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Panel #6, Small States and Globalization

**THE IMPACT OF THE CARIFORUM- EUROPEAN UNION ECONOMIC PARTNERSHIP
AGREEMENT ON THE JURIDICAL FRAMEWORK, LEGAL AND INSTITUTIONAL OPERATION OF
THE *REVISED TREATY OF CHAGUARAMAS ESTABLISHING THE CARIBBEAN COMMUNITY
INCLUDING THE CARICOM SINGLE MARKET AND ECONOMY.* ©**

Sheldon A.McDonald, J.P., LL.M.,

International Lawyer, Acting Head and Senior Lecturer,

Department of Law,

Faculty of Social Sciences,

University of Guyana

Georgetown Guyana

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Prefatory Comments

The author wishes to express gratitude to the Chairman-in-Office of the Caribbean Association of Judicial Office, Mr. Justice Adrian Saunders, for the opportunity to participate in this conference of distinguished Judicial Officers from the Caribbean Community and the wider world. Certain events have made physical participation impossible. However, I have committed and now deliver on that promise to have a paper ready for the discussion in Panel 6 –Small States and Globalization.

INTRODUCTION

‘Small States’ (read small –or not so small –independent communities, nations, tribes and States) have for centuries been immersed in the process of globalization, mostly against their own will. Their territories have been pillaged, their populations enslaved or semi-enslaved, their resources extracted against their will or coerced or disingenuously taken from them. Hence the state of today’s global political economy after the **Washington Consensus** (including its patent failure,) really represents the norm.

Without prejudice to the present writer’s own views on the issue, Western Europe feels quite comfortably in enforcing, including paying local agents, its views on the death penalty in Small States. Yet the States of the United States of America, the Kingdom of Saudi Arabia and other ‘big ones’ may continue to exact such a punishment on offenders without vigorous protest.

The judicial arm of Government has not escaped this **econo-colonization**. I would argue that the judgment of the Judicial Committee of the Privy Council in the case relating to the emplacement of the latter by the Caribbean Court of Justice as Jamaica’s final appellate court¹ arguably represents such an instance of self-serving action. I would equally argue that the remission of the case involving the Dominican telecommunications company and Cable and Wireless is in the same vein.²

This presentation purports to discuss the impact of the CARIFORUM-European Union Economic Partnership Agreement on the *Revised Treaty of Chaguaramas Establishing the Caribbean Community Including The CARICOM Single Market And Economy*. In This endeavour, the institutional setting and the dispute settlement mechanism, particularly the jurisdiction of the Caribbean Court of justice, will be addressed.³ Naturally, the institutional framework and the dispute settlement modalities of the EPA will be presented. The reader may well come away from this presentation with a view that while CARICOM has accepted *inter se*, an **inter-governmental mode** of governance, with notable exceptions; **it has had agreed; been persuaded, or been coerced into accepting the EU’s approach to governance in intra regional economic interaction and in interaction between that entity and third States or Group of States.**

¹ Privy Council Appeal No. 41 of 2004 Independent Jamaica Council for Human Rights (1998) Limited and Others (1) Hon. Syringa Marshall-Burnett and (2) The Attorney General of Jamaica

² **Cable and Wireless (Dominica) Limited v. Marpin Telecoms and Broadcasting Company Limited (Dominica) [2000] UKPC 42 (30th October, 2000)**

³ This will be done in a final version of the paper. Due to time constraints, a general discussion is presented.

The presentation will support the positions advanced by Norman Girvan and many others who have argued that the juridical regime of the *Revised Treaty* may have been subverted (wittingly or unwittingly.) The present writer takes the view that the unbridled arrogance of the then leadership of the CRNM and its unwillingness to ‘associate itself’ with ‘learned’ professionals in international trade and economic law, as well as the canons of public international law, is a subjective factor which cannot be ignored and must not be repeated.

The paper will point to, and analyse the implications of, CARICOM, not being Party to the EPA but is fundamentally and ineluctably impacted upon by its provisions. CARICOM has been given duties (and minor rights) in direct contravention of the rule in the Vienna Convention on the Law of Treaties that third Parties may only be given rights, and have duties imposed on them with their explicit consent –the *pacta tertiis nec nocent nec prosunt* rule.⁴ This has been completely ignored. Further, there has been an **implicit and not so implicit amendment by subsequent practice, of the constituent instrument of CARICOM, the *Revised Treaty*, by the Member States and Organs of that Community, either at the urging, pushing, cajoling of the European Union, or by their own capitulation.**

If the foregoing be correct, there will be a major and inevitably potentially negative impact on the jurisdiction of the Caribbean Court of Justice. With that in mind therefore, the jurisdiction of the Court and Revised Treaty provisions related to this issue area will be discussed. As a positive, the views of the Court on the scope of its jurisdiction in its first Original Jurisdiction case will also be presented. It is perhaps the case that some natural or legal persons will have the audacity to ask the CCJ’s its view on this institutional, juridical and legal conundrum.

But perhaps the writer is hoping too much, given that the EU has imposed (or been given the acceptance to have) a CARIFORUM Official performing functions within the Secretariat of the Caribbean Community Secretariat.

How the CCJ reacts, if asked, may be guided by the manner in which the European Union’s judicial tribunal, the European Court of Justice, regard treaties with third States and entities which have an impact on the ‘uniform interpretation and application of Community law,’ This includes the issue of how does the ECJ view the obligations which the Union and its Member States owe to the multilateral trading regime encompassed within the World Trade Organization.

This is the sort of globalization enveloping, if not swallowing, Small States, particularly the Member States of the Caribbean Community and its Single Market and Economy that this paper will seek to address. Do not be surprised if there are no ‘informed’ conclusions.

⁴ See the Vienna Convention on the Law of Treaties, Article 35.

A significant element of this presentation is dedicated to Professor Norman Girvan; known for his formidable economic and policy analytical skills and increasingly for his diplomatic skills rather than for his ability to compose *risqué* Calypso lyrics. However, his power point presentation of April 27, 2008 “The CARIROUM –EC EPA A Critical Evaluation – ‘The Devil is in the Detail,’ is most apt.⁵

The present discussion is not about ‘sexy esoteric judicial fantasy,’ but rather the extent to which precipitous and essentially unlearned and ignorant technocratic actions may lead to results that non international lawyers regard as ‘no big thing.’ Thankfully, the Economists (led by Girvan, Thomas, Brewster and others,) supported by the outstanding ‘Caribbean Man’ Sir Shridath Ramphal with underpinning support at the political level, evidenced by the ‘crie de couer’ of at least on Head of State, His Excellency, Bharat Jagdeo of the Republic of Guyana, sounded the warning. These events and actions all present a situation where the Caribbean may not be permitted to say it was not warned.

To evidence the foregoing, it may be appropriate to utilize the words of the European Court of Justice treating with the actual or potential impact of EU-negotiated instruments within the municipal legal domain of the Parties,⁶ **including the possibility of the rights and obligations contained producing *direct effect*.** The ECJ stated *inter alia*:

It should first be noted, as a preliminary point, that in conformity with the principles of public international law the institutions of the European Union, which have power to negotiate and conclude an agreement with non-member countries, are free to agree with those countries what effect the provisions of the agreement are to have in the internal legal order of the contracting parties. Only if that question has not been settled by the agreement does it fall to be decided by the courts having jurisdiction in the matter, and in particular by the Court of Justice within the framework of its jurisdiction under the FEU Treaty, in the same manner as any other question of interpretation relating to the application of the agreement in the European Union (see Case 104/81 Kupferberg [1982] ECR 3641, paragraph 17; Case C-149/96 Portugal v Council [1999] ECR I-8395, paragraph 34; and Joined Cases C-120/06 P and C-121/06 P FIAMM and FIAMM Technologies v Council and Commission [2008] ECR I-6513, paragraph 108).

*It should also be noted that, in accordance with the Court's settled case-law, examination of the **direct effect** of provisions contained in an agreement concluded by the European*

⁵ Available at normangirvan.info

⁶ JUDGMENT OF THE COURT (Third Chamber) 20 May 2010 (*) (Regulation (EEC) No 1591/84 Cooperation Agreement between the European Economic Community, of the one part, and the Cartagena Agreement and the member countries thereof, Bolivia, Colombia, Ecuador, Peru and Venezuela, of the other part Most-favoured-nation clause Direct effect Excise duty on the import of bananas into Greece)
In Case C-160/09, REFERENCE for a preliminary ruling under Article 234 EC from the Simvoulis tis Epikratias (Greece), made by decision of 1 April 2009, received at the Court on 8 May 2009, in the proceedings **Ioannis Katsivardas Nikolaos Tsitsikas OE v Ipourgos Ikonomikon,**

*Union with non-member countries invariably involves an **analysis of the spirit, general scheme and terms** of that agreement (see *Chiquita Italia*, paragraph 25 and the case-law cited).*

On the other hand, as the European Commission observed at the hearing, the nature of the legal measure approving the international agreement concerned is not relevant in such an examination. As follows from Case 12/86 Demirel [1987] ECR 3719, paragraph 25, the fact that an international agreement has been approved by means of a decision or by means of a regulation cannot affect whether it is recognised as having direct effect.

The ‘lofty’ ideals are also worth bearing in mind; which sentiments were stated long before the onset of the actual EPA negotiations.⁷

The EU should increasingly use regional and national development strategies and instruments to address the root-causes of insecurity, instability and conflict, which include poverty, inequality and lack of social cohesion. Especially in certain fragile states that risk slipping from middle to low income status, a culture of conflict prevention needs to be developed and fostered. Caribbean states themselves must also take responsibility for this task. To this end, CARICOM/CARIFORUM is encouraged to continue initiatives on the political front, such as electoral monitoring and special missions for the resolution of political issues which will be further supported by the EU in future.

Good and effective governance is recognised by the Caribbean as a crucial prerequisite for sustainable development and is another of EU's guiding principles, as outlined in the 2003 Communication on Governance and Development.¹⁰ Central to good and effective governance is the strengthening of credible institutions - such as parliaments, the judiciary system and public financial management systems - both at national and regional level. The EU will systematically support these key institutions as central elements of the EU governance priority in the Caribbean. However, it is recognised that governance is not only about institution building, but also about appropriate policies and adequate legal and regulatory frameworks, both in the economic, social and political

⁷ Brussels, 2.3.2006 COM(2006) 86 final COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE : AN EU-CARIBBEAN PARTNERSHIP FOR GROWTH, STABILITY AND DEVELOPMENT {SEC(2006) 268} . Agreement was approved by Council Decision of 15 July 2008.

sphere. The EU will, therefore, continue to promote transparency and effective exchange of information between authorities in order to fight corruption as well as corporate and financial malpractices. The EU will also promote good governance in the financial, tax and **judicial areas.**

The Communication continues:⁸

In an increasingly interdependent and globalised world, a major objective of EU development policy is to assist developing countries to better harness the globalisation process. Therefore coherence between EU trade policy and EU political dialogue with the Caribbean must be further harnessed in order to develop viable economic models for the region. To that end the EU will strongly support the completion and operation of the Caribbean Single Market and Economy (CSME) as both an element of regional integration and the establishment of the EPA with the EU. The EU will contribute to strengthening and streamlining of existing regional institutions and organs in view of guaranteeing the smooth operation of the single market. Additionally, the Special Development Fund (SDF) and the Regional Development Fund can help facilitate the Caribbean Single Market and economy. Several countries, including among the OECS are set to directly benefit from such solidarity-based instruments.

A well defined and credible integration agenda and functioning internal market are the necessary pillars for a successful outcome of the EPA negotiations which started in April 2004. The EPA process will support Caribbean regional integration and provide rules based framework to help increase competitiveness, diversify exports and create regional markets thereby contributing to sustainable economic development. It will also facilitate adjustment, including its social dimension, to trade policy reforms and address the significant issue of reducing currently high levels of budgetary dependence upon import revenues. This integration process is of strategic importance to the future of the economy of the Caribbean region. The development dimension should be further strengthened so as to better help the Caribbean region achieve strategic targets of global competitiveness.

The EU will step up its trade related assistance to the Caribbean in order to strengthen in-country and regional trade policy and negotiation capacity, to assist countries with negotiation and implementation of the WTO agreements and the EPA, as well as other concurrent trade negotiations. The EU will also encourage the development of customs and trade facilitation measures and use of

⁸ Ibid.

international standards. The removal of current barriers to intra-regional trade and investment and the establishment of more stable, transparent and predictable rules and reliable institutions will contribute significantly to the growth of national and regional economies.

In this context key to successful economic diversification and structural reform is the establishment and effective implementation of national long term strategies by the region and the governments of the Caribbean states - with the private sector, including social partners fully involved in the design of such strategies. The EU will assist, if required, in the elaboration of such national strategies. The key to a successful strategy will depend on whether it manages to support the private sector in a real and meaningful way as the engine of economic progress.

.....

The region's generally small open economies are especially vulnerable to global market forces and in particular to changes affecting the stability of financial markets. This is why, the development of financial services in this region has to go parallel with the development of an appropriate regulatory framework, notably in order to prevent and combat corporate and financial malpractices. In the cooperation with the Caribbean, ACPs and OCTs, the EU will support good governance in the financial, tax and judicial areas, in particular with regard to transparency and effective exchange of information for tax purposes. This issue will also be addressed in the context of Economic Partnership Agreements (EPAs).

It is thus to be observed that for the European Union, the CARIFORUM-EU EPA, was the outcome sought in a clearly thought out policy adumbrated by the Commission and endorsed by the Council. The European Parliament was the only Union institution where any sort of opposition was voiced⁹. The Leadership of the Caribbean Community was clearly too trusting in the preparedness of its negotiating team. For the leadership of the Caribbean Negotiating Machinery itself, there were times when one felt the process represented a monument to

⁹ See for example [European Parliament resolution of 25 March 2009 on the Economic Partnership Agreement between the Cariforum States, of the one part, and the European Community and its Member States, of the other part, in which it was observed in paragraph 13](#): Recognises that the Cariforum States that are members of Caricom have made commitments in subject areas not yet settled under the CSME or fully implemented, including financial services, other services, investment, competition, public procurement, e-commerce, intellectual property, free circulation of goods, and the environment; calls for due regard to the CSME in the implementation of provisions in these subject areas, in accordance with Article 4(3) of the EC-Cariforum EPA;

collective and individual greater glory. The people of the Caribbean will suffer because of arguably stubborn, individualistic, intellectual egotism.¹⁰

For the substantive trade and economic perspective, let us hear what Professor Girvan has to say:¹¹

“Since 1989 the countries of the Caribbean Community (Caricom) have been constructing the Caricom Single Market and Economy (CSME); an economic integration scheme that responds to globalisation by means of Open Regionalism. The urgency of economic diversification has been underlined by the erosion of preferences for Caricom’s traditional exports in the European market as a result of challenges mounted under WTO rules. The replacement of the EU’s non-reciprocal trade preferences for the African Caribbean and Pacific (ACP) group of countries under the Lome agreement (1975), and temporarily extended under the Cotonou Agreement (2000), is to be effected under Economic Partnership Agreements (EPAs) with ACP countries. EPA negotiations were concluded with the ‘Cariforum group’ in December 2007.

EPAs are negotiated under a mandate from the Cotonou Partnership Agreement to conclude ‘WTO compatible’ trade agreements that promote sustainable development, poverty reduction, regional integration within ACP groups, and the gradual integration of

¹⁰ Statement justified by the present author’s own experience with the leadership of the CRNM, as a former member of the Collegium.

¹¹ Caribbean Integration and Global Europe Implications of the EPA for the CSME Norman

ACP countries into the world economy. However, the content of the cariforum-EU EPA is in accordance with the objectives of the EU's 'Global Europe' project; which seeks to use bilateral trade agreements to prize open developing country markets to European firms and secure binding WTO-plus commitments in the EU's bilateral trade agreements. This chapter argues that the EPA's emphasis on reciprocal trade and investment liberalization, and its binding of neo-liberal policy regimes, render problematic the completion of the Caricom Single Market and Economy and call into question the feasibility of the Caricom integration project.

THE JURIDICAL ISSUES

Professor Girvan, as stated, while not being a 'certified' international lawyer, certainly has the requisite expertise and competence to make critique which impact on the legal and juridical domain. In this section we will place his assertions and assess them against the provisions in the EPA instrument. Girvan offers the following on the **Juridical structure**:¹²

Article 228 of the RTC gives the Caribbean Community full juridical personality and the right to conclude agreements with States and International Organisations. However, Caricom as a juridical entity is not a Party to the EPA; while Cariforum is not a juridical entity. Although the EPA states that for the purposes of the Agreement the Cariforum states 'agree to act collectively', the substantial rights and obligations are between the 'EC Party' and 'the Signatory Cariforum states' (Article 233): Thus, the market access commitments in goods, services and investment, and the regulatory obligations; are expressed as the obligations of individual states in the text and there are separate access

¹² Ibid., p.15

schedules for each country in the Annexes. Each Cariforum state is therefore placed in a direct bilateral relationship with the EC in respect of the key operative provisions of the treaty. Besides weakening the bargaining power of individual states; this feature of the EPA is at variance with the integrity of the Caribbean Community as a body collectively responsible, in behalf of its members, for implementation of trade and integration matters and for interfacing with external trade partners. It provides an incentive for individual countries to compete with one another in accessing rights and benefits from the EC. Because of 'Regional Preference', it could give rise to a situation where one Cariforum country brings a complaint against another for violating a provision of the Agreement and seeks the support of EC officials in the event of a dispute. The juridical structure of the EPA therefore undermines Caricom's own regional integration scheme and has the potential of promoting regional fragmentation.

In order to validate or dismiss the foregoing, one has to go to the text of the Agreement. One preambular paragraph states in the following condescending terms:

HAVING REGARD TO the Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy, the Treaty of Basseterre Establishing the Organization of Eastern Caribbean States and the Agreement Establishing a Free Trade Area between the Caribbean Community and the Dominican Republic, on the one part, and the Treaty establishing the European Community, on the other part[.]

Article 4 of the Agreement even purports to pay obeisance to the treaty regime of the Caribbean Community. The provision, entitled **Regional Integration**, states as follows:

- 1. The Parties recognise that regional integration is an integral element to their partnership and a powerful instrument to achieve the objectives of this Agreement.*
- 2. The Parties recognize and reaffirm the importance of regional integration among the CARIFORUM States as a mechanism for enabling these States to achieve greater economic opportunities, enhanced political stability*

and to foster their effective integration into the world economy.

3. The Parties acknowledge the efforts of the CARIFORUM States to foster regional and sub-regional integration amongst themselves through the Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy, the Treaty of Basseterre establishing the Organization of Eastern Caribbean States and the Agreement establishing a Free Trade Area between the Caribbean Community and the Dominican Republic.

4. The Parties further recognize that, without prejudice to the commitments undertaken in this Agreement, the pace and content of regional integration is a matter to be determined exclusively by the CARIFORUM States in the exercise of their sovereignty and given their current and future political ambitions.

5. The Parties agree that their partnership builds upon and aims at deepening regional integration and undertake to cooperate to further develop it, taking into account the Parties' levels of development, needs, geographical realities and sustainable development strategies, as well as the priorities that the CARIFORUM States have set for themselves and the obligations enshrined in the existing regional integration agreements identified in paragraph 3.

6. The Parties commit themselves to cooperating in order to facilitate the implementation of this Agreement and to support CARIFORUM regional integration.

By way of commentary, one may be tempted to aver that this article 'saves' or preserves extant regional integration ambition. Paragraph 1 is a clear enough statement, but at the general level, but cleverly clothed in the preambular language of '**recognition.**' But even that grant is weakened (as far the Caribbean Community is concerned).

What does '**recognition and reaffirming the importance of regional integration among CARIFORUM States**' mean? There is a discrete treaty regime encompassed within CARICOM. The OECS, while pursuing their Economic Union, are still a critical sub-set of the former. Even as there is existent a CARICOM-Dominican Republic FTA (with problems for CARICOM cement entering the DR,) the latter has expressed or even moved to become a Member of the Community. **In other words, just stringing these three legal instruments, as in a bead, does not preserve their juridical integrity in relation the present (EPA) instrument. This could be assimilated to the concept of 'passing off' in intellectual property law.** The legal technocrats within the CARIFORUM negotiating team who accepted this, ought to be censured. It gets worse.

Paragraph 4 relegate to a **secondary or tertiary** position, the proposition that "...*the pace and content of regional integration is a matter to be determined exclusively by the CARIFORUM States in the exercise of their sovereignty...*" This relegation is evidenced by the fact that the **pace and content** of regional integration is made

subject to the EPA Agreement. As the provision states, “...**without prejudice to the commitments undertaken in this Agreement.**”

Thus even the genuflection to the CARICOM mantra of being a ‘*Community of Sovereign States*,’ is mercilessly vitiated by the European Union negotiators, with the explicit consent of ours.

Finally there is the bland statement in relation to levels of development in paragraph 5, while the final provisions once again states the supremacy of the EPA. That is the effect of the statement that the Parties “...***commit themselves to co-operating in order to facilitate the implementation of this Agreement...***” while only committing themselves to “*support*” CARIFORUM [sic] regional integration.

First strike against the EPA to Professor Girvan.

Perhaps the ‘defects’ observed may be clarified by the provisions on the discrete ‘Parties’ to the Agreement. There is firstly, the very unusual practice –both for the European union and CARICOM negotiators of virtually **hiding** the *Definition of the Parties and fulfilment of obligations*, to General and Final Provisions, particularly Article 233.

This Article represents the starkest disaggregation of the Caribbean Community, as established under the 1973 Treaty and as remodelled in the Revised Treaty. For the present writer, it represent a stark blot on the legal and intellectual capacity of legal technocrats within the Community. But even more important, it represents the emasculation (or de-feminization) of the Community, threatening the basic fabric of its juridical structure.

Paragraph one of the cited Articles has to be regarded as the ‘constituent instrument’ of CARIFORUM. The present writer did extensive research and no discrete instrument could be located. (Including searches at the Secretariat of the Caribbean Community, the nominal ‘home’ of CARIFORUM.¹³

On the other hand, there is a discrete instrument constituting te grouping of which CARIFORUM is a part, the *Georgetown Agreement established the African, Caribbean and Pacific Group of States*¹⁴. That is a

¹³ And where the EU has installed a technocrat to protect its interest in the EPA.

¹⁴ ACP/27/005/00 Rev.16 Brussels, 28 November 2003 Legal Service/NJB/mgf [Final Version] THE GEORGETOWN AGREEMENT As amended by Decision No.1/LXXVIII/03 of the 78th Session of the Council of Ministers, Brussels, 27 and 28 November 2003. The Agreement provides, *inter alia*:

CHAPTER I

MEMBERSHIP AND OBJECTIVES OF THE ACP GROUP

Article 1 The ACP Group

1. There is hereby established the African, Caribbean and Pacific Group of States, designated “the ACP Group”.

juridical entity, recognized in both public international law, and the *lex specialis* of the law of regional integration. It would be useful if the EU and CARICOM negotiators were able to indicate the 'signposts' set out on Article 1 of the ACP Agreement. But then, we are instructed by the *Vienna Convention on the Law of Treaties*, that States may by **subsequent practice, modify or amend treaties outside of the formal amendment framework**. The Members of the Conference of CARICOM need to state the legal bases on which they have acted, **Not the sovereign States stuff**.

Let us now turn to the issues of Parties in the EPA context.

Article 233

Definition of the Parties and fulfilment of obligations

1. **Contracting Parties** of this Agreement are Antigua and Barbuda, The Commonwealth of the Bahamas, Barbados, Belize, The Commonwealth of Dominica, **the Dominican Republic**, Grenada, The Republic of Guyana, The Republic of Haiti, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Christopher and Nevis, The Republic of Suriname, and The Republic of Trinidad and Tobago, **herein referred to as the "CARIFORUM States"**, on the one part, and the **European Community or its Member States or the European Community and its Member States, within their respective areas of competence as derived from the Treaty establishing the European Community**, herein referred to as the "EC Party", on the other part.
2. For the purposes of this Agreement, the CARIFORUM States agree to act collectively.
3. For the purposes of this Agreement, the term "Party" shall refer to the CARIFORUM States acting collectively or the EC Party as the case may be. The term "Parties" shall refer to the CARIFORUM States

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2. The Members of the ACP Group shall be the African, Caribbean and Pacific States party to this Agreement or to the ACP-EC Partnership Agreement.
 3. Accession to the ACP Group shall be in accordance with Article 28 (1) of this Agreement.
 4. The ACP Group shall be organised on the basis of six geographical regions, namely Central Africa, East Africa, Southern Africa, West Africa, the Caribbean and the Pacific.
 5. The ACP Group shall have legal personality. It shall have the capacity to contract, acquire, and dispose of movable and immovable property and to institute legal proceedings.

acting collectively and the EC Party.

4. Where individual action is provided for or required to exercise the rights or comply with the obligations under this Agreement reference is made to the "Signatory CARIFORUM States".

5. The Parties or the Signatory CARIFORUM States as the case may be shall adopt any general or specific measures required for them to fulfil their obligations under this Agreement and shall ensure that they comply with the objectives laid down in this Agreement.

Now for some commentaries, which, it is suspected will further validate Professor Girvan's criticisms. Who are the Parties and how are they defined:

- (i) The individual States of CARIFORUM, but who, by their consent evidenced in paragraph (2) '**agree to act collectively.**' This does not relieve the individual States of their legal obligations under the Agreement; (The CARICOM bloc.)
- (ii) In the same vein, the Dominican Republic Individually and as a Member of CARIFORUM;
- (iii) The European Community **or** its Member States; **or**
- (iv) The European Community **and** its Member States "**within their respective areas of competence as derived from the Treaty establishing the European Community –the EC Party.**

The upshot of the foregoing is that CARICOM States, acting within the context of CARIFORUM are jointly and severally liable for acts or omissions under the Agreement. **But they also have to be mindful of their rights and obligations under the revised Treaty. The Dominican Republic is under no such constraint, not being a Party to the latter, and given the fact that the EPA supercedes the provisions of the CARICOM-DR FTA.**

On the other side, the EC or its Member States are Parties, the distinct possibility existing of the view of the EC (represented by the Commission,) not being the view or position of the Member State concerned. This coincides broadly with the position of the CARIFORUM States, in a situation where the collective entity has no juridical status or legal personality.

The final Party context is the EC and its Member States, where the latter have competences in particular areas reserved to them by the EC Treaties. In this situation, there is very little scope for a discretion to be exercised by the EC institution (the Commission,) in respect of an issue, given that the Member States have concurrent competences under the treaties establishing the EC. The individual Member State or the Commission may rely on the principle of subsidiarity, conferral or proportionality in determining whether one or the other wishes to prosecute an issue against CARIFORUM or an individual Member State thereof¹⁵

Closely related to the foregoing is the onus placed on individual CARIFORUM States by paragraph (4), which, to reiterate, states as follows: "Where individual action is provided for or required to exercise the rights or comply with the obligations under this Agreement reference is made to the "Signatory States of CARIFORUM."

¹⁵ Article 5 of the Treaty on European Union states that "[t]he limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. These principles are defined in paragraphs 2,3 and 4 of the same Article.

Paragraph (5) is a very peremptory statement of the accepted rule of public international law, in two dimensions, the general undertaking to implement their duly contracted obligations, and the *grundnorm* of *pacta sunt servanda*.

A significant area of criticism of the EPA and its deleterious impact on CARICOM, is the impact on the grant of competences to the Organs of the latter, under the Revised Treaty. The Conference signs-off on treaties with third States and entities, negotiated by competent Community Organs, mainly the COTED and the COFCOR. We are still at the level of **inter-governmentalism**. On the other hand, the provisions of Article 80 of the Revised Treaty represent an almost legally perfect grant of executive competence to the Community –**supranationality**:

ARTICLE 80
Co-ordination of External Trade Policy

2. *The Member States shall co-ordinate their trade policies with third States or groups of third States.*
3. *The Community shall pursue the negotiation of external trade and economic agreements on a joint basis in accordance with principles and mechanisms established by the Conference.*
4. *Bilateral agreements to be negotiated by Member States in pursuance of their national strategic interests shall:*
 - (a) *be without prejudice to their obligations under the Treaty; and*
 - (b) *prior to their conclusion, be subject to certification by the CARICOM Secretariat that the agreements do not prejudice or place at a disadvantage the position of other CARICOM States vis-a-vis the Treaty.*
4. *Where trade agreements involving tariff concessions are being negotiated, the prior approval of COTED shall be required.*
5. *Nothing in this Treaty shall preclude Belize from concluding arrangements with neighbouring economic groupings provided that treatment not less favourable than that accorded to third States within such groupings shall be accorded to the Member States of the Community, and that the arrangements make adequate provision to guard against the deflection of trade into the rest of CARICOM from the countries of such groupings through Belize.*

It is being suggested that the provisions on the Parties to the EPA –in respect of CARICOM may be at odds with Article 80 of the revised Treaty. While CARIFORUM is recognized as an adjunct to the Community, that should not be read as displacing the obligation set out in the first and second paragraphs of the instant provision.

Furthermore, to the extent that the EPA imposes obligations upon individual CARICOM Member States, the negotiations are *ipso facto* bilateral and therefore fall within the terms of Article 80(3). One of the major obligations under the Revised Treaty is the compulsory and binding jurisdiction of the Caribbean Court of Justice (to which we shall return.) Are the Dispute Settlement provisions in the EPA compatible with the requirements of Chapter Ten of the Treaty, as is required by Article 80(3)(a.) It is a little more than resorting to ‘tabulated legalism’ to enquire whether the individually signed EPA’s were “...prior to their conclusion...” certified by the Secretariat in relation to the potential prejudicing or placing at a disadvantage, other Member States. (Article 80(3)(B.)

Was there the ‘prior approval’ of the Council for Trade and Economic Development for concessions in the areas of both goods and services.

While it is not legally possible for a CARICOM Member to take a dispute with another Member outside of the procedures established in the Revised Treaty, it is jurisdictionally possible for this to happen under the EPA, given that there is no juridical underpinning of CARICOM and its institutional apparatus, including the Court. A tribunal would therefore need to reconcile whether the EPA ousts the jurisdiction of the dispute settlement modes set out in CARICOM’s constituent instrument. The EPA would, consistent with the Vienna Convention on the Law of Treaties, be regarded as one which came later in time, and to that extent has the possibility of vitiating rights and obligations in the former instrument.¹⁶

The Convention treats with the application of successive treaties to the same subject-matter. Many of the matters in the EPA are, in essence, the same as in the Revised Treaty, or the FTA between CARICOM and the DR. Thus in essence, in significantly material aspects both these instruments are amended (blindly or not, certainly by ‘subsequent practice,’¹⁷ and means that between CARICOM Members *intra se*, the EPA could be the instrument applicable. Similarly between CARICOM *qua* CARICOM and the DR, or between a Member of the former and the DR, the same position potentially obtains.

Before leaving this matter, it is to be noted that the crucial test in relation to successive instruments on the same subject matter is ‘compatibility’ or incompatibility.’ Article 30(2) of the VLCT provides that “[w] a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier treaty, the provisions of that other treaty prevail.” The situation in the present case is distinct. The EPA nowhere makes a clear statement in this regard. On the contrary, the scheme of drafting relegates the earlier treaty. This is to be seen in Article 4(4) and (6) and Article 233(2),(3),(4) and (5) *supra*.

Before moving on to the dispute provision it is necessary to dismiss a superficial and facile ‘analysis’ of the institutional provisions of the EPA, done by the CRNM entitled “**CRNM Brief On Legal And Institutional Issues In The EPA.**”¹⁸ Two examples will suffice. Firstly, the paper presents the EPA bodies and then the CARICOM Secondary Organs and arrive at this amazing conclusion:

It must be appreciated that these institutions have functions specific only to the internal administration of the Community, with respect to the conclusion of agreements on behalf of the Community and with respect to determining the internal and external policies of the Community. Article 12 (2) of the Revised Treaty provides for example that “the Conference [of Heads of Governments] shall

¹⁶ The VLCT states in Article 30(3): “When all the parties to the earlier treaty are parties also to the latter treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.” Paragraph 4 of this Article is also relevant, since the Dominican Republic is not a Party to the Revised Treaty but is a Party to the EPA. It states: “When the parties to the later treaty do not include all the parties to the earlier one: (a) as between States parties to both treaties the same rule applies as in paragraph 3; (b) as between State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.”

¹⁷ See Ian Brownlie, *Principles of Public International Law*, (Fourth Ed.,) Clarendon Press Oxford, 1995, p.625

¹⁸ Available at www.sice.oas.org/TDP/CAR-EU/Studies/CRNM_legal_issues, p.4

determine and provide policy direction for the Community.” With respect to the Community Council of Ministers, (the second highest organ of the Community) Article 13 provides for example that this Council “...shall, in accordance with the policy directions established by the Conference, have primary responsibility for the development of Community strategic planning and coordination in the areas of economic integration, functional cooperation and external relations.”

In contrast, the EPA institutions have functions and responsibilities relative only to the implementation and operationalisation of the trade partnership constituted by the EPA and do not have roles in determining the internal or external policies etc of the Community or of any CARIFORUM State. It is sufficient to note the following provisions of the EPA which set out the functions of the Joint CARIFORUM-EC Council and the CARIFORUM EC Trade and Development Committee which make this point eminently clear.

Does the author (or do the authors) have a clue to ‘real-time’ treaty interpretation? Have they read the ICJ’s disposition in the case *Reparation for Injuries Suffered in the Service of the United Nations*?¹⁹ Although occurring after, they should also read the judgment of the CCJ in its first Original Jurisdiction case.²⁰ Do they really believe what they have presented represent the sum total of the functioning of the CARICOM Organs and Bodies. Are they blind to the clear disjunct between the weak inter-governmentalism within the CARICOM structure, and the ‘approximation’ of supranationality in the EPA structure and functioning. Finally are they even vaguely familiar with the functioning of the institutions of the European Union, the *acquis communautaire* in that respect, and the *jurisprudence constant* of the European Court of Justice in regard to institutional competences. Are they aware of the reasons why the Treaty on European Union was constrained to include the principles set out in Article 5.²¹ Finally by their own emphases of Article 227 *et seq.* of the EPA, they point to the institutional anomalies,²² but then they have the temerity to conclude:

The highlighted portions serve to clearly indicate the scope of operation of these bodies, namely with restriction only to matters arising under the EPA. As such, the bodies are no more incompatible with the CARICOM organs than are the other

¹⁹ **Advisory Opinion of April 11th, 1949**

²⁰ [2008] CCJ 1 (o.J.) *Trinidad Cement Ltd., TCL Guyana Incorporated (Applicants) And The Co-Operative Republic Of Guyana*

²¹ See footnote 13 *supra*.

²² See footnote 16, at p. 5

institutions created by other international agreements (for example, the WTO General Council) to ensure the proper implementation of those arrangements.

The final statement is of course disingenuous given that the Revised Treaty is notified to the WTO under Article XXIV. The ‘jury is still out’ in relation to the Agreement’s consistency with Article IV of the WTO Agreement on Trade in Services.²³ The European Union refused to budge on the issue of market access to cultural services providers from CARIFORUM. The CRNM may or may not be aware of the real reasons. This is succinctly stated by Eleonora Koeb and Melissa Dalleau²⁴ in the following terms:

3.1.2. Negotiations and conclusion of international agreements

Two key features of the process of negotiation and conclusion of international agreements remain unchanged with the ToL (Art. 207 (3)). The Council continues to authorize the Commission to open negotiations on the basis of Commission recommendations. The Commission represents the Union as ‘the negotiator’ while the Council is ultimately “responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules” (Art. 207 (3)). Also, the Commission conducts negotiation in consultation with the Trade Policy Committee (previously called ‘Article 133-Committee’) and regularly reports to it on the progress made at the negotiation table.

²³ **Article IV: Increasing Participation of Developing Countries**

1. The increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments, by different Members pursuant to Parts III and IV of this Agreement, relating to:

- (a) the strengthening of their domestic services capacity and its efficiency and competitiveness, *inter alia* through access to technology on a commercial basis;**
- (b) the improvement of their access to distribution channels and information networks; and**
- (c) the liberalization of market access in sectors and modes of supply of export interest to them.**

2. Developed country Members, and to the extent possible other Members, shall establish contact points within two years from the date of entry into force of the WTO Agreement to facilitate the access of developing country Members’ service suppliers to information, related to their respective markets, concerning:

- (a) commercial and technical aspects of the supply of services;**
- (b) registration, recognition and obtaining of professional qualifications; and**
- (c) the availability of services technology.**

3. Special priority shall be given to the least-developed country Members in the implementation of paragraphs 1 and 2. Particular account shall be taken of the serious difficulty of the least-developed countries in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs.

²⁴ [Discussion Paper No. 98 June 2010 Trade relevant provisions in the Treaty of Lisbon :Implications for Economic Partnership Agreements](http://www.ecdpm.org/dp98) www.ecdpm.org/dp98

However, there are also important changes in the procedure: From now on the **Council is acting by qualified majority** (Art. 207 (4) and Art. 218) when adopting both, the negotiating directives for the Commission and the final agreement. **However, there are some exceptions: following pressures from several member states⁴, some provisions have been included in the text to preserve, under specific circumstances, the rule of unanimity in EU decision-making on those sensitive sectors (such as health, education, audiovisual and cultural services) on which the EU stance is overall more likely to be defensive.** Article 207(4) stipulates that unanimity should prevail within the Council:

“(a) in the field of trade in cultural and audiovisual services, where agreements risk prejudicing the Union’s cultural and linguistic diversity;
(b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them”.

Are policy outcomes from this perspective consistent with the letter and spirit of GATS Article IV?

We now move to the Dispute Settlement provisions in the EPA and their potential impact on the Revised Treaty provisions. Given that this presentation is really a ‘work in progress,’ Professor Girvan’s intriguing questions on this issue will form the main areas presented, rather than a ‘hardcore’ legal discursus.²⁵

Dispute Settlement and Governance²⁶

The RTC establishes a number of modes of Dispute Settlement for the CSME, including the use of Good Offices, Mediation, Consultations, Conciliation, Arbitration

²⁵ Some readers may regard this as a ‘cop-out’ given the author’s relationship to regional efforts in this area, *vide*, Sheldon A. McDonald “**THE CARIBBEAN COURT OF JUSTICE: ENHANCING THE LAW OF INTERNATIONAL ORGANIZATIONS**” in 27 **Fordham International Law Journal** [2004], pp 930-1016, and **REGIONAL INTEGRATION AND ITS POSSIBLE IMPACT ON DOMESTIC LAW** Sheldon A. McDonald, (Presentation for the Inaugural Conference of the Caribbean Association of Judicial Officers (CAJO) –June 25 to 27th, 2009, Hyatt Hotel, Port-of-Spain, Trinidad and Tobago.) The author is committed to the refining of this paper.

²⁶ Girvan, Note 10 *supra*

and Adjudication. Parties are encouraged to utilise arbitration and other alternative modes before resorting to adjudication. They are obliged, first, to engage in exchange views, they may agree to Good Offices and/or Mediation; consultations are obligatory where one Member State requests it. Conciliation is by mutual agreement with non-binding conclusions; Arbitration is by mutual agreement with decisions that are final and binding. Adjudication, the last resort, is by the Caribbean Court of Justice which has 'compulsory and exclusive jurisdiction' to hear and determine disputes, and to deliver advisory opinions, on the interpretation and application of the Treaty. Parties are required to comply 'promptly' with the judgments of the Court. But notably absent is enforcement machinery for Arbitration and Adjudication; and no time-frame is given for compliance. In tone and content, the RTC provisions envisage the amicable resolution of disputes and voluntary compliance with decisions of Dispute Settlement bodies...

In contrast, the EPA sets out mechanisms that are time-bound, follow an established sequence, and are buttressed by strong enforcement machinery. Consultation is obligatory in the first instance but if this does not produce a satisfactory result a Complaining Party may proceed directly to arbitration. Time-lines are laid down for every step of the arbitration process and for compliance with arbitration rulings. In the event of non-compliance, the Party Complained Against is obliged to offer compensation. Failing agreement on this, the Complaining Party is entitled 'to adopt appropriate measures' at its own discretion, except for

some caveats of a general nature; and these measures may continue as long as there is non-compliance or until the dispute is settled. Trade sanctions may be employed except for disputes over the Environment and Social Aspects.

All parts of the EPA are covered by these provisions, subject to certain caveats on relation with the WTO agreement.

The possibility must be considered of an overlapping of jurisdiction in Dispute Settlement. The EPA explicitly addresses the issue of overlap with the WTO machinery (Article 222), but it is silent on this issue as it relates to the RTC. Under EPAs Regional Preference Cariforum states must extend to each other the same treatment that they extend to the EU. Hence EPA commitments in respect of market access in goods, services and investment; and trade related issues; are to be simultaneously applied among all CSME participating states. CSME obligations, either established or contemplated, embrace all the above subject areas. Could a CSME-related dispute between two Caricom states be brought before the EPA Disputes Settlement machinery? Could an EPA implementation obligation conflict with a CSME implementation obligation, or vice versa; in either case, which machinery will apply? Is this consistent with the CCJ's 'exclusive jurisdiction' over disputes arising out of the RTC? These questions point to areas of ambiguity in the consistency of the EPA with the CSME and the possible undermining of the juridical integrity of the CSME arrangement.

Governance

Caricom Governance is depicted in Figure 1. At the apex is the Conference of Heads of Government ('the Conference') and immediately beneath is the Community Council of Ministers ('the Community Council'). Four Ministerial Councils are responsible for the main areas of the CSME and functional cooperation; with three specialised committees beneath them; all serviced by the Caricom Secretariat. A notable feature is the absence of supranationality. Decisions of the Conference are 'binding'; but decisions of all Caricom organs 'shall be subject to the relevant constitutional procedures of the Member States before creating legally binding rights and obligations for nationals of such States.' Thus, Caricom defines itself as a 'Community of Sovereign States'. Caricom leaders have not reached consensus on a reform of governance that would provide for automatic, legally binding effect of decisions of the Conference within member states and for the appointment of Commissioners to facilitate implementation of decisions.

The EPA establishes a structure of governance (Figure 2) with legally binding powers and detailed monitoring and enforcement machinery. At the apex is the Joint Cariforum-EC Council, a ministerial body with the power to take binding decisions on all matters related to the Agreement which decisions are obliged to take all measures necessary to implement them (Article 228)'. No limit is placed on the number of European representatives on the Joint Council, but in matters in which Signatory Cariforum States agree to act collectively, they are limited to one representative

Directly beneath the Joint Council, is the Trade and

Development Committee, a body composed of senior officials with responsibility to 'supervise and be responsible for the implementation and application' and 'oversee the further elaboration of the provisions of the Agreement and evaluate the results obtained'. The Committee may have powers delegated to it from the Joint Council. It has wide-ranging responsibilities in all aspects of the EPA, with fifty-four separate references in the text. In effect, it disposes of quasi-legal powers over permissible actions, interpretations and derogations by the Parties that arise in the course of implementation. Decisions of the Joint Council and Trade and Development Committee are by consensus, but the context will be one of asymmetrical power, heightened by the structure of the Agreement as a set of bilateral obligations between the Signatory Cariforum states and the European Commission. Also important is the Special Committee on Trade Facilitation and Customs Administration, which has specified responsibilities in the corresponding chapter of the EPA. The Consultative Committee and the Joint Parliamentary Committee have consultative and deliberative functions, with the ability only to make recommendations to the Joint Council that have no binding effect. Hence, they produce the appearance of participative and democratic governance of the EPA without the substance.

It appears that EPA governance will have a degree of effective supranational authority that is absent from Caricom governance. This is due to the wide scope of the subject areas covered by the agreement; of the binding nature of decisions; the imbalance of bargaining power; and strict enforcement machinery supported by economic sanctions.

