

CRNM BRIEF ON LEGAL AND INSTITUTIONAL ISSUES IN THE EPA

A. PARTIES TO THE AGREEMENT

The EPA is a region to region agreement and as such for the specific purposes of the Agreement, there are only two Parties to it, namely, the CARIFORUM States (collectively) on the one hand and the European Community and its member states on the other hand. Each CARIFORUM State however is a recognized as a contracting Party to the Agreement and this means that each such state is actually recognized as a “party” to the Agreement in international law, with the result that each such state is obliged to comply with the obligations imposed undertaken by it and is entitled to the due performance of the obligations undertaken by other states.

In keeping with the notion of a region to region agreement, in areas where the capacity to accept collective obligations currently exists or has been contemplated, the CARIFORUM States have agreed to accept collective obligations. In areas however, where there is no existing regional competence and none such is contemplated or feasible, the Agreement provides for the CARIFORUM states to be individually responsible for discharging the obligations imposed upon them.

A further consequence of the region to region nature of the Agreement, is that dispute settlement proceedings are also region to region in nature. In other words, such proceedings have to be between the two Parties and not between the EC Party on the one hand and an individual CARIFORUM State on the other for example. This notwithstanding, the Agreement clearly provides that in cases where one or more CARIFOURM States have failed to abide by their obligation under the Agreement with the consequence that through the dispute settlement process, the EC has earned the right to impose sanctions, such sanctions will only be imposed on the particular CARIFORUM State or States whose measures have been found to be in breach of the Agreement.

B. DISPUTE SETTLEMENT

As in the WTO dispute settlement system, the dispute settlement mechanism of EPA employs a consultation and dispute settlement panel type procedure. Upon a dispute arising between the Parties, they are obliged to first enter into consultation with a view to resolving the contentious issues between them. Where the consultations fail to resolve the issues in dispute, the Parties may then request the establishment of an arbitration panel to resolve the dispute. Prior to requesting the establishment of a dispute settlement panel, and after the consultations have been completed, the Parties as a further step in aid of finding an amicable resolution to their dispute, can refer the matter to a mediator.

It has already been noted that where the EC Party is the successful party to dispute settlement proceedings and has earned the right to impose sanctions, it must, notwithstanding the region to region nature of the dispute settlement process,

specifically impose those sanctions only on the CARIFOPRUM State or States whose measures have been found to be in breach of the Agreement. There is asymmetry inherent in the dispute settlement provisions as evidenced by Article 214 (3) which obliges the EC to exercise due restraint in seeking trade related compensation from the CAROIFORUM States or in seeking to impose appropriate measures against a CARIFORUM state who has not complied with a determination of the Arbitration panel that its measures must be brought into conformity with the EPA provisions. There is no corresponding obligation on the CARIFORUM States.

C. INSTITUTIONS

Part V of the CARIFORUM-EC EPA establishes the following institutions each of which have been vested with specific responsibilities essential to ensuring that the objectives of the partnership are met.

- (i) The Joint CARIFORUM - EC Council
- (ii) The CARIFORUM-EC Trade and Development Committee
- (iii) The CARIFORUM-EC Parliamentary Committee
- (iv) The CARIFORUM-EC Consultative Committee

The Joint CARIFORUM EC Council

This is the highest institution created by the EPA and will meet at Ministerial level at regular intervals not exceeding two year periods. This institution is charged with the responsibility of supervising the implementation of the EPA and is vested with normative powers in that it may take decisions concerning any aspect of the agreement which will be binding on the Parties.

The CARIFORUM –EC Trade and Development Committee

This is the second highest institutional body of the EPA and is charged with the responsibility of assisting the Joint CARIFORUM-EC Council in supervising the implementation of the Agreement. In practical terms, this body will be the “work horse” of the trade partnership, having been vested with specific responsibilities vital to ensuring that all matters affecting the partnership are resolved in an expeditious manner and that the development dimension of the Agreement is fulfilled. The Trade and Development Committee has therefore been vested with specific trade related and development related functions. Examples of these responsibilities are:

In the area of trade:

- (a) to supervise and be responsible for the implementation and proper application of the provisions of the Agreement and to discuss and recommend cooperation priorities
- (b) to undertake action to avoid disputes and to resolve disputes that may arise regarding the interpretation or application of the Agreement,

(c) to discuss and undertake actions that may facilitate trade, investment and business opportunities between the Parties,

and, in the area of development:

(a) to monitor the implementation of the cooperation provisions laid down in the Agreement and to coordinate such action with third party donors,

(b) to make recommendations on trade-related cooperation between the Parties;

(c) to keep under periodic review the cooperation priorities set out in the Agreement, and to make recommendations on the inclusion of new priorities, as appropriate.

The CARIFORUM –EC Parliamentary Committee

This Committee is to be comprised of representatives of the European Parliament on the one hand and of the legislatures of the CARIFORUM States on the other hand and will provide a forum for these persons to meet and exchange views on the process of implementation of the EPA and any other matter relative to the agreement. Such a forum was deemed necessary given the emphasis of the EPA on promoting the sustainable development of the CARIFORUM States and in furthering the traditions of good governance of each of the Contracting parties of the Agreement.

The CARIFORUM-EC Consultative Committee

This Committee is designed to be a forum for civil society to become engaged in the EPA implementation process. Its composition will be determined upon by the Joint CARIFORUM-EC Council in a manner that will ensure broad representation of interests. This body is also crucial to ensuring that appropriate information and ideas emerge that will contribute to the fulfillment of the development dimension of the EPA.

The concern has been expressed that the EPA institutions conflict with the powers and autonomy of the organs created by the Revised Treaty of Chaguaramas to govern the Caribbean Community (CARICOM).

Article 10 of the Revised Treaty establishes these Organs of the Community as being the following:

- (i) The Conference of Heads of Governments
- (ii) The Community Council of Ministers
- (iii) The Council for Finance and Planning
- (iv) The Council for Trade and Economic Development
- (v) The Council for Foreign and Community Relations and,
- (vi) The Council for Human and Social Development

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 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:

Article 227

Joint CARIFORUM-EC Council

1. A Joint CARIFORUM-EC Council is hereby established, **which shall supervise the implementation of this Agreement...**
2. Without prejudice to the functions of the Council of Ministers as defined in Article 15 of the Cotonou Agreement, the Joint CARIFORUM-EC Council **shall generally be responsible for the operation and implementation of this Agreement and shall monitor the fulfilment of its objectives.** It shall also **examine any major issue arising within the framework of this Agreement,** as well as any other bilateral, multilateral or international question of common interest and affecting trade between the Parties.
3. The Joint CARIFORUM-EC Council shall also examine proposals and recommendations from the Parties for **the review of this Agreement.**

Article 230

CARIFORUM-EC Trade and Development Committee

3. *The CARIFORUM-EC Trade and Development Committee shall have, in particular, the following functions:*

(a) *In the area of trade:*

(i) *to supervise and be responsible for the implementation and proper application of the provisions of the Agreement and to discuss and recommend cooperation priorities in this regard; ...*

(b) *In the area of development:*

(i) *to assist the Joint CARIFORUM-EC Council in the performance of its functions regarding development cooperation related matters falling under this Agreement...*

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

D. RELATIONSHIP BETWEEN THE EPA AND THE COTONOU AGREEMENT AND THE WTO AGREEMENTS

The EPA has been designed to replace the now expired transitional trade regime of the Cotonou Agreement and does not therefore conflict with the continuing provisions of that Agreement. Rather, the EPA reinforces some of the core provisions of the Cotonou Agreement such as Articles 2 and 9 dealing with the fundamental principles and the essential and fundamental elements of that Agreement respectively. By virtue of its many provisions on development cooperation, the EPA also complements the developmental aspects of the Cotonou Agreement. This notwithstanding, as a safeguard measure, Article 241 of the Agreement provides that with the exception of the development cooperation provisions of the Cotonou Agreement, in the event of a conflict between the provisions of the EPA and those of the Cotonou agreement, the provisions of the EPA will prevail.

Article 36 (1) of the Cotonou Agreement mandates that EPAs must take the form of WTO compatible arrangements. This primarily meant that the EPAs should meet the criteria established by Article XXIV of the General Agreement on Tariffs and Trade (GATT) 1994, a WTO compatible Free Trade Agreement but arguably also, that as far as possible, EPA provisions should not conflict with WTO obligations. In compliance with this mandate, the EPA has been designed to meet the core requirements for compatibility with GATT Article XXIV, one of which is the liberalization of substantially all the trade

between the Parties within the time allowed to do so by the Understanding on the Interpretation of GATT Article XXIV.

The Parties have also taken every precaution to ensure that the EPA's negotiated commitments do not conflict with the provisions of the WTO Agreements and Article 242 specifically provides that nothing in the Agreement obliges the Parties or any of the CARIFORUM State to act in a manner inconsistent with their WTO obligations. To ensure further coherence between the EPA and the existing or future WTO agreements and with a view to defending the new arrangements in the WTO, the Parties are obliged pursuant to Article 6 to endeavour to cooperate in all international fora where issues germane to the Partnership are discussed.