

IN THE CARIBBEAN COURT OF JUSTICE
Original Jurisdiction

CCJ Application No AGOJ2021/001

Between

Ellis Richards
Medical Benefits Board
Spencer Thomas
Others Listed in Appendices 1 to 4

Claimants

And

The State of Trinidad and Tobago

Defendant

Caribbean Community Law – Jurisdiction – Chapter Three of Treaty - Right to provide services – Scope of application – Exclusion – Activities in Member State involving exercise of governmental authority – Activities conducted neither on commercial basis nor in competition with one or more economic enterprises – Whether Court has jurisdiction to determine claims falling within or outwith scope of application - Whether actions of State of Trinidad and Tobago in ‘CL Financial bail out’ fall outside scope of application – Revised Treaty of Chaguaramas, Article 30(2) and (3).

SUMMARY

After the collapse of the Trinidad and Tobago conglomerate CL Financial (‘CLF’) in early 2009, the Government of the State of Trinidad and Tobago (‘the Defendant’) decided to rescue or “bail out” the company and its Trinidad and Tobago subsidiaries, CLICO Investment Bank (‘CIB’), Colonial Life Insurance Company (Trinidad) Limited (‘CLICO’) and British American Insurance Company (Trinidad) Limited (‘BAT’). The Defendant engaged in a series of measures including assumption of control of CLICO and BAT, provision of liquidity support, injection of funds and the purchase of the rights of some policyholders of CLICO and BAT in order to mitigate the effects of the collapse on policyholders and the wider Trinidad and Tobago economy.

The Claimants – nationals of, and institutions established in, Antigua and Barbuda and Grenada – were all policyholders of another CLF subsidiary, British American Insurance Company Limited (‘BAICO’) which was incorporated in the Bahamas. They alleged that

when the Defendant carried out the bailout measures to rescue CLF and CLICO, CIB and BAT, the same protection was not offered to them as policyholders of BAICO. They argued that the Defendant, through its Central Bank, took active steps to exclude them from the scope of its rescue of CLF and took steps to positively disadvantage them when compared to the steps taken in relation to the policyholders of BAT. They claimed that these actions amounted to discrimination on the ground of nationality in breach of Article 7 of the Revised Treaty of Chaguaramas ('RTC'). They further claimed that the Defendant's intervention came within the scope of the application of the RTC because it concerned the cross-border provision of services under Article 36 and a measure taken by a Member State to provide redress for consumers within the scope of Article 184(1)(j).

In its Defence, the Defendant contended that the facts and matters of the Claimants' claims fell outwith the RTC and thus, the jurisdiction of the Court. The Claimants had invoked Articles 36, 37 and 38 of the RTC (which fall within Chapter Three of the RTC) and Article 184(1)(j). Article 30, which defines the scope of application of Chapter Three, excludes from the operation of Chapter Three 'Activities in a Member State involving the exercise of governmental authority.'

At the case management stage, the issue as to whether the activities fell within Article 30(2) arose and the Court directed the parties to make submissions on two preliminary issues: First, assuming, for the sake of argument, the truth of the matters pleaded by the Claimants in the Originating Application, do the actions of the State of Trinidad and Tobago alleged by the Claimants fall outside the scope of Chapter Three of the Revised Treaty of Chaguaramas because they fall within the meaning of Article 30(2) and Article 30(3)? And, second, if the answer is yes, what are the consequences for these proceedings?

In examining the purpose and objectives of Chapter Three of the RTC, the Court explained that the Chapter addresses four fundamental freedoms or rights that help to form the core of the CARICOM Single Market and Economy, namely the right of establishment; the right to provide services; the freedom to move capital and the freedom of movement of Community nationals. Notably, the obligations imposed by, and the correlative rights

accrued from Chapter Three are among the most critical elements that advance the object and purpose of the RTC. The Court considered that under these areas, the Member States have agreed to yield aspects of their sovereignty for the collective good. However, the inclusion of Article 30 in the RTC makes it clear that a space is reserved for Member States to permit them to conduct certain activities which are excluded from the scope of operation of Chapter Three. These excluded activities are exempted from the restraints and constraints imposed upon Member States by the Chapter. Furthermore, the non-discrimination rule in Article 7 applies only 'Within the scope of application of this Treaty'. In these circumstances the Court can and must make the appropriate declarations.

Where a dispute arises as to whether a governmental activity falls within or outside the excluded zone (Article 30(2) and 30(3)), the Court must consider the facts of the case, including the nature of the activity in question and the general context in which the activity was conducted.

In the present proceedings, the Court considered the wording of Article 30(2) and 30(3), to determine whether the nature of the Defendant's activities were 'activities conducted on a commercial basis' or 'in competition with one or more economic enterprises' and/or whether they fell within the definition of 'other activities conducted by a public entity for the account of or with the guarantee or using financial resources of the government' (Article 30(3)(d)).

The Court considered that the Defendant's actions, as presented in the Claimants' pleadings, were not commercial in nature. There was no suggestion that either the Government of Trinidad and Tobago, the Ministry of Finance or the Central Bank of Trinidad and Tobago when making the relevant decisions, assuming control of CLICO and BAT and taking control of CLF's assets in exchange for the liquidity support were doing so on a profit-making basis or for the purpose of participating and seeking superiority or supremacy in the single market alongside or against economic enterprises within the Defendant or within the Member States. The activities involved, *inter alia*, legal, accounting, and managerial intervention by the Central Bank and the direct use of financial

resources of the Defendant to mitigate the effects of the financial collapse of CLF. The pleadings clearly suggested that the Defendant's activities in providing liquidity support to CLICO and BAT and in purchasing the rights of their policyholders involved the use of State funds and fell expressly within the terms of Article 30(3)(d).

The Court therefore agreed, that on the facts pleaded by the Claimants, the Defendant's actions were to be considered 'Activities in a Member State involving the exercise of governmental authority ... conducted neither on a commercial basis nor in competition with one or more enterprises' as defined in Article 30(2) and 30(3) and that those actions fell outside the scope of application of Chapter Three of the RTC and therefore outside the ambit of Article 7.

Accordingly, the Court ordered that the Claimants' claims with respect to breaches of Articles 36, 37, 38 and 7 (in so far as it relates to Chapter 3) be dismissed. The claim with respect to a breach of Article 184(1)(j) and Article 7 in so far as it is applicable may proceed. The Court reserved the issue of costs to the conclusion of the matter.

Cases referred to:

Canada-Measures Affecting the Importation of Milk and the Exportation of Dairy Products - Report of the Appellate Body (13 October 1999) WT/DS103/AB/R and WT/DS113/AB/R; *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion) [1950] ICJ Rep 4; *Competence of the International Labour Organization to Regulate Conditions of Agricultural Labour, Etc* (Advisory Opinion) [1922] PCIJ Rep Series B No 2, 9; *Myrie v State of Barbados* (No 2) [2013] CCJ 3 (OJ), BB 2013 CCJ 4 (CARILAW), (2013) 83 WIR 104; *Rock Hard Distribution v State of Trinidad and Tobago* [2022] CCJ 2 (OJ); *Trinidad Cement Ltd v Co-operative Republic of Guyana* [2009] CCJ 1 (OJ), GY 2009 CCJ 1 (CARILAW), (2009) 74 WIR 302.

Treaties and International Materials referred to:

Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C 115/47; General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 190; General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 183; Revised Treaty of Chaguaramas

Establishing the Caribbean Community including the CARICOM Single Market and Economy (adopted 5 July 2001, entered into force 4 February 2002) 2259 UNTS 293; Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

Other Sources referred to:

Allen R E, Fowler H W and Fowler F G, *The Concise Oxford Dictionary of Current English* (8th edn, BCA 1991); Bossche Peter van den, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2nd edn, Cambridge University Press 2008); Gardiner Richard K, *Treaty Interpretation* (Oxford University Press 2008); Leroux Eric H, 'What is a "Service Supplied in the Exercise of Governmental Authority" Under Article I:3(b) and (c) of the General Agreement on Trade in Services?' (2006) 40 (3) J of World Trade 345.

THE COURT,

composed of A Saunders, President and W Anderson, M Rajnauth-Lee, A Burgess and P Jamadar, Judges

having regard to the originating application filed at the Court on 18 October 2021, together with the annexures thereto, the defence of the State of Trinidad and Tobago filed on 15 December 2021 and the annexures thereto, the reply filed on 9 March 2022 and the annexures thereto, the rejoinder of the State of Trinidad and Tobago filed on 9 May 2022 and the annexures thereto, the written submissions of the State of Trinidad and Tobago filed on 15 August 2022, of the Claimants filed on 16 September 2022 and the reply of the State of Trinidad and Tobago thereto filed on 7 October 2022 and the rejoinder of the Claimants thereto filed on 25 October 2022 and to the public hearing held on 2 November 2022

and after considering the notes and oral observations of:

- **Ellis Richards, Medical Benefits Board, Spencer Thomas & Others**, by Mr Simon Davenport KC, appearing with Dr Kenny Anthony, Mr Robert Strang, Mr Gregory Pantin, Mr Matthew Happold, Mr George Kirnon, Mr Miguel Vasquez, Attorneys-at-Law
- **the State of Trinidad and Tobago**, by Ms Deborah Peake SC, appearing with Ms Tamara Toolsie, Mr Brent James, and Mr Murvani Ojah Maharaj, Attorneys-at-Law

issues on **8 March 2023**, the following:

JUDGMENT

Introduction

- [1] In early 2009, CL Financial Limited ('CLF'), a Trinidad and Tobago financial conglomerate, collapsed. To mitigate the effects of the collapse on policyholders and the wider Trinidad and Tobago economy, the Government of the State of Trinidad and Tobago ('the Defendant') decided to rescue or "bail out" CLF and its Trinidad and Tobago subsidiaries, CLICO Investment Bank ('CIB'), Colonial Life Insurance Company (Trinidad) Limited ('CLICO') and British American Insurance Company (Trinidad) Limited ('BAT'). The Defendant engaged in a series of measures including assumption of control of CLICO and BAT, provision of liquidity support, injection of funds and the purchase of the rights of some policyholders of CLICO and BAT.
- [2] The claims before this Court arise out of those actions taken by the Defendant in the aftermath of the collapse of CLF and its subsidiaries. The Claimants are nationals of, and institutions established in, Antigua and Barbuda and Grenada and were all policyholders of another CLF subsidiary, British American Insurance Company Limited ('BAICO'), which was incorporated in the Bahamas. They are currently members of BACOL Insurance Policyholders Group of Grenada Inc and the Annuity Holders (BAICO) (Antigua) Advocacy Group. Each Claimant or the individuals they represent was/were holders of an annuity and investment product issued by BAICO called an Executive Flexible Premium Annuity ('EFPA'). The Claimants allege that when the Defendant carried out these bailout measures to rescue CLF and its subsidiaries, CLICO, CIB and BAT, the Defendant breached Articles 7, 36, 37, 38 and 184(1)(j) of the Revised Treaty of Chaguaramas ('RTC' or 'the Treaty').

The Claims

- [3] On 14 July 2021, the Claimants sought Special Leave pursuant to Articles 211 and 222 of the RTC to commence proceedings against the Defendant. Special Leave was granted on 11 October 2021 after the Defendant, by letter to the Court dated 8 October 2021, indicated its decision not to pursue its objections to the Application for Special Leave but without prejudice to its contentions that the Application and the draft Originating Application filed therewith were misconceived in fact and law and therefore unarguable, and were founded on facts and matters which fell outwith the operation of the RTC.
- [4] In their Originating Application dated 18 October 2021, the Claimants summarised the Defendant's actions as follows:
- i. After the collapse of CLF in 2009, the Defendant engaged in several acts to rescue CLF and its insurance and financial subsidiaries and protect the funds of their policyholders and depositors. The protection was given to policyholders and depositors of CLF's insurance subsidiaries, CLICO and BAT. However, they, the Claimants, as policyholders of BAICO, were not offered the same protection.
 - ii. In 2009, the Defendant agreed to provide loan financing to stabilize CIB and make up any deficits in the statutory funds of CLICO and BAT under a Memorandum of Understanding between the Defendant and CLF. The Central Bank of Trinidad and Tobago ('the CBTT') then took control of CIB, CLICO and BAT after the passage of the necessary legislation.
 - iii. By an agreement made in June 2009, known as the "Shareholders Agreement", between CLF, the Defendant, the directors of CLF and the majority shareholders of CLF, the parties agreed that a new board of directors would be appointed to CLF to take over the management and control of CLF's assets to execute the actions contemplated by the MOU. After taking control of BAT, the CBTT appointed a new board of directors and directed that BAT and BAICO be segregated.
 - iv. With respect to CLICO and BAT, the Defendant's actions included the following steps, *inter alia*:

- a. Between 2009-2010, the Defendant injected funds into CLICO and BAT in the form of cash and government bonds.
- b. CLF, acting at the Defendant's instance, transferred to CLICO the shareholdings in Republic Bank Limited and Methanol Holdings (Trinidad) Limited (MHTL) that were not already owned by CLICO and likewise transferred to CLICO its shareholding in MHTL's sister company, Methanol Holdings International Limited.
- c. Also at the Defendant's request, CLF transferred to CLICO the proceeds of its sale of the share of CLICO Energy Limited; and sold other assets, including its shareholdings in, among others, Burn Stewart Distillers Limited and Lascelles de Mercado Limited, and transferred the proceeds to the CBTT.
- d. In 2010, the Defendant revised its promise to policyholders of CLICO and BAT. It maintained its promise of a guarantee to "traditional" insurance policyholders and to holders of EFPAs with a low value. For those EFPA policyholders whose policies had a high value (short term investment products, or STIPs), the Defendant offered to buy their claims in return for a promise to repay their principal investments in full over time, in the form of a government bond. This offer was made to non-resident and resident policyholders of CLICO, but not to BAICO policyholders.
- e. In September 2011, the Defendant announced a revised plan under which EFPA policyholders would be able to exchange their policies with CLICO and BAT in return for units in an investment trust, the CLICO Investment Fund.
- f. On 27 March 2015, the CBTT announced that CLICO and BAT had returned to solvency and would soon be able to pay remaining creditors (including EFPA policyholders who had not taken up the Defendant's offer) in full. The CBTT announced that the Defendant's claim on CLICO would be covered by a cash payment and the transfer of assets from CLICO to the Defendant; and that other creditors of CLICO would be paid from the proceeds of the sale of assets by CLICO. As for BAT, the CBTT announced that the plan to pay off its remaining liabilities would follow a broadly similar outline, save that the Defendant would provide some further financial assistance to enable it to pay its creditors.
- v. With respect to BAICO, the Defendant promised CARICOM Member States that it would provide US\$100 million to assist with the resolution of the consequences of the CLF Group's collapse. However, the Defendant has paid only US\$36 million of that sum and has otherwise refused to compensate policyholders of BAICO.

[5] Based on these contentions, the Claimants make the following claims in their Originating Application¹:

- i. The Defendant's intervention and rescue of BAT's policyholders was discriminatory on the ground of nationality in breach of Article 7 of the RTC which prohibits such discrimination. The Defendant's intervention came within the scope of the application of the RTC because it concerned the cross-border provision of services under Article 36(4) (and the correlative right of consumers to receive such services) and it concerned a measure taken by a Member State to provide redress for consumers within the scope of Article 184(1)(j).
- ii. The Defendant did not merely omit to include the Claimants in its rescue of policyholders, but took active steps which damaged their interests. In the knowledge that the operations of BAT and BAICO were merged, the CBTT nevertheless ordered their segregation, so that the policyholders of BAICO were excluded from its responsibility. Second, in the course of its intervention in CLF and its subsidiaries, the Defendant took control of the assets of CLF and applied them to the benefit of CLF's insurance subsidiaries, CLICO and BAT, or otherwise required that they be so applied. It thus deprived BAICO of the benefit of the support of CLF and its assets, even though CLF owed money to BAICO. In effect, it saw to it that the assets of CLF were used to benefit CLF's subsidiaries with Trinidad and Tobago policyholders, at the expense of the subsidiary with non-Trinidad and Tobago policyholders. Accordingly, these were discriminatory restrictions imposed on the rights of BAICO's policyholders, contrary to Article 36(1) of the RTC; and they amounted to a breach of Article 7 for the same reasons as above.
- iii. The CBTT claimed that it had no scope or power to intervene in the affairs of BAICO because BAICO was not registered as an insurance company under the *Insurance Act Chap. 84:01*. This reason, i.e., the lack of statutory basis, was a specious reason for the Defendant and the CBTT's failure to intervene, because the Defendant in fact amended the statutory scheme for the very purpose of allowing the CBTT to intervene in CLICO and BAT and so it could have legislated so as to allow for intervention in BAICO. In any event, the different statutory treatment of BAT and BAICO and the failure of the Defendant to address it, amounted to discriminatory treatment in breach of the RTC. In the result, the CBTT was empowered to supervise and intervene in the control and operation of an insurance business based in the Defendant selling policies to residents of Trinidad and Tobago, but not where that same management and business in the Defendant was selling policies to non-residents. The regulatory scheme was therefore discriminatory, in contravention of Article 7 of the RTC. Further, this absence of regulatory oversight over BAICO and the consequent failure by the Defendant to protect BAICO's policyholders amounted to a

¹ Ellis Richards, 'Originating Application' in *Richards v State of Trinidad and Tobago*, AGOJ2021/001, 18 October 2021, [10] - [15].

discriminatory restriction on the correlative right of those policyholders to receive cross-border services (as defined in Article 36(4)(c) and (d) of the RTC). The failure to remove or address the statutory obstacles to such oversight amounted to a failure to remove such restriction, in contravention of Articles 37 and 38 of the RTC. And it amounted to a failure to take appropriate measures to promote the interests of the consumers of the insurance services provided by BAICO, including through the provision of adequate and effective redress, contrary to Article 184(1)(j) of the RTC.

[6] Accordingly, the Claimants sought the following relief:

- i. A Declaration that in excluding the Claimants from the BA Rescue Plan, the Defendant discriminated against them on the basis of nationality contrary to Article 7 of the Treaty and thereby acted in breach of rights conferred on the Claimants by the Treaty.
- ii. A Declaration that the Defendant's exclusion of the Claimants from the BA Rescue Plan constituted a restriction on the provision of cross-border insurance services to the Claimants (and on their correlative rights to receive such services) in breach of Article 36(1) of the Treaty.
- iii. A Declaration that the exclusion of the Claimants from the BA Rescue plan resulted from the failure by the Defendant to remove discriminatory restrictions on the provision of cross-border insurance services to the Claimants (and on their correlative rights to receive such services), in breach of Articles 37(1) and 38(1) of the Treaty.
- iv. A Declaration that the Defendant failed to take appropriate measures to promote the interests of the Claimants as consumers of insurance services, including through the provision of adequate and effective redress, contrary to Article 184(1)(j) of the Treaty.
- v. A Declaration that the Claimants are entitled to receive from the Defendant similar benefits in relation to the value of their BAICO insurance policies as was given by the Defendant to policyholders of BAT in the BA Rescue Plan.
- vi. An Order mandating the Defendant to treat the Claimants accordingly, by issuing them with units in the CIF, on the same terms as were offered to policyholders of BAT, or by providing an equivalent benefit.
- vii. Alternatively, an Order that the Defendant pays damages or compensation to the Claimants so as to provide an equivalent benefit (i.e., including interest accrued over the intervening period), as would have obtained if BAICO policyholders had been treated the same as BAT policyholders.

- viii. Such further or other relief as this Court considers just.
- ix. Costs.

The Defendant's Position

[7] In its Defence, the Defendant contended that the facts and matters of the Claimants' claims fall outwith the RTC and thus, the jurisdiction of this Court. The Defendant stated that, in their Originating Application, the Claimants invoked Articles 36, 37 and 38 of the RTC (which fall within Chapter Three of the RTC) and Article 184(1)(j). Article 30, which defines the scope of application of Chapter Three, excludes from the operation of Chapter Three 'Activities in a Member State involving the exercise of governmental authority.' According to the Defendant, its actions in providing financial support to CLF, CLICO, CIB and BAT, all Trinidad and Tobago registered entities, at CLF's request, as alleged in the Originating Application, fall within this definition.

Preliminary Issues for Determination

[8] The contentions set out in the Originating Application and the Defence necessarily raised the issue of whether the facts and matters pleaded by the Claimants constitute, 'Activities in a Member State involving the exercise of governmental activity' within the meaning of Article 30(2) and (3) and therefore are excluded from the operation of Chapter Three and consequently do not fall within the scope of application of the RTC. This matter was raised at the case management stage of these proceedings and on 15 June 2022, the Court directed that the parties make submissions on the following issues, to be heard preliminarily:

- i. Assuming, for the sake of argument, the truth of the matters pleaded by the Claimants in the Originating Application ("OA"), do the actions of the State of Trinidad and Tobago alleged by the Claimants fall outside the scope of Chapter Three of the Revised Treaty of Chaguaramas ("RTC" or "the Treaty") because they fall within the meaning of Article 30(2) and Article 30(3)?

- ii. If the answer to (i) above is yes, what are the consequences for these proceedings?
- [9] The Court directed the parties to file their submissions on the above issues, and oral arguments were heard on 2 November 2022.

Defendant's Submissions

- [10] The Defendant's overarching argument was that the claim was founded on allegations of facts and matters which fell within the exclusionary zone referenced in Article 30 of the RTC.
- [11] The Defendant argued that the express language of Articles 30(2) and 30(3) in excluding certain activities of Member States, which are done within the limits of their borders, neither on a commercial nor competitive basis, from the scope of application of Chapter Three and from challenge before the Court "makes sense." The carving out of these activities is consistent with the preambular paragraphs of the RTC and the object and purpose of the RTC. Furthermore, the list of examples provided in Article 30(3) is a non-exhaustive list. Where a Member State seeks to invoke the article and argues that an activity involving the exercise of governmental activity which is not expressly included in Article 30(3)(a)-(d), falls within the article, it is for this Court to decide whether that activity was conducted neither commercially nor in competition with one or more economic enterprises and is therefore covered by Article 30.
- [12] The Defendant submitted that the CBTT's intervention in the management of CLICO and BAT and the Defendant's alleged "taking control" of CLF's assets and the statutory scheme which governed insurance services, were not 'activities conducted on a commercial basis or in competition with economic enterprises.' They are excluded from the operation of Chapter Three of the RTC because they were "activities involving the exercise of governmental authority." The framers of the RTC were clear that once activities in a Member State involve the exercise of

governmental authority, such activities are to be excluded from the operation of Chapter Three. Further, the framers defined what was meant by the term “activities involving the exercise of governmental authority” in Article 30(3). Moreover, the Claimants’ suggested example that regulation or control by government in the policing sector is outwith Chapter Three, whereas regulation or control by the government in the insurance sector is not, runs counter to the express language of Article 30(2) and (3), where the focus is not on the sector/sphere in which the activities are undertaken, but on the nature of the activities themselves, the purpose for which they are conducted and their effect on the private sector.

- [13] The actions which formed the basis of the claim by the Claimants fell outside the scope of application of Chapter Three of the RTC because they unequivocally fell within the meaning of Articles 30(2) and 30(3). Accordingly, the Claimants’ claims which rely on an alleged breach of Articles 36, 37 and 38 of the RTC were inadmissible and this Court has no jurisdiction to try same. The consequence of this is that a valid claim of discrimination on grounds of nationality only, contrary to Article 7 of the RTC, cannot be made or entertained.

Claimants’ Submissions

- [14] The Claimants acknowledged that Article 30(2) of the RTC provides that ‘Activities in a Member State involving the exercise of governmental authority’ are excluded from the operation of Chapter Three and a Member State’s policies or rules applying to such areas of activity are exempt from compliance with Chapter Three’s requirements. A Member State may apply discriminatory policies or rules to such activities, such as permitting only its nationals to serve as police officers or judges. If such policies or rules apply to an activity involving the exercise of governmental authority, Article 30(2) exempts them from conformity with Chapter Three’s requirements.

[15] The Claimants further submitted that Article 30(2) does not exempt from scrutiny, the conduct by a Member State which seeks to regulate or control activities not involving the exercise of governmental authority. In this case, the provision of insurance services is not an “activity involving the exercise of governmental authority” and, therefore, the Claimants argued, it falls within the scope of application of Chapter Three. A Member State cannot apply discriminatory policies or rules to the provision of insurance services and cannot take discriminatory action in favour of or against the providers of such services.

[16] The Claimants argued that the Defendant is therefore misreading the wording, structure and purpose of Chapter Three and Article 30. If the Defendant’s contention is correct, the prohibitions and restrictions in Chapter Three would have no effect against actions taken in the exercise of governmental authority and would have no real effect in establishing or protecting the four freedoms provided for therein. The regulation of economic activity is a quintessential example of the exercise of governmental authority. So, when Article 30(2) excludes from the scope of Chapter Three “activities involving the exercise of governmental authority”, it does not mean that the requirements of Chapter Three do not apply to the government actions which are the very subject of Chapter Three. Article 30(2) does not mean that no rule or policy of the government can be subject to scrutiny under Chapter Three, otherwise Chapter Three would have no effect. So, the “activities” with which Article 30(2) is concerned are not the activity of regulation and control which is specifically addressed by the remainder of Chapter Three. The “activities” with which Article 30(2) is concerned are the fields of activity under regulation or control by the government. When the government makes rules or policies which apply to the activity of providing insurance, it must observe the four freedoms and it cannot discriminate against non-nationals.

[17] Therefore, the Claimants submitted that the provision of insurance services is not an ‘activity in a Member State involving the exercise of governmental authority.’ The actions do not fall within any of the specific instances in Article 30(3) nor within the

term as defined in Article 30(2) and the Defendant's actions to regulate or intervene or interfere in the provision of insurance services or to help/hinder persons engaged in the provision of insurance services fall within the scope of application of Chapter Three of the RTC.

The Jurisdiction of the Court & the Scope of Application of Chapter Three

[18] The jurisdiction of the Court is set forth in the RTC. Article 211 grants this Court compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Treaty.

[19] Article 30 defines the scope of application of Chapter Three of the RTC:

1. Save as otherwise provided in this Article and Article 31, the provisions of this Chapter shall apply to the right of establishment, the right to provide services and the right to move capital in the Community.
2. Activities in a Member State involving the exercise of governmental authority shall, in so far as that Member State is concerned, be excluded from the operation of this Chapter.
3. For the purposes of this Chapter, "activities involving the exercise of governmental authority" means activities conducted neither on a commercial basis nor in competition with one or more economic enterprises, and includes:
 - (a) activities conducted by a central bank or monetary authority or any other public entity, in pursuit of monetary or exchange rate policies;
 - (b) activities forming part of a statutory system of social security or public retirement plans;
 - (c) activities forming part of a system of national security or for the establishment or maintenance of public order; and
 - (d) other activities conducted by a public entity for the account of or with the guarantee or using financial resources of the government.

[20] The claims made by the Claimants raise issues surrounding the interpretation and application of the RTC. So, it follows that this Court has exclusive and compulsory

jurisdiction to hear and determine the dispute which has arisen. In particular, the Court has jurisdiction to determine whether the actions of the Defendant, assuming them to be as alleged by the Claimants, fall within or outwith the scope of application of Chapter Three of the RTC.

[21] Chapter Three is titled ‘Establishment, Services, Capital and Movement of Community Nationals’. It addresses four fundamental freedoms or rights that help to form the core of the CARICOM Single Market and Economy (‘CSME’), namely the right of establishment; the right to provide services; the freedom to move capital and the freedom of movement of Community nationals.

[22] Chapter Three is the only chapter in the RTC where broad, deep, and substantive rights are specifically, unequivocally, and unambiguously conferred on private entities. This Court has noted that rights and benefits under the RTC are not always expressly and specifically conferred on individuals. Many rights ascribed to private individuals are derived or inferred from correlative obligations imposed upon Member States. Thus, in these instances, in order to determine individual rights, one mostly has to look for these rights which enure directly to the benefit of private entities throughout the Community as a corollary to the obligations imposed upon Member States.² In Chapter Three, this is not the case. Within the scope of the Treaty, Community nationals are granted specifically ‘the right of establishment, the right to provide services and the right to move capital in the Community.’

[23] Notably, the obligations imposed by, and the correlative rights accrued from, Chapter Three are, perhaps, among the most critical elements that advance the object and purpose of the RTC. As this Court has explained, the CSME is intended to be private sector driven.³ Chapter Three bestows on the private sector, the wherewithal to make the CSME function, imposing restraints and constraints on each Member State in

² *Trinidad Cement Ltd v Co-operative Republic of Guyana* [2009] CCJ 1 (OJ), GY 2009 CCJ 1 (CARILAW), (2009) 74 WIR 302 at [32].

³ *ibid* at [13].

order to facilitate and advance the enjoyment by the people and business enterprises of the Community of these fundamental freedoms.

- [24] Under these areas, the Member States have agreed to yield aspects of their sovereignty for the collective good. In yielding up these aspects of their sovereignty, the Member States are not rendered entirely bereft of control. The inclusion of Article 30 in the RTC makes it clear that a space is reserved for Member States where they may conduct certain activities which are excluded from the operation of Chapter Three. If a Member State engages in these excluded activities, those activities are exempted from the restraints and constraints imposed by the Chapter and this Court can and must so declare.
- [25] The question then arises – What are these excluded activities? Article 30(2) defines broadly that they are, ‘Activities in a Member State involving the exercise of governmental authority.’ The excluded activities are described in a manner that seeks to strike a balance between, on the one hand, ensuring that their impact does not unduly compromise the enjoyment by private entities of the rights granted by the Chapter and on the other hand, assuring to the Member States a space for engaging in activities involving the exercise of governmental authority that are conducted *‘neither on a commercial basis nor in competition with one or more economic enterprises...’*. Article 30(3) goes on to provide examples of conduct or activities that fall within this exclusionary zone.
- [26] When a dispute arises the Court has the responsibility to assess whether in each case a particular set of activities falls within or outside the excluded zone. The Court must consider the facts of the case, including the nature of the activities in question. By stipulating that, to be excluded, the governmental activities must be conducted ‘neither on a commercial basis nor in competition with one or more economic enterprises’, the RTC is being cautious to ensure that licence is not given to Member States unduly to strip away from the citizenry and the private sector the benefits that are afforded by Chapter Three. To be excluded, the governmental activities must not

have the effect of competing with the private sector. In an appropriate case, where a State invokes Article 30(2) and (3) as a defence, there may be a dispute as to whether the relevant governmental activities were conducted on a commercial or a competitive basis. In such an instance, the Court may be called upon to make the appropriate determination.

[27] In *Myrie v State of Barbados (No 2)*⁴, in the context of the unique facts of that case, this Court interpreted Article 30 as follows:

[57] The purpose of Article 30 is to allow Member States as part of the exercise of their sovereignty to reserve certain public service positions strictly for their own nationals. The justification for this exception/derogation is that these positions presume “a special relationship of allegiance to the State” and “reciprocity of rights and duties which form the foundation of the bond of nationality”. Article 30(2) could therefore be applied to limit the right to seek employment in another Member State’s armed forces, the police force, immigration, customs, the judiciary, etc. It is, however, not intended to limit the right to free movement as such nor can it be invoked to prevent the Court from subjecting to judicial scrutiny the actions of functionaries in those areas in the exercise of their duties in the context of the RTC.

[28] The Court therefore affirmed that in assessing whether an activity is excluded much depends on the context in which the governmental authority conducts the particular activity. Ultimately, *Myrie* determined that freedom of movement conferred by the provisions of the RTC combined with a subsequent decision of the Conference of Heads of Government, could not be hindered by the unlawful acts of law enforcement agencies of the State of Barbados. The actions of the law enforcement agencies were directly contrary to the binding decision of the Conference of Heads of Government and could not benefit as being “excluded” from the scope of application in Chapter Three. The circumstances in that case and the context surrounding the impugned activities, were patently different from the present proceedings in which the Defendant State engaged in a governmental bailout of private commercial entities within its jurisdiction to prevent severe economic dislocation to its economy.

⁴ [2013] CCJ 3 (OJ), BB 2013 CCJ 4 (CARILAW), (2013) 83 WIR 104.

Do the actions of the Defendant fall within the meaning of ‘Activities in a Member State involving the exercise of governmental authority’?

[29] In answering this question, the relevant principles of treaty interpretation apply. Interpretation of Articles 30(2) and 30(3) of the RTC must be conducted in accordance with the principles of Public International Law. As this Court has stated time and time again, the RTC, like all other treaties, must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the RTC in their context and in the light of their object and purpose (Article 31(1) of the Vienna Convention on the Law of Treaties (‘VCLT’)).⁵ This is, in fact, the first duty of a tribunal in interpreting treaty provisions. If their natural and ordinary meaning make sense in their context, that is the end of the matter. If the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties meant when they used those words.⁶ Furthermore, the treaty must be read as a whole.⁷

[30] Thus, Article 30(2) and (3) of the RTC must be interpreted in good faith in accordance with the ordinary meaning to be given its terms, in their context and in the light of the RTC’s object and purpose. Examining the context, object, and purpose of the RTC, this Court in *TCL v Guyana*⁸ has already stated:

[12] The RTC establishes the Caribbean Community including the CARICOM Single Market and Economy (“CSME”) and its Preamble is an important part of its context for the purposes of interpretation. Through the Preamble one is made aware of the goals of the States Parties and of statements of principle by which they propose to be guided...

[31] The Court then examined several preambular paragraphs of the RTC and continued:

⁵ *Rock Hard Distribution v State of Trinidad and Tobago* [2022] CCJ 2 (OJ) at [23]-[24]; *Trinidad Cement Ltd* (n 2) at [9] – [10].

⁶ *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion) [1950] 1950 ICJ Rep 4 at 8.

⁷ *Competence of the International Labour Organization to Regulate Conditions of Agricultural Labour, Etc* (Advisory Opinion) [1922] PCIJ Rep Series B No 2, 9 at 23; see also, Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, arts 31-32.

⁸ *Trinidad Cement Ltd* (n 2).

[13] From these and other paragraphs of the preamble, one deduces that, in an age of liberalisation and globalisation, the Contracting Parties are intent on transforming the CARICOM sub-region into a viable collectivity of States for the sustainable economic and social development of their peoples; that the CSME is regarded as an appropriate framework or vehicle for achieving this end and that private entities, “and in particular the social partners”, are to play a major role in fulfilling the object and goals of the RTC. The CSME is intended to be private sector driven...”

[32] In conclusion, the interpretation of an article, in this case, Article 30, cannot cease with a mere literal interpretation of the provision. The Court must examine the context in which the provision appears in light of the object and purpose of the RTC and interpret the article in a manner that renders it effective.⁹

[33] The core issue for present consideration is whether the activities complained of by the Claimants, that is to say, the Defendant’s actions in the intervention and bailout of CLF and its subsidiaries, can be properly considered to be within the exception provided for in Article 30(2), that is, ‘Activities in a Member State involving the exercise of governmental authority.’ It is therefore necessary to interpret what this definition entails before assessing the nature of the Defendant’s activities, as alleged by the Claimants, to determine whether they are ‘activities conducted on a commercial basis or in competition with one or more economic enterprises’ and/or whether they fall within the definition of ‘other activities conducted by a public entity for the account of or with the guarantee or using financial resources of the government’ (Article 30(3)(d)) as proposed by the Defendant.

[34] Article 31(4) of the VCLT is clear when it states that ‘A special meaning shall be given to a term if it is established that the parties so intended.’ The drafters of the RTC intended a special meaning to be attached to the term “activities involving the exercise of governmental authority” by providing a definition in the chapeau of Article 30(3). The chapeau provides that for the purpose of Chapter Three those activities are ‘*activities conducted neither on a commercial basis nor in competition*

⁹ *Trinidad Cement Ltd* (n 2) at [38].

with one or more economic enterprises.’ This definition is clear and obvious evidence of what the phrase “activities involving the exercise of governmental authority” is intended to represent.¹⁰

[35] The dictionary definition of “commercial” is ‘of, engaged in, or concerned with, commerce, having profit as a primary aim’. “Compete” means ‘strive for superiority or supremacy’.¹¹ The Defendant has referred to a definition for “economic enterprises” in Article 32(5)(b) of the RTC in which “economic enterprises” is defined for the purposes of Chapter Three, as including ‘any type of organisation for the production of or trade in goods or the provision of services (other than a non-profit organisation) owned or controlled by any person or entity mentioned in subparagraph (a) of this paragraph.’¹²

[36] Article 30(3) further expands this definition by including a non-exhaustive and illustrative list of examples of activities which may fall within the class of exempt activities. An “activity involving the exercise of governmental authority” can also include (a) activities conducted by a central bank or monetary authority or any other public entity, in pursuit of monetary or exchange rate policies; (b) activities forming part of a statutory system of social security or public retirement plans; (c) activities forming part of a system of national security or for the establishment or maintenance of public order; or (d) other activities conducted by a public entity for the account of or with the guarantee or using financial resources of the government. It therefore follows that if the activity in question satisfies the conditions defined in the chapeau and falls into any of the categories enumerated in Article 30(3)(a)-(d) it may be regarded as excluded under the terms of Article 30(2).

[37] Contrary to the Claimants’ submissions, Article 30 does not speak of or use language such as “underlying activity” or “nature of the underlying activity” or “field of activity” or “area of activity” or “regulated activity” or “the activity of regulation or

¹⁰ See also Richard K. Gardiner, *Treaty Interpretation* (Oxford University Press 2008) para 3.2.

¹¹ R E Allen, H W Fowler and F G Fowler, *The Concise Oxford Dictionary of Current English* (8th edn, BCA 1991) 227, 232.

¹² Article 32(5)(b).

intervention” in the special meaning given to the term “activities involving the exercise of governmental authority” for the purpose of Chapter Three. The Article refers simply to the all-embracing concept of ‘Activities in a Member State involving the exercise of governmental authority’.

[38] For the reasons already alluded, it is for this Court, guided by the terms of the Treaty, to determine what the term ‘Activities in a Member State involving the exercise of governmental authority’ entails. When confronted with this issue it is for the Court to assess whether particular activities are or are not excluded. In making that determination the Court must apply the terms of the Treaty considering the facts of the case before it, the nature of the activities in question, and their impact on competitive private-sector relationships and cross-border trade within the context of the CSME.

[39] In this case, the Claimants do not suggest that the Defendant’s actions were commercial or competitive in nature or were carried out for, or with the view to, obtaining a financial return or profit. It is evident from the pleadings that the Defendant’s actions were not commercial in nature. They were not carried out for, or with the view to, obtaining a financial return or profit. Neither is there any suggestion in the Originating Application that they can be considered ‘activities in competition with one or more economic enterprises.’ There is no suggestion that either the Defendant, the Ministry of Finance or the CBTT, when making decisions, assuming control of CLICO and BAT and taking control of CLF’s assets in exchange for the liquidity support and so forth, were doing so for a profit-making basis or for the purpose of participating and seeking superiority or supremacy in the single market alongside or against economic enterprises within the Defendant or within the Member States. The activities involved, *inter alia*, legal, accounting, and managerial intervention by the CBTT and the direct use of financial resources of the Defendant to mitigate the effects of the financial collapse of CLF, a private entity. The pleadings clearly suggest that the activities of the Defendant in providing liquidity support to

CLICO and BAT and in purchasing the rights of their policyholders involved the use of State funds and fell expressly within the meaning of Article 30(3)(d).

[40] Financial bailouts by Governments to reduce systemic risk, avoid or mitigate a collapse of the financial system, increase stability, and reduce the likelihood and severity of recessions are not uncommon internationally. For example, reference may be made to the United States' and the United Kingdom's commercial bank bailouts during the 2008 Global Financial Crisis. As Counsel for the Defendant pointed out, legislation was enacted to give effect to the bailout and/or significant funds injected to avoid economic collapse. In this case, the Defendant's actions in bailing out CLF and its subsidiaries would appear logically to fall within the space for governmental action contemplated by Article 30(2) and (3) of the RTC. The Defendant's actions were part of a decision to safeguard the economy. The RTC was meant to operationalise, facilitate and govern free trade within a customs union; it was not intended to hamstring governmental action taken in economically turbulent times to shore up and protect the national economy from extraordinary shocks and hazards.

[41] The Court therefore agrees, that on the facts pleaded by the Claimants, the Defendant's actions can be considered 'activities involving the exercise of governmental authority ... conducted neither on a commercial basis nor in competition with one or more enterprises' as defined in Article 30(2) and 30(3) and that those actions fall outside the scope of application of Chapter Three of the RTC. This conclusion accords with the object and purpose of the RTC.

[42] The Defendant has helpfully referred to European Union ('EU') and World Trade Organization ('WTO') jurisprudence which has assisted the Court. Both systems have multilateral treaties with provisions similar in purpose and effect to Articles 30(2) and (3) of the RTC. The approach of the European Court of Justice ('ECJ') and the WTO Dispute Settlement Body to similar provisions are in accordance with this Court's approach to the interpretation of Article 30 as set out above.

[43] In the European context, Articles 51¹³ and 62¹⁴ of the Treaty on the Functioning of the European Union ('TFEU') both exclude "*activities which in that State are connected, even occasionally, with exercise of official authority*" from Chapter 2, the Right of Establishment and Chapter 3, Services of the TFEU.

[44] While the facts and issue in the cases cited by the Defendant that have come before the ECJ are different when compared to those of the instant case, the approach of the ECJ is relevant. The ECJ cases show that when faced with arguments about the applicability of Article 51 of the TFEU, the ECJ considers the nature of the activities themselves; not the sector in which those activities are engaged. This is in accordance with the approach of this Court as informed by the Treaty, that is to say, to examine the nature of the activities undertaken by the Defendant rather than the particular sector in which those activities were undertaken. Upon this approach, this Court has determined that the Defendant's rescue and intervention of the financially troubled CLICO and BAT, provision of liquidity support, injection of public funds and the purchase of the rights of some policyholders of CLICO and BAT, all with the clear aim of containing systemic risks to the economy, fall within the meaning of Articles 30(2) and (3) and are therefore outside the scope of application of Chapter Three of the RTC.

[45] In the WTO context, Article I (3)(c) of the General Agreement on Trade in Services (GATS)¹⁵, a scope and definition article, contains a similar provision to Article 30 of

¹³The provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may rule that the provisions of this Chapter shall not apply to certain activities.

¹⁴ The provisions of arts 51 to 54 shall apply to the matters covered by this Chapter.

¹⁵ (Adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 183. Article I states:

1. This Agreement applies to measures by Members affecting trade in services.

2. For the purposes of this Agreement, trade in services is defined as the supply of a service:

(a) from the territory of one Member into the territory of any other Member;

(b) in the territory of one Member to the service consumer of any other Member;

(c) by a service supplier of one Member, through commercial presence in the territory of any other Member;

(d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

3. For the purposes of this Agreement:

(a) "measures by Members" means measures taken by:

(i) central, regional or local governments and authorities; and

(ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;

the RTC. Articles 30(2) and (3) of the RTC contain a general and broader term “*activities involving the exercise of governmental authority*” whereas the GATS provides for “*a service supplied in the exercise of governmental authority*”. Nevertheless, Article I (3)(c) of the GATS indicates that this expression means “*any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers*”; language similar to that of Article 30(3) of the RTC.

[46] Similarly, Article I(b) of the Annex on Financial Services¹⁶ (‘the Annex’), a scope and definition provision, contains language in *pari materia* to Article 30(2) and Article I(b)(i)-(iii) contains the same activities listed in Article 30(3)(a),(b) and (d) of the RTC.¹⁷

[47] In *Canada-Measures Affecting the Importation of Milk and the Exportation of Dairy Products*,¹⁸ the Appellate Body considered the meaning of “government” in the context of Article 9.1(a) of the Agreement on Agriculture. It stated:

We start our interpretive task with the text of Article 9.1(a) and the ordinary meaning of the word government itself. According to *Black’s Law Dictionary*, “government” means, *inter alia*, “[t]he regulation, restraint, supervision, or control which is exercised upon the individual members of an organized jural society by those invested with authority” (emphasis added). This is similar to meanings given in other dictionaries. The essence of “government” is,

In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory;

(b) “*services*” includes any service in any sector except services supplied in the exercise of governmental authority;

(c) “*a service supplied in the exercise of governmental authority*” means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers (emphasis added).

¹⁶ *ibid* at art I(b): 1. (a) This Annex applies to measures affecting the supply of financial services. Reference to the supply of a financial service in this Annex shall mean the supply of a service as defined in paragraph 2 of Article I of the Agreement.

(b) For the purposes of subparagraph 3(b) of Article I of the Agreement, “services supplied in the exercise of governmental authority” means the following:

(i) activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies;

(ii) activities forming part of a statutory system of social security or public retirement plans; and

(iii) other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government.

(c) For the purposes of subparagraph 3(b) of Article I of the Agreement, if a Member allows any of the activities referred to in subparagraphs (b)(ii) or (b)(iii) of this paragraph to be conducted by its financial service suppliers in competition with a public entity or a financial service supplier, “services” shall include such activities.

(d) Subparagraph 3(c) of Article I of the Agreement shall not apply to services covered by this Annex.

¹⁷ Save art 30(3)(c) that has been added to the RTC to illustrate a further example of what is intended by “activities involving the exercise of governmental authority.”

¹⁸ *Canada-Measures Affecting the Importation of Milk and the Exportation of Dairy Products - Report of the Appellate Body* (13 October 1999) WT/DS103/AB/R and WT/DS113/AB/R at [97].

therefore, that it enjoys the effective power to “regulate”, “control” or “supervise” individuals, or otherwise “restrain” their conduct, through the exercise of lawful authority. This meaning is derived, in part, from the *functions* performed by a government and, in part, from the government having the *powers* and *authority* to perform those functions. A "government agency" is, in our view, an entity which exercises powers vested in it by a “government” for the purpose of performing functions of a “governmental” character, that is, to “regulate”, “restrain”, “supervise” or “control” the conduct of private citizens. As with any agency relationship, a "government agency" may enjoy a degree of discretion in the exercise of its functions.

[48] According to the WTO, “governmental authority” has little to do with commerce, trade and “mere matters of business” and the notion of economic profit or financial gain is generally absent in the case of the exercise of governmental authority, but is a prominent factor, and is generally, if not always, present in the case of the supply of services on a commercial basis.¹⁹

[49] In the GATS, “service supplied in exercise of governmental authority” means any service which is supplied ‘neither on a commercial basis, nor in competition with one or more service suppliers.’²⁰ In defining the term ‘*services supplied on a commercial basis*’, the ordinary meaning of the word “commercial” to a certain degree, implies the notion of financial return or profit. It would thus seem reasonable to associate the concept of ‘on a commercial basis’ in Article I 3(c) of GATS with the notion of financial return or profit or understand that the expression refers to or conveys the general idea of the supply of a service with a view to making a profit and obtaining a financial return. This would involve an assessment of whether the modalities of the supply of the service are such as to indicate that the service is being supplied mainly with a view of making a profit or obtaining a financial gain. A review of the context of Article I 3(b) and (c), the object and purpose of the GATS and the WTO

¹⁹ Eric H Leroux, ‘What is a “Service Supplied in the Exercise of Governmental Authority” Under Article I:3(b) and (c) of the General Agreement on Trade in Services?’ (2006) 40(3) J of World Trade 345, 352.

²⁰ Examples of such services as intended as “services supplied neither on a commercial basis nor in competition with one or more service suppliers” in art I (3)(c) of the GATS may be healthcare, police protection, penitentiary services and basic education. However, in a growing number of Members, some of the services that are traditionally considered to be services supplied in the exercise of governmental authority have in recent years been subject to privatisation and may now fall within the scope of the GATS in - Peter van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2nd edn, Cambridge University Press 2008) para 4.3.2.1.

Agreement, more generally, is supportive of this view.²¹ Additionally, the concept of ‘service supplied in competition with one or more service suppliers’ remains imprecise but conveys the general idea of two or more service suppliers contending one with another in the same services market.²²

[50] Based on the foregoing, the GATS and the Annex contain wording that is similar to Articles 30(2) and 30(3) of the RTC. In the language of the WTO jurisprudence, the activities of the Defendant and the CBTT in the aftermath of the collapse of CLF were in their essence that of “government.” The Defendant had the powers and authority to regulate, control, supervise and restrain when it carried out the actions in question, through the passage of emergency legislation.

[51] Moreover, like the EU, the WTO appreciates that there must be an assessment of “the modalities of the supply of the service”. Likewise, in the RTC context, there therefore must be an assessment of the Defendant’s activities in question to determine whether they were done ‘neither on a commercial basis, nor in competition with one or more economic enterprises.’

[52] The jurisprudence of the ECJ and WTO accord with the approach adopted by this Court, that is, assessment of the nature of the activities which are the basis of complaint by the Claimants and consideration of the facts of the case to determine whether the activities fall within the exclusionary zone created by Articles 30(2) and (3).

Conclusions on Preliminary Issues

[53] Assuming the truth of the matters pleaded by the Claimants in the Originating Application, the actions of the State of Trinidad and Tobago alleged by the Claimants fall outside the scope of Chapter Three of the Revised Treaty of Chaguaramas

²¹ Leroux (n 18) 349.

²² *ibid* 354, 384.

because they come within the meaning of Article 30(2) and Article 30(3). They are therefore excluded from the operation of Chapter Three. The consequence that follows from this is that the claims alleging breaches of Articles 36, 37 and 38 are not justiciable by this Court. Further, as the impugned activities do not fall within the scope of application of the RTC, the Claimants cannot rely on them to ground a breach of Article 7, which provision is expressly applicable ‘Within the scope of application’ of the RTC.

[54] The Claimants may, however, proceed to present those aspects of the claim relating to a breach of Article 184(1)(j) of the RTC, and Article 7 in so far as it is applicable.

Disposition

[55] The Court therefore orders that:

- i. The Claimants’ claim with respect to breaches of Articles 36, 37, 38 and 7 (in so far as it relates to Chapter 3) is dismissed.
- ii. The Claimants’ claim with respect to a breach of Article 184(1)(j) and Article 7 in so far as it is applicable may proceed.
- iii. The issue of costs is reserved to the conclusion of this matter.

/s/ A Saunders

The Hon Mr Justice Saunders (President)

/s/ W Anderson

The Hon Mr Justice Anderson

/s/ M Rajnauth-Lee

The Hon Mme Justice Rajnauth-Lee

/s/ A Burgess

The Hon Mr Justice Burgess

/s/ P Jamadar

The Hon Mr Justice Jamadar