

THE EPA: FACT VS. FICTION - Issue 3

Fiction: The EPA commitment to 'national treatment' requires CARIFORUM States to remove domestic subsidies.

Fact: The obligation to apply national treatment does not require CARIFORUM States to remove domestic subsidies. More precisely, the EPA expressly stipulates that the obligation to accord national treatment does not affect the ability of the CARIFORUM States to effect the payment of subsidies exclusively to national producers.

National treatment is a principle of non-discrimination that governs the competitive relationship between a domestically produced good and a like import within the domestic market. Commitment to this principle obligates Parties to accord to each other's products, treatment no less favorable than that which they accord to their respective domestically produced goods.. National Treatment therefore prevents discrimination between imported products and the like domestic products with respect to all laws, regulations, and requirements that affect their internal sale, distribution or use.

Furthermore, the principle commits Parties not to apply charges such as license fees, or domestic taxes such as VAT, on imported products in excess of those which they apply to the like domestic products. In addition, such charges and taxes may not otherwise be applied in such a manner as to afford the like domestic product protection from competition from the like imported product. Such provisions on non-discrimination between domestic products and like imports are not limited to the EPA but appear, for example, in Article III of the General Agreement on Tariffs and Trade (GATT) 1994 and Article 90 of the Treaty of Chaguaramas.

Whereas unless its scope is circumscribed, obligation to accord national treatment might normally prevent governments from offering domestic support to national producers and national production within any given sector, the articulation of this obligation in the EPA **does not** have this effect. This arises from Article 27 (4) of the agreement which is in the following terms:

The provisions of this Article [dealing with national treatment obligations] shall not prevent the payment of subsidies exclusively to national producers, including payments to national producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

However, it must be noted that while the EPA does not affect the rights of the parties to grant subsidies exclusively to domestic producers, it does not insulate a Party or CARIFORUM State which grants such a subsidy from the possibility that a countervailing duty might be imposed on imports of its products into another Party to redress or forestall injury to that Party's domestic production of "like" products. Therefore, for example, if subsidized domestic products from CARIFORUM when exported to the EC enter at lower prices because of the effect of the subsidy and as a result, cause or threaten injury to European industries producing like products, then countervailing duties may be applied to these CARIFORUM products.

Fiction: The EPA has usurped the rights of CARIFORUM States to determine the direction and pace of Caribbean Integration.

Fact: Regional integration initiatives are understood by CARIFORUM States as important to enabling

their effective participation in the global environment. This is well illustrated, for example, in the Preamble of the Treaty of Chaguaramas which acknowledges the conviction of CARICOM Member States that the establishment of a fully integrated and liberalized internal market is necessary to “achieve sustained economic development based on international competitiveness, coordinated economic and foreign policies, functional cooperation and enhanced trade and economic relations with third States” including the European Community (EC).

The utility of such integration initiatives is reaffirmed in the articulation of a Fundamental Principle of the Partnership between Europe and the ACP States under Article 2 of the Cotonou Agreement. The EPA, which is based on the fundamental principles of the Cotonou, acknowledges the mutual understanding between Europe and the CARIFORUM States of the importance of regional integration in furthering the objectives of their Partnership and in achieving the objectives of the EPA.

The EPA expressly recognizes and gives deference to the sovereign rights of CARIFORUM states to determine the direction of regional integration initiatives including the integration initiatives of the Organisation of Eastern Caribbean States (OECS), Free Trade Agreement between the Dominican Republic (DR) and CARICOM (CARICOM –DR FTA) and the CARICOM Single Market and Economy (CSME).

Though CARIFORUM States would have, amongst themselves, pledged commitments to facilitate these various integration initiatives, in some cases the implementation of these commitments has not been completed. Lack of progress attained in the implementation does not, in principle, forgo the obligation to the pledged commitments. The provisions in the EPA, which are designed to bolster regional integration, are based upon the levels of ambition of regional integration initiatives already outlined in the Revised Treaty of Chaguaramas, the Treaty of Basseterre and the FTA between CARICOM and the DR.

Fiction: The EPA creates a supranational governance structure.

Fact: Supra-nationality, understood conceptually as governance structures that transcend established borders or spheres of influence held by Nation States, is not established through the EPA.

The EPA contains provisions which establish certain institutional bodies designed to play key roles in (a) supervising the implementation of the Agreement, (b) facilitating dialogue and cooperation between the Parties, and (c) enabling the open participation of CARIFORUM and EC stakeholders in the process of implementing the EPA. These bodies which are therefore inherently crucial to ensuring that the development dimension of the EPA is fulfilled are: The **Joint CARIFORUM-EC Council**, the **CARIFORUM-EC Trade and Development Committee**, the **CARIFORUM-EC Parliamentary Committee**, and the **CARIFORUM-EC Consultative Committee**.

It is a regular feature of international agreements that joint institutional frameworks are established to facilitate the fulfillment of the contractual obligations of the Contracting States. The establishment of these institutional frameworks is in no way inconsistent with the doctrine of the sovereignty of states in international law, nor in the regular course of events, do they constitute true supra-national entities.

The member states of CARICOM themselves, have long embraced the existence of these institutions in their international agreements. The Cotonou Agreement, for example, by establishing the Council of Ministers, the Committee of Ambassadors and the Joint Parliamentary Assembly has an institutional framework similar to that of the EPA so as to facilitate the implementation of the partnership between the EC and its Member States on the one hand and the grouping of African, Caribbean and Pacific States

on the other hand. It is also to be observed that the Cotonou established Council of Ministers, the highest institutional body established in that agreement, like the EPA Joint CARIFORUM-EC Council, has the power to take decisions concerning that agreement, which are binding on the Parties. The CARICOM countries have also embraced institutional arrangements with decision making powers in bilateral trade agreements such as the CARICOM-Costa Rica Free Trade Agreement and the CARICOM-DR Free Trade Agreement.

The establishment of the EPA institutional framework was squarely in keeping with the Lomé and Cotonou acquis that the implementation of the Partnership between Europe and the ACP countries should in principle be based on open participation of a range of stakeholders, dialogue between Europe and the ACP States, and the ACP ownership of the development strategies implemented under the Partnership. Further, the establishment of this framework in the EPA was not only consistent with the experiences of the CARIFORUM States in embracing such arrangements in international agreements, but was also essential to ensuring that the core objectives of the agreement are fulfilled. In this regard, the point must be emphasized that the EPA is not intended to be a static agreement but one intended to respond to the evolving developmental goals of the CARIFORUM States. In light of this, the vesting of the power to take decisions binding on the Parties in the Joint CARIFORUM-EC Council is vital to ensuring that proper adjustments can be made to the agreement in the area of development cooperation throughout the life of the agreement without the need for the parties to engage in perpetual negotiations on this issue.

The ability of the CARIFORUM States to effect their own decision making in exercise of their rights of sovereignty, has not been transcended by the inclusion of the institutional provisions. Rather the Joint Council's structure, rules and procedures, for example, reflect a delegation of authority to a Ministerial representative of the State rather than a ceding of the sovereign rights of States to a supranational body.

The Joint Council may only adopt decisions and recommendations by agreement of the Parties. Ultimately therefore, the decisions of the Joint Council which are to be considered binding on the Parties are those which the Parties themselves would have agreed upon through their Ministerial representatives. In effect therefore, the CARIFORUM States will retain a key role in EPA governance. This is an element that does not obtain in true supra-national institutions such as the European Commission which in accordance with the powers vested in it by the Treaty of Rome 1957 and subsequent treaties dealing with the integration of the European Union, has the power to take decisions binding on the twenty seven EU member states, even though such states have not been a part of the decision making process.

It is also useful to note that the EPA institutional structure accords with the principle of transparency in governance. This is evident for example in the relationship between the CARIFORUM-EC Parliamentary Committee and the Joint Council. The established CARIFORUM-EC Parliamentary Committee, composed of members from the legislatures of CARIFORUM States and the European Parliament, is free to meet and exchange views on matters pertaining to EPA implementation as well as the decisions of the Joint Council. Furthermore the Joint Council is mandated to inform the Committee of their decisions and to provide any information as so requested by the Committee.

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