

Are Domestic Licensing Rules Governing Access to Fisheries Consistent with the Objectives of the Treaty Establishing the CARICOM Single Market and Economy?

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ABSTRACT

All CARICOM Member states have implemented laws and regulations governing access to their fisheries as a part of the regime to control the sustainable development and conservation of these resource systems. The access regimes normally take the form of a licensing and registration system, which may apply to both fishing vessels and individual fishermen wishing to exploit the resources. This paper looks at these national laws in relation to the rights granted to nationals of the Caribbean Community by the Revised Treaty of Chaguaramas establishing the CARICOM Single Market and Economy (CSME), specifically the fundamental rights consisting, *inter alia*, of the freedom of establishment and the freedom to provide services. The issue is whether these domestic rules of law for licensing of fishing vessels and fishermen, are capable of hindering or frustrating the achievement of the CSME's objectives in respect of fisheries. The basic objective of the CSME is the establishment of a single internal market having the characteristics of a domestic market that is without barriers in which the free movement of goods, services, and capital is ensured in accordance with the provisions of the Revised Treaty.

KEY WORDS: CARICOM, fisheries, access rules, single market

¿Son las Reglas Domesticas que Gobiernan el Acceso a las Pesquerias Consistentes con los Objetivos del Tratado que Establece La Economia y Mercado Unico de CARICOM?

Todos los Estados Miembros de CARICOM han implementado leyes y regulaciones que gobiernan el acceso a sus pesquerias como parte de un regimen para controlar el desarrollo sostenible y la conservacion de esos sistemas de recursos. Los regimenes de acceso normalmente toman la forma de un sistema de licencia y registro, el cual puede aplicar a las embarcaciones pesqueras y a los pescadores individuales que deseen explotar los recursos.

Este documento revisa esas leyes nacionales en relacion a los derechos otorgados a nacionales de la Comunidad Caribena, por el Revisado Tratado de Chaguaramas estableciendo la Economia y Mercado Unicos de CARICOM (CSME, por sus siglas en ingles), especificamente los derechos fundamentales consistentes, *inter alia*, de la libertad de establecimiento y la libertad de proveer servicios. El asunto es si esas regulaciones domesticas de la legislacion para provision de licencias de embarcaciones y pescadores son capaces de minimizar o frustrar el alcance de los objetivos del CSME con respecto a las pesquerias. El objetivo basico del CSME es el establecimiento de un mercado unico interno que tenga las caracteristicas de un mercado domestico, es decir, sin barreras, en las cuales, el libre movimiento de bienes, servicios y capital esta asegurado en acordancia con las provisiones del Revisado Tratado.

PALABRAS CLAVES: CARICOM, pesquerias, reglas de acceso, mercado unico.

Y a-t-il des Règles Dirigeant L'accès à Pêche Compatibles avec les Objectifs du Traité Étab;ossant la Marché Unique et L'économie à L'intérieur du CARICOM?

Tous les états membres du CARICOM ont mis en œuvre des lois et des règlements dirigeant l'accès à leur pêche comme une partie du régime pour contrôler le développement durable et la conservation de ces systèmes de ressource. Les régimes d'accès prennent normalement la forme d'une licence et d'un système d'enregistrement, qui peut s'appliquer tant aux navires de pêche qu'aux pêcheurs individuels souhaitant exploiter les ressources. Ce papier regarde ces lois nationales par rapport aux droits accordés aux ressortissants de la Communauté caraïbienne selon le traité révisé de Charaguamas établissant le Marché unique du CARICOM et de l'économie (CSME), spécifiquement les droits fondamentaux traitant, entre autres, de la liberté d'installation et de la liberté de fournir des services. La question est de savoir si ces règles intérieures législatives permettant l'obtention d'une licence de pêche pour les navires et les pêcheurs sont capables de minimiser ou d'entraver l'accomplissement des objectifs du CSME pour la pêche. L'objectif de base du CSME est l'établissement d'un marché interne unique ayant les caractéristiques d'un marché intérieur, c'est-à-dire sans barrières dans lesquelles, le libre mouvement des marchandises, des services et du capital sont assurés conformément aux dispositions du traité révisé.

MOTS CLÉS: CARICOM, pesquerias, reglas de acceso, mercado unico

INTRODUCTION

Since the advent of the 1982 United Nations Convention on the Law of the Sea (Montego Bay Convention), which gave coastal states responsibility for the development, management and conservation of the living resources within the waters under their jurisdiction or sovereignty, coastal states have developed laws and policies to control and regulate access to these resources. CARICOM

Member states have enacted laws and regulations establishing access regimes among other devices, to control and regulate the development, management, conservation of their fisheries and aquatic ecosystems. The access regimes normally take the form of a licensing and registration system, which may apply to both fishing vessels and individual fishermen wishing to exploit the resources.

This review concerns the fisheries laws of Antigua and

Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St Kitts and Nevis, St Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago. It does not include the fisheries laws of Haiti, Suriname and The Bahamas although these are CARICOM Member States.

The paper looks at these laws and policies in relation to the rights granted to nationals of CARICOM Member States by the Revised Treaty of Chaguaramus establishing the CARICOM Single Market and Economy (CSME), specifically the fundamental rights consisting, *inter alia*, of the freedom of establishment, the freedom to provide services and the free movement of capital (CARICOM 2002). The specific issue being considered is whether there are rules within the Member States' laws and policies for the licensing of fishing vessels and fishermen, which are capable of hindering or frustrating the achievement of the objectives of the CARICOM single market and economy, bearing in mind that the objective of the CSME is the establishment of a single market having the characteristics of a domestic market, that is, one without barriers in which, *inter alia*, the free movement of goods, services, and capital is ensured in accordance with the provisions of the Revised Treaty.

The Revised Treaty not only imposes a general prohibition of discrimination on the basis of nationality (Article 7), but it also imposes an obligation on States to take all appropriate measures to ensure the carrying out of the Treaty obligations including those arising from decisions taken by the Organs and Bodies of the Community (Article 9). It goes on to impose obligations on Member States, firstly, not to introduce any new restrictions, and secondly, to remove existing restrictions on the freedom of establishment and the freedom to provide services, that is, the freedom of self-employed persons or enterprises established in one Member State to move to another Member State to establish themselves on a permanent or temporary basis to provide service (engage in economic activity).

Any licensing rule in respect of fishing that may restrict, prevent, hinder or burden the provision of service by a natural or legal person established in another Member State where he or she lawfully provides service may constitute a restriction and may therefore be incompatible with the Revised Treaty rights and obligations.

Before considering the issues further it is useful to consider some basic terminology including what is considered to be a fish for the purposes of the fisheries laws of Member States, and what is fishing. There is neither a legal definition of fish nor of fishing that is common to all the CARICOM Member States. However, throughout the Community fish is defined widely to include all or any aquatic animal. A common definition found in laws of several countries says: "*fish means any aquatic animal, whether piscine or not and includes shellfish, turtles, mollusks, crustaceans, corals, sponges,*

echinoderms, their young and their eggs;" (see for example Sections 2 of the Fisheries Acts of Antigua and Barbuda, Dominica, and Barbados). Belize extends this further to include "any aquatic plant" (s.2 Fisheries Act 2000) while Grenada includes "sea moss and weeds" (s.2 Grenada Fisheries Act 1986). Barbados defines fishing to include the harvesting of fish or aquatic plants. Such a wide definition would, for practical purposes, include all living aquatic resources, such as the "normal" fish, shellfish, turtles, mollusks, crustaceans, corals, sponges, sea moss and other sea weeds, echinoderms, and marine mammals. The definitions of fish usually also include not only the adult specimen, but also their young and eggs.

Fishing is generally defined to mean the taking, catching, or killing of fish or searching for fish by whatever means or methods. However, some countries have wider definitions which include attempting or preparing to do the things mentioned above, or breeding or producing any fish. Furthermore in many jurisdictions the operating definition of fishing is made even wider by use of the terminology "fishing and related activities," where "related activities" normally means all or any of the following:

- i) Trans-shipping fish to or from any vessel;
- ii) Storing, processing or transporting fish at sea,
- iii) Refueling or supplying fishing vessels or performing other activities in support of fishing operations; or
- iv) Attempting to do any of the above.

REGULATING ACCESS TO FISHING OPPORTUNITIES

The licensing systems used to regulate access to fishing opportunities in the waters of CARICOM States are to be found in the national fisheries laws. The OECS States including Antigua and Barbuda, Dominica, Grenada, Montserrat, St. Lucia, St. Kitts and Nevis, and St. Vincent and the Grenadines have harmonized their fisheries laws. Barbados's main fisheries legislation, the Fisheries Act 1993, follows the general scheme of the fisheries laws of other eastern Caribbean states. The 2002 Fisheries Act of Guyana likewise has the effect of bringing Guyana's fisheries legislation in harmony with the harmonized fisheries laws of the OECS Member States and Barbados. The scheme of the principal fisheries legislation in Jamaica (Fishing Industry Act 1975) and Trinidad and Tobago (Fisheries Act 1916) pre-dates the Montego Bay Convention, and are different from the harmonized legislation of the other English speaking CARICOM States.

The principal Fisheries Acts of Member States lay down the basic requirements for use and management of the fisheries resources and the conduct of fishing and related activities in the waters under the sovereignty or jurisdiction of the state in question. The main objective of these laws is to ensure sustainable development and optimum utilization of the fisheries resources for the benefit of the people of the country. Examples of the

fisheries acts are the Antigua and Barbuda Fisheries Act, 1983; the Barbados Fisheries Act 1993; The Belize Fisheries Act 2000, the Jamaica Fishing Industry Act 1975, and the Guyana Fisheries Act 2002. These primary legislations are implemented by subsidiary legislations containing detailed rules, such as, Antigua and Barbuda's Fisheries Regulations 1990, Grenada's Fisheries Regulations 1987 and St. Lucia's Fisheries Regulations of 1994. The Acts and subsidiary legislations set out, *inter alia*, the systems and rules which regulate and control access, by nationals and foreigners, to the fisheries resources within the waters of the state.

Legal regimes governing access by vessels to national fisheries generally vary depending on the nationality of the vessel. The typical arrangement encountered globally is that national fisheries legislation establishes two separate legal regimes of access, one applying to national fishing vessels and the other to foreign fishing vessels. The European Union represents a notable exception to this general position. The EU Member States have established a single market and a common fisheries policy by which foreign fishing vessels are vessels flying the flag of a non-Member State, whereas vessels flying the flag of a Member State are regarded as Member State flag vessels or Community vessels, which are treated as domestic or national vessels. The waters under the sovereignty or jurisdiction of EU Member States, by virtue of the founding Treaties establishing the European Communities, are regarded as Community waters and in respect of fishing, the waters and aquatic resources therein are managed by the Community as a single domestic space (EC Council Regulation No 2371/2002 of 20 December 2002; EC Treaty 2002a). Rights of access to fishing opportunities are granted by the Council of Ministers to Member States. Likewise, each year the Council determines the total catch allocated to each Member State.

A clear distinction is made between licenses for local and foreign fishing vessels in most CARICOM States. A local fishing vessel is generally defined as any fishing vessel which is wholly owned by the government of the state or territory in question, or a citizen or permanent resident, or any company, society or association established under the laws of the State and the members are citizen or permanent residents or the shares are held by citizens or permanent residents. In Barbados, the Minister responsible for fisheries may certify that a vessel has such a substantial economic connection with Barbados as to be deemed to be a local vessel. A foreign fishing vessel on the other hand is generally defined as any other than a local vessel. In some countries, including Antigua and Barbuda and Guyana, the law recognize a third category, that is, locally based foreign fishing vessel, which is a foreign fishing vessel based in the country in question and which lands all its catch in the country.

The effect is that a fishing vessel of another CARICOM Member States, like those of any other nation state,

is defined as a foreign vessel and is subject to the access regime regulating such vessels in the waters of most Members States.

Fisheries Development and Management

The Ministers responsible for fisheries are usually vested with the power to administer the fisheries laws and take measures to promote the management and development of fisheries so as to ensure the optimum utilization of the resources (see for example Sections 3 of the Fisheries Acts of Antigua and Barbuda, Grenada, and Dominica). The Ministers are also empowered to appoint and delegate power to a Chief Fisheries Officer who is then required to prepare and keep under review a plan for the management and development of the fisheries – see for example Sections 4(1) of the Fisheries Acts of Antigua and Barbuda, Dominica, Grenada, St Vincent and the Grenadines, and s.5 (1) of the 2002 Fisheries Act of Guyana. The plan must specify the objectives to be achieved in the management of each fishery; the management and development measures to be taken; the licensing programmes to be followed for each fishery; the limitations, if any, to be applied to local fishing operations; and the amount of fishing, if any, to be allocated to foreign vessels (see for example s.4 (2) of the Fisheries Acts of St. Lucia and Dominica).

The Fisheries Acts of most states require that, under normal circumstances, access to the resource by foreign vessels must not be permitted unless there is a fisheries management plan in place, and the catch limits and conservation measures stipulated in the plan must be incorporated as conditions of the license granted to the foreign vessel.

Regional Cooperation

In the OECS States, Barbados, Belize, and Guyana the Ministers responsible for fisheries are authorized to enter into arrangements or agreements with other countries in the region, or with competent regional organization, providing for, *inter alia*: harmonization of statistical systems, the carrying out of scientific surveys and studies to determine the state of the fisheries resources; harmonization of licensing procedures, and conditions for foreign fishing vessels; schemes for the issuance of regional licences by a competent international or regional organization; harmonized enforcement measures in respect of foreign vessels; establishment and operation of regional fisheries management bodies; and the establishment of a regional register of fishing vessels. See for example Sections 6 of the Fisheries Acts of Antigua and Barbuda, Barbados, Dominica, St Lucia, Section 16 of the 2002 Fisheries Act of Guyana, and Regulation 28(3) of the Fisheries Regulations 2003 of Belize. The fisheries laws of Jamaica and Trinidad and Tobago do not contain provisions which are equivalent to these.

The fisheries laws of most CARICOM countries contain substantive and interesting provisions on the subject of regional cooperation in fisheries. Provisions are made for regional cooperation not only in respect of collaboration and harmonization of systems for research, data collection, licensing and monitoring and enforcement; but also in respect of the establishment and operation of regional fisheries management bodies. The fisheries Ministers may also delegate powers to a competent regional fisheries body to grant licences (referred to as "Regional Fishing Licences" by the various Acts), on behalf of the Ministers, to foreign vessels (not local) permitting such vessels access to fishing opportunity in the waters of the states. The basic legal framework is, therefore, in place that could enable an authorized competent regional fisheries body to issue regional fishing licenses, on behalf of the governments of several states, to foreign vessels to access fishing opportunities in the waters of these states.

Fishing Access Agreement

The Ministers responsible for fisheries are also authorized to enter into access agreements with States and associations representing foreign fishing vessel owners or charterers. The amount of fishing allowed under such agreements must not exceed the total resources or the limits established by the fisheries management plan for the category of vessel in question. Fishing access agreements are required to include provisions establishing the responsibility of the other partner to ensure compliance by its vessels with the terms and conditions of the agreement, and with the fisheries laws of the country. See for example Sections 7 of the Fisheries Acts of Antigua and Barbuda, Barbados, Dominica, Grenada, St Lucia, Section 17 of the 2002 Fisheries Act of Guyana, and Regulations 32 of the Belize Fisheries Regulations 2003. In Barbados the Minister may grant a license to any foreign fishing vessel where in his opinion it is in the interest of Barbados to grant such a license notwithstanding the absence of an access agreement. This exception was introduced by Section 3(b) of the Barbados Fisheries (Amendment) Act of 2000 which diminishes the restrictive effect of s 8(5) of the 1993 Act requiring the existence of an access agreement as a precondition for the issuance of a foreign fishing licence.

According to the fisheries laws of most CARICOM States, fishing vessels of another CARICOM State are "foreign vessels" which would be treated in the same manner as fishing vessels of any other nation state. They would therefore be subject to the same requirements to conclude an access agreement before their vessels would be considered for a license to fish in the waters of the host State. Such requirements appear *prima facie* to be inconsistent with the principles of a single market and economy. However, another possible interpretation is that the provisions regarding regional cooperation, including the

recognition of regional fishing licenses duly issued by a competent regional fisheries body could effectively avoid the requirements for there to be an access agreement between two or more CARICOM States. The only constraint here is that not all CARICOM States have the same or equivalent provisions on the subject of regional cooperation in their fisheries laws. This is the case with Jamaica and Trinidad and Tobago.

Scheme for Licensing of Fishing Vessels

Foreign Vessels — The core of the schemes for licensing of foreign fishing vessels are provided for in the principal fisheries acts and further elaborated in the implementing regulations. See for example, Sections 8 of the Fisheries Acts of Antigua and Barbuda, Grenada, St. Vincent and the Grenadines and Section 18 of the 2002 Fisheries Act of Guyana. In Trinidad and Tobago the rules concerning licensing and registration of foreign fishing vessels and members of their crew is provided for in Sections 25-26 of the Archipelagic Waters and Exclusive Economic Zone Act 1986. The basic requirements found in the laws of most CARICOM States are discussed in the following paragraphs.

A foreign vessel must have a valid fishing license before being used for fishing or related activities in the waters of all CARICOM States. The license may be issued by either the Minister responsible for fisheries (or Chief Fisheries Officer on his/her behalf), or a competent regional organization duly authorized to do so by the Minister. An application must be submitted in the prescribed form and the fees for the license and any royalties or other relevant charges paid.

As noted above, a foreign fishing vessel license can only be issued if there is in force a fishing access agreement between the Government of the CARICOM State and the Government of the flag state of the vessel seeking the license, or there is an agreement with an association of which the owner of the vessel is a member, and to which the Government of the CARICOM State is a party.

Three classes of vessels are, however, exempt from this access agreement requirement: locally based foreign vessels; vessels to be used for test fishing operations; and vessels with a regional fishing license issued by competent regional organization (a regional fishing license exempts the holder from all requirements for a foreign fishing license).

Most States have a general prohibition on the issuance of a fishing license to a foreign vessel unless a local representative authorized to act on behalf of the master, owner or charterer is appointed in the State. This rule by itself may constitute a restriction on the Treaty rights and also amount to discrimination based on nationality when applied to vessels from another CARICOM State.

Other general conditions attached to the license of foreign fishing vessels including a duty to comply with the

laws, maintenance of log-books, recording and reporting of catch and fishing activity, boarding and inspection by authorized personnel, display of identification markings, accommodation of observers, etc., are provided for in the fisheries laws and regulations. The Ministers generally have a discretionary power to attach to any fishing license such special conditions as they may think fit, and may also vary such special conditions if satisfied that it is expedient for the proper management of fisheries (see for example Section 12 Fisheries Acts of Antigua and Barbuda; Sections 13 of the Fisheries Acts of Grenada and St. Vincent and the Grenadines; and Section 20 of the 2002 Fisheries Act of Guyana).

General conditions applicable to all foreign vessels are provided for under the fisheries regulations. The conditions normally include, *inter alia*, a duty to comply with the laws, maintenance of log-books, recording of information, reporting of catch and fishing activity, prohibition of trans-shipping at sea, boarding and inspection by authorized personnel, display of identification markings, and notification of the Chief Fisheries Officer if there is any change in the information submitted on the application. See for example Regulation 9 of the Fisheries Regulations of Antigua and Barbuda and Regulations 12-16 of the Fisheries Regulations of St. Lucia.

If a foreign fishing vessel is found fishing without a valid license or in contravention of any condition attached to the license, the master, owner, and charterer is each liable on summary conviction to a fine which vary from country to country but may be up to EC\$500,000 in the OECS States (see for example s.8(6) of the Fisheries Acts of Antigua and Barbuda, Dominica, Grenada, St. Lucia and St. Vincent and the Grenadines), \$500,000 in Barbados currency in Barbados (s. 8(7) Fisheries Act 1993) and \$10 million in Guyanese currency in the case of Guyana (s.18 (8) Fisheries Act 2002).

Where a person is convicted of an offence against the Fisheries Acts of any CARICOM State, whether local or foreign vessel, the court, in addition to any other penalty imposed, may order that the forfeiture of the vessel (together with its gear, stores and cargo) and any vehicle, fishing gear, net or other fishing appliance, to the state. Furthermore, in most jurisdictions, the court is mandated to order the forfeiture of any fish caught in the commission of such offence or the proceeds of sale of such fish. See for example s.40 Barbados Fisheries Act 1993, s.34 Grenada Fisheries Act 1986; s.32 Dominica Fisheries Act 1987; and s. 33 Antigua and Barbuda Fisheries Act).

Local Vessels — Before a determination can be made that the licensing requirements for foreign vessels when applied to vessels from another CARICOM State would amount to discrimination on the basis of nationality, or would fall foul of the basic Treaty rights, the licensing requirements for local vessels must first be examined.

There is a general prohibition on the use of local fishing vessel for fishing or related activities in all CARICOM States without a valid license (see for example ss.11(1) Fisheries Acts of Antigua and Barbuda, Barbados, Dominica, Grenada, and St. Vincent and the Grenadines; and s.13(1) 2002 Fisheries Act of Guyana). An application for a local fishing license may be made in the prescribed form to the Chief Fisheries Officer who may issue a local license unless one of the grounds on which it may be refused is established (see for example Sections 11(4) of the Fisheries Acts of Antigua and Barbuda; Dominica, Grenada. The grounds for refusal include, *inter alia*, that:

- i) It is necessary to give effect to any licensing programme specified in the fisheries management and development plan;
- ii) The Chief Fisheries Officer believes that the applicant will not comply with the conditions of the licence;
- iii) The vessel does not have a valid certificate of inspection where so required, or is not in compliance with any safety regulations

The general conditions attached to the license of a local fishing vessel include: compliance with the laws, maintenance of log-books, recording and reporting of catch and fishing activity, boarding and inspection by authorized personnel, display of identification markings etc., are provided for under the Fisheries Regulations.

The 1975 Fishing Industry Act of Jamaica does not make a distinction between local and foreign fishing licences whether for fishing boats or fishermen. Section 6 of the Exclusive Economic Zone Act 1991 of Jamaica deals with access to the living resources of the EEZ. The Minister responsible for fisheries, through the Licensing Authority (Director of Fisheries) is empowered to register and grant fishing licenses to local or foreign vessels or fishermen at his discretion in keeping with the policies of the Government. The legal rules pertaining to licensing and registration of fishermen and fishing vessels appear to be indistinctly applicable, that is, they apply equally to both Jamaicans and other nationals seeking access to the resources. Such rules would, *prima facie* not be discriminatory against nationals of other Member States seeking access to fishing opportunities in Jamaica on the basis of their nationality (see Sections 3-5, and 8, 9 and 11 of the Fisheries Industry Act 1975, and Section 6 of the Exclusive Economic Zone Act 1991, of Jamaica).

Where a local fishing vessel is used without a valid license or in contravention of any condition of the licence, the master, owner, and charterer is each liable to a fine, which vary from country to country (for example EC\$1,000 in Antigua and Barbuda, EC\$2,500 in St. Vincent and the Grenadines; EC \$10,000 in Grenada; and EC\$10,000 and up to 12 months imprisonment in default of

payment in Dominica, and in Barbados up to BDS\$50,000 or 12 months imprisonment (see Sections 11(5) Fisheries Acts of Antigua and Barbuda, Grenada and St. Vincent and the Grenadines; Section 11(6) Fisheries Act of Dominica; and Section 11(8) Fisheries Act Barbados).

These penalties should be contrasted with the fines of up to \$500,000 that may be imposed on each guilty party in the case of foreign vessels, which include vessels of other CARICOM States. It is suggested that the magnitude of the fine on foreign vessels (when applied to CARICOM vessels) is capable of being an indirect restriction on the Treaty rights and may also be contrary to the prohibition against discrimination on the basis nationality.

CONCLUSION

The Revised Treaty of Chaguaramas prohibits discrimination on the ground of nationality, and precludes a Member State from restricting or prohibiting a natural or legal person who is lawfully established in one Member State from freely moving to provide service or to establish him/herself in another Member State to engage in economic activity. The foregoing suggests, however, that the rules of the licensing system of most CARICOM States include provisions that discriminate between nationals of the State in question and other CARICOM nationals on the basis of nationality, and which are likely to prevent, restrict, or burden the freedom of establishment or the freedom to provide service by national of other Member States. Such restrictions would restrict or undermine the operation of the CARICOM Single Market and Economy.

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