 1991)) (last visited Oct. 29, 2010).

32. CAHFSA Agreement, *supra* note 11, art. 18.

33. *Id.* art. 1, art. 4, ¶ 3.

34. *See* Revised Treaty, *supra* note 1, art. 12, ¶ 10 (reporting that the organs, bodies, and institutions of the Community do recognize "observers," but it is unclear whether observer status in CARICOM is equated with Affiliated Membership in CAHFSA).

35. CAHFSA Agreement, *supra* note 11, art. 4, ¶ 3. Article 1 defines "Affiliated Member" as "any Caribbean State or Territory admitted to affiliate membership of CAHFSA pursuant to Article IV of this Agreement." *Id.* art 1.

36. *Id.* art. 4, ¶ 1.

B. Institutional and Administrative Architecture

CAHFSA consists of a Board, a Secretariat, and Technical Advisory Committees ("TACs").[37] Under the current CAHFSA, the Board of Directors comprises only Members of CARICOM and must convene an annual general meeting at the headquarters of CAHFSA or any other venue determined by the Board.[38] The Board is made up of one representative from each Member representing the specialized areas of focus for CAHFSA, "including animal and veterinary public heath, plant health, food safety and quality and other relevant fields such as risk management and laboratory services."[39] The current Agreement abolishes membership from the private sector.[40] Associate Members have the right to participate in the meetings of the Board without the right to vote. The Secretary General of CARICOM is granted observer status on the Board.[41] Only Members have the right to vote.[42]

The functions of the Board of Directors are detailed in Article X.[43] An overriding obligation is to report annually to the Council for Trade and Economic Development ("COTED"),[44] which is the body authorized to determine the establishment or adoption of regional SPS measures, strategies, and standards.[45] Subject to this requirement, the Board has a multiplicity of advisory and executive or regulatory functions.[46] Among the primary advisory functions is to advise COTED on the making of recommendations on the conduct of regional and international risk assessments for the importation of plants, animals, and the products thereof.[47] The Board should also inform COTED of new and emerging issues which pose a threat to the agricultural health and food safety systems in the Community.[48] The Board may make recommendations to COTED on the budget as well as the strategic plan and work program of the Agency.[49]

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37. *Id.* art. 6.
38. *Id.* art. 10.
39. *Id.* art. 9, ¶ 1. The CAHFSA Agreement lists these five institutions with related functions as: CARDI; the Caribbean Environmental Health Institute ("CEHI"); Caribbean Regional Fisheries Mechanism ("CRFM"); CROSQ; and one person jointly representing the University of the West Indies, the University of Guyana, and Anton De Kom University of Suriname. *Id.*
40. *Id.*
41. *Id.* art. 9, ¶ 3.
42. *Id.* art. 10, ¶ 3.
43. *Id.* art. 10.
44. *Id.* art. 10, ¶ 1.
45. Revised Treaty, *supra* note 1, art. 12.
46. CAHFSA Agreement, *supra* note 11, art. 10, ¶ 3.
47. *Id.* art. 10, ¶ (3)(k).
48. *Id.* art. 10, ¶ (3)(i).
49. *Id.* ¶ (3)(j).

The executive functions include the appointment of the Chief Executive Officer; the exercise of power over appointments, termination of appointments, and approval of staff regulations; and the approval of organizations with which CAHFSA may establish and maintain functional cooperation.[50] The Board is also competent to establish guidelines and standards for monitoring and evaluating CAHFSA regarding its targets, objectives, and policies, as well as to promote the use of international and regional SPS standards, guidelines, and recommendations.[51] The executive or regulatory functions are in relation to the Agency rather than the Member States. In performance of its functions, the Board may seek the advice of a TAC.[52]

The TAC consists of nominees of Contracting Parties and other persons drawn from public and private sector entities.[53] A wide diversity of institutions may be represented.[54] The TAC meets "as often as necessary to perform its functions."[55] Its decisions are taken by a simple majority and constitute recommendations to the Chief Executive Officer ("CEO").[56] The functions of the TAC are to provide, *inter alia*, advice, comments and reviews on:

> (a) the development, adoption, adaptation or harmonisation of sanitary and phytosanitary measures and regional guidelines, measures, positions and standards regarding new and emerging sanitary and phytosanitary issues;
>
> (b) regional training programmes with respect to strengthening the capacity and capability for agricultural health and food safety systems as they relate to sanitary and phytosanitary issues; and
>
> (c) any other function as may be requested by the Secretariat or the Board.[57]

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50. *Id.* art. 10, ¶ (3)(a), (b), (c), (h).
51. *Id.* art. 10, ¶ (3)(g).
52. *Id.* art. 10, ¶ 3. Note that the article appears to have two Paras. 3.
53. *Id.* art. 11, ¶ 1. Note that the Agreement appears to have two Article XI.
54. *Id.* The CAHFSA Agreement specifies that Members TACs "shall be selected from the nominees of Contracting Parties, persons drawn from the public and private sectors, national, regional and international organizations, Community Institutions and Associate Institutions." *Id*. art. 11 ¶ 3.
55. *Id.* art. 13, ¶ 1.
56. *Id.* art. 13, ¶ 2.
57. *Id.* art. 12.

The Secretariat is appointed by the Board and consists of a CEO; a Food Safety Specialist; an Animal Health Specialist; a Plant Health Specialist; and "any other technical, professional or ancillary staff as may be necessary including accounting and secretarial personnel."[58] In appointing the professional staff, due consideration must be given to "equitable geographical representation of the membership of CAHFSA";[59] but in performing their functions the staff "shall neither seek nor receive instructions from any source external to CAHFSA."[60]

The functions of the CEO are spelled out in detail in Article XV. Subject to the directions of the Board, the CEO performs the following functions among others:

> (a) liaise with the relevant national, regional and international organisations and private sector bodies to ensure successful management and operations of CAHFSA;
>
> (b) liaise with the Technical Advisory Committees and other agencies, organisations, and national contact points in the planning and development of regional programmes, positions, representations and recommendations on agricultural health and food safety;
>
> (c) liaise with the relevant Technical Advisory Committee to ensure integrity of recommendations to the Board;
>
> (d) make recommendations for appointment of other staff with due consideration to qualification and experience in the critical areas of animal and plant health, food safety and project management;
>
> (e) manage the daily operations of CAHFSA;
>
> (f) ensure good accounting practices in the Secretariat;
>
> (g) submit to the Board an annual report, which includes audited financial statements;

58. *Id.* art. 14, ¶ 1.
59. *Id.* art. 14, ¶ 4.
60. *Id.* art. 14, ¶ 5.

(h) prepare the annual budget and work programme of CAHFSA for submission to the Board; and

(i) undertake any other function as may be determined by the Board.

2. The Chief Executive Officer may establish committees as may be necessary to recommend protocols, guidelines, measures, standards and regulations to the Board.[61]

These institutional and administrative arrangements are the bare essentials required for the organization and vitality of CAHFSA. With the exception of competence in relation to the power to prescribe and ensure implementation of relevant standards, the arrangements would appear to be adequate for the purposes of the Agency. The legal personality of CAHFSA is recognized as including the full capacity to acquire and dispose of property, contract, and institute legal proceedings.[62] The funding consists primarily of donations from Members, Associate Members, and Affiliate Members; other donations; and "fees derived from the conduct of consultancy, investigations, training courses and other services performed by CAHFSA."[63] "Privileges and immunities to be recognized and granted by Contracting Parties . . . [are to] be set out in a Protocol to the Agreement."[64]

IV. INTEGRATION INTO INSTITUTIONAL LANDSCAPE

The Agreement takes particular care to integrate CAHFSA into the multitude of institutions that populate the CARICOM landscape. The Board of Directors is dominated by representatives from institutions within CARICOM having functions to perform in the SPS field. The Board is specifically required to collaborate with established bodies in specific areas mandated by COTED including the Committee of Caribbean Plant Health Directors (CCPHD), Committee of CARICOM Chief Veterinary Officers (CCCVO), and the Caribbean Regional Fisheries Mechanism (CRFM).[65]

61. *Id.* art. 15.
62. *Id.* art. 5.
63. *Id.* art. 18, ¶ 1.
64. *Id.* art. 19, ¶ 1.
65. *Id.* art. 11, ¶ 4.

Several of these institutions, as well as other regional bodies, must be represented on the TACs.[66]

Another methodology by which institutional integration is ensured relates to the functions of the Agency. In some instances, it is expressly provided that CAHFSA is required to conduct its affairs in partnership with regional and international organizations in matters of agricultural health and safety[67] and to coordinate the integration of technical support to stakeholders by relevant regional and international organizations.[68] Even where the requirement is not articulated, the *nature* of the mandate is such that it can only be achieved by inter-agency collaboration. Such mandates include the development of regional standards, measures and guidelines; facilitation of harmonized technical procedures; the monitoring and evaluation of regional agricultural health and food safety programs; and the encouragement of a regional consensus on SPS matters.[69]

In short, both formal and systemic linkages have been established between the new agency and related CARICOM institutions. Financial constraints and the dearth of human resources are also likely to exert practical pressures for close collaboration and burden sharing. Further work is being undertaken in preparation for the revamping of the relationship between CARICOM and its institutions, which is expected to eventually mature into a convention binding the Community and its institutions.

V. ADOPTION OF SPS STANDARDS THAT PROTECT HEALTH AND FACILITATE TRADE

International and regional trade laws establish obligations in relation to the adoption of SPS standards which protect public health while facilitating international trade.[70] WTO Member States are obliged to apply international standards, guidelines, and recommendations when conducting international trade in agricultural products.[71] The Member States administer the WTO Agreement on the Application of Sanitary and Phytosanitary Measures, which is concerned with and sets constraints on standards that safeguard food safety (such as bacterial contamination, pesticides, inspection, and

66. *Id.* art. 11.

67. *Id.* art. 3, ¶ 2(a).

68. *Id.* art. 3, ¶ 2(f).

69. *Id.* art. 3, ¶ 2(e).

70. *See, e.g.*, GEOFFREY S. BECKER, CONG. RESEARCH SERV., RL 33472, SANITARY AND PHYTOSANITARY (SPS) CONCERNS IN AGRICULTURAL TRADE 16–17 (2006) (listing other existing international trade agreements with SPS provisions).

71. *See* Agreement on Technical Barriers to Trade (with Annexes), Apr. 15 1994, 1867 U.N.T.S. 3 (entered into force Jan. 1, 1995).

labeling), as well as animal and plant health (for example, phytosanitary).[72] Member States retain the right to take SPS measures that are necessary for this purpose, but these measures must not be used for protectionist reasons.[73] Where scientific evidence is not available, provisional SPS measures are to be taken on the basis of available information, always bearing in mind the general requirement to implement international standards and not to "arbitrarily or unjustifiably discriminate between Member [States] where identical or similar conditions prevail."[74]

At the regional level, the Revised Treaty requires the establishment of "an effective regime of sanitary and phytosanitary measures"[75] and the harmonization of "laws and administrative practices in respect of . . . sanitary and phytosanitary measures."[76] Even before the formal adoption of the CAHFSA Agreement, CARICOM had established certain basic bodies to carry out SPS functions.[77] The CARICOM Sanitary and Phytosanitary Inspection Team did valuable work in the *Tastee Patties* dispute, as indicated earlier.[78]

CAHFSA is expected to develop technical measures and protocols that complement and build upon existing Caribbean programs in animal health, plant health, and food safety so as to achieve relevant SPS certification.[79] The Agency works in support of the development and use of regional and international SPS standards.[80] Particular focus is to be placed on the following critical functional areas:

> (a) promotion of the development and use of regional and international sanitary and phytosanitary measures, standards and guidelines;
>
> (b) strengthening of the legislative framework with respect to sanitary and phytosanitary measures;

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72. SPS Agreement, *supra* note 16, art. 2, ¶ 1.

73. *Id.* art. 2, ¶ 3.

74. *Id.* art. 2, ¶¶ 2, 3.

75. Revised Treaty, *supra* note 1, art. 57, ¶ 1(k).

76. *Id.* art. 74, ¶ 2(e).

77. *See* Revised Treaty, *supra* note 1, art. 57(1)(k) ("[The] Community shall, through competent Community Organs and Bodies, promote and support . . . the establishment of an effective regime of sanitary and phytosanitary measures.").

78. *See Tastee Gets Full Clearance from Caricom, supra* note 8.

79. *See* CAHFSA Inauguration Remarks, *supra* note 9 (describing the importance of technical measures and protocols for trade in the Caribbean).

80. CAHFSA Agreement, *supra* note 11, art. 7.

(c) harmonisation of technical procedures in relation to matters such as quarantine systems and their protocols, surveillance, laboratory analyses, safe management and use of agrochemicals and other relevant processes and procedures in collaboration with other existing organisations in the Community;

(d) provision of a coordination mechanism for sanitary and phytosanitary related issues;

(e) monitoring and evaluation of national programmes in relation to animal health, plant health, and food safety;

(f) development of protocols for the conduct of regional and international risk assessments, including site visits and other investigations;

(g) coordination and support of the conduct of risk assessments including site visits;

(h) provision of support for the strengthening of the regional and national capacity agricultural health and food safety systems in partnership with all stakeholders;

(i) provision of technical support for the strengthening of agricultural health and food safety systems taking into consideration the role of other agencies and institutions;

(j) establishing mechanisms to assist Contracting Parties in complying with transparency obligations;

(k) provision of support for the strengthening of laboratory services;

(l) harmonization of regional strategies for emergencies and emerging and related issues;

(m) informing COTED of new and emerging issues which pose a threat to the agricultural health and food safety systems in the Community;

> (n) development and maintenance of regional and national databases taking into consideration the roles of other agencies and institutions in existing databases;
>
> (o) provision of services as a clearing house for specific information on agricultural health and food safety;
>
> (p) establishment of partnerships with existing regional and international organizations in matters of agricultural health and food safety;
>
> (q) complementing and building upon existing programmes in animal and plant health and food safety in support of national agricultural health and food safety systems in Contracting Parties;
>
> (r) mobilization of resources including the sourcing, utilization and allocation of funding and other development assistance to support the objectives and functions of CAHFSA; and
>
> (s) promotion of the use of international and regional measures, standards and guidelines for sanitary and phytosanitary measures as obliged under the SPS Agreement.[81]

The reference to the development of "risk assessment" protocols deserves further elaboration given the likely costs involved and its centrality to the SPS regime as illustrated in the *European Communities—Measures Concerning Meat and Meat Products (Hormones)* case.[82] "Risk assessment" is defined as the evaluation of the

> likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Contracting Party according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of

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81. *Id.*

82. *See* Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, ¶ 208, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (holding that the European Communities failed to conduct risk analysis and violated obligations under SPS Agreement, *supra* note 16, art. 5); *see also* Appellate Body Report, *Japan—Measures Affecting the Importation of Apples*, ¶ 216, WT/DS245/AB/R (Nov. 26, 2003) (holding that Japan did not satisfy the risk assessment requirement as defined by the SPS Agreement, *supra* note 16, art. 5).

> the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.[83]

These are all important SPS functions that involve adopting measures that protect public health while devising arrangements to reduce the use of SPS measures as non-tariff barriers, including undue administrative delays in clearance of perishable agricultural products. However, there is a central weakness in the arrangement. The CAHFSA Agreement merely creates the framework within which the standards are to be developed.[84] The nature of the drafting places considerable discretion on the pace and urgency with which the standards are established and makes virtually no provision for their implementation and enforcement.[85] There appears to be very little scope for authoritative decision-making by CAHFSA, which must rely on COTED to make SPS rules that are binding on Member States.[86] Under the Revised Treaty, COTED has power to make decisions which are binding on Member States of CARICOM.[87] The Council has specific legislative power in relation to SPS measures that are prescribed in the CAHFSA Agreement: SPS measures recommended by the Board of CAHSA and approved by COTED become binding and Contracting Parties are required to "adopt appropriate legal and administrative arrangements to give effect to the decision within their respective jurisdictions."[88]

VI. DISPUTE RESOLUTION

The provision on dispute settlement focuses on the use of arbitration. Any difference between the Contracting Parties "which is not settled by negotiation or other agreed mode of settlement" shall be referred "for final decision" to an arbitral tribunal "at the instance of any party."[89] The composition of the arbitration tribunal is reliant upon the appointment of

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83. SPS Agreement, *supra* note 16, art. 1.

84. *See* CAHFSA Agreement, *supra* note 11, art. 3 (stating that CAHFSA will provide support in establishing SPS standards, in addition to facilitating the synchronization of technical procedures and providing a framework for monitoring of programs and identifying financial needs).

85. Note that much of the objectives and guidelines laid out within the CAHFSA Agreement are largely discretionary in regards to extent of performance and place few affirmative duties on signing parties. *See generally* CAHFSA Agreement, *supra* note 11.

86. *See id.* arts. 7, 10 (delineating CAHFSA's advisory role to COTED, while Article 16 states that any recommendation must be approved by COTED).

87. Revised Treaty, *supra* note 1, arts. 15, 29.

88. CAHFSA Agreement, *supra* note 11, art. 16.

89. *Id.* art. 20, ¶ 1.

one arbitrator by each of the disputing parties, with the possibility of recourse to the Secretary-General of CARICOM to appoint an arbitrator.[90] The arbitrators thus appointed are responsible for appointing a third arbitrator who shall be the Chairman. The arbitration tribunal establishes its own rules of procedure.[91]

Whether disputes may be adjudicated by the CCJ is open to question. There is nothing in the CAHFSA Agreement that prevents the parties from agreeing to refer the dispute to the Court as an "agreed mode of settlement"[92] but according to one interpretation the CCJ has jurisdiction only with respect to the interpretation and application of the Revised Treaty. Where the Court exercises that jurisdiction and it becomes necessary to pronounce upon subsidiary agreements, such as the CAHFSA Agreement, such pronouncement appears permissible either pursuant to the generic nature of the "compulsory . . . [and] original jurisdiction" to interpret and apply the Revised Treaty, or to the general obligation of the Court to "apply such rules of international law as may be applicable" to the dispute.[93]

The converse case of taking jurisdiction directly over disputes arising under CAHFSA raises greater difficulty. Not only is there the problem of the apparent restriction of the CCJ's competence to adjudicate on matters related to the Revised Treaty, there is also the consideration that in some of the subsidiary CARICOM agreements, recourse by the Contracting Parties to the CCJ seems either to be excluded[94] or not contemplated.[95] The CAHFSA Agreement is one of only two agreements establishing CARICOM institutions that leave open-ended the matter of a referral to the

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90. *Id.* art. 20, ¶¶ 1, 2, 3.

91. *Id.* art. 20, ¶ 5.

92. *Id.* art. 20, ¶ 1.

93. Revised Treaty, *supra* note 1, arts. 216, ¶ 1, 217, ¶ 1. It should be noted that CAHFSA itself appears to recognize this jurisdiction in that its provision on arbitration relate to differences arising out of the interpretation or application of the Agreement, "which is not related to the interpretation or application of the [Revised] Treaty." *Id*. art. 20 ¶ 1.

94. *E.g.*, *id.*; *see also* Agreement for the Establishment of the Caribbean Meteorological Organisation, art. 23, *opened for signature* Oct. 19, 1973, 947 U.N.T.S. 543 (requiring arbitration as the only mode of dispute settlement); Agreement Establishing the Caribbean Environmental Health Institute, *supra* note 19, art. 17, ¶ 1 ("[D]ispute[s] shall be submitted to arbitration."); Agreement Establishing the Caribbean Agricultural Research and Development Institute art. 16, ¶ 1, *opened for signature* Dec. 5, 1974, 2285 U.N.T.S. 607 ("[D]isputes shall be submitted to arbitration.").

95. *See, e.g.*, Agreement Establishing the Caribbean Subcentre of the Latin American Centre for Development Administration, Jan 1, 1980–Aug. 19, 1981, *available at* http://www.caricad.net/UserFiles/File/headquartersagmt.pdf (lacking any provisions for modes of dispute settlement); *see also* Agreement Establishing the CARICOM Regional Organisation for Standards and Quality, arts. 4, ¶¶ 2(d), 2(g), 7, Feb. 4, 2002, 2324 U.N.T.S. 413 (establishing CROSQ duty to "provide guidance to Community Organs and Bodies regarding . . . disputes settlement.").

Court.[96] The matter is complicated by *Johnson v. CARICAD*[97] in which the Court affirmed that it had no jurisdiction over institutions of CARICOM and therefore, *a fortiori,* over associate institutions of CARICOM.[98] Hopefully, the Court will be afforded another opportunity to clarify its jurisdiction in relation to this matter.

CONCLUSION

The establishment and operation of CAHFSA is critical to the development of effective SPS standards. The development of technical standards and national capacities, as well as the harmonization of relevant laws and administrative practices and procedures, should facilitate Community trade in food and agricultural products. Indeed, given the express linkages to the adoption of international standards evolving through the WTO, CAHFSA should increase the overall competitiveness of Caribbean products generally and thus increase the region's share of the global trade in agricultural products. Thereby, an incentive is provided for Caribbean states who are not members of the CSME to nonetheless participate in the work of the Agency. The provision for inter-institutional collaboration is very evident in the organization of CAHFSA and is undoubtedly one of the major achievements of the Agreement.

Among the most intractable problems that remain are those that have to do with the powers of the Agency and the Agency's integration into the dispute settlement regime of the region. There is no supranational power to develop or implement SPS standards. Measures agreed to by CAHFSA become binding through the traditional route of adoption by ministerial council and are implemented by the individual state apparatus.[99] This route has proved entirely unreliable and inadequate in light of the requirements of modern Community building and has been the subject of aging reform efforts at overhauling the process by which community law is

96. The other is the Agreement Establishing the Caribbean Disaster Emergency Response Agency, art. 30, *opened for signature* Feb. 26, 1991, 2256 U.N.T.S. 53, which provides: "*In the absence of a contrary agreement* between the parties concerned, all disputes arising from or in connection with the interpretation or application of this Agreement shall be settled by the Council." (emphasis added).

97. *Johnson v CARICAD* [2009] CCJ 3 (OJ) (Caribbean Ct. of Justice).

98. *Id.* at [14]–[15].

99. *See* Revised Treaty, *supra* note 1, arts. 9, 15, 29 (stating that Member States are responsible for carrying out obligations of the Treaty in Article 9, that COTED consists of ministers from the Member States and what the duties of COTED are in Article 15, and finally that ministerial councils have certain procedural obligations in Article 29).

implemented.[100] Even more disappointing was the failure of the CAHFSA Agreement to expressly place the adjudication of disputes in the competence of the CCJ, thereby leaving the issue to unclear and uncertain principles of general international law.

Ultimately, further development of CAHFSA is dependent upon the economic interests and the political will of the Member States.[101] A critical concern is whether Member States are sufficiently committed to the process given that the region's agricultural sector might not be vibrant enough to create significant lobbying pressure or provide the required economic resources. There is considerable doubt as to whether the sector generates sufficient resources to make cost recovery possible. In addition to the regional costs, the burden of implementation falls to the national institutions thus making additional demands on scarce resources. A leap of faith may be required, that is, a financial investment in the belief that, benefits to public health apart, a vibrant and effective CAHFSA will lead to greater competitiveness and increased regional and international trade, thus justifying the initial outlay of additional resources at the regional and national levels.

100. *See* TECHNICAL WORKING GROUP ON GOVERNANCE APPOINTED BY CARICOM HEADS OF GOVERNMENT, MANAGING MATURE REGIONALISM: REGIONAL GOVERNANCE IN THE CARIBBEAN COMMUNITY (2006), *available at* http://www.caricom.org/jsp/community/twg_governance_report.pdf (describing the major problems and making recommendations for more effective regional governance).

101. *Id.* at 12.