

**REVIEW OF  
THE ROSE HALL DECLARATION PROVISIONS  
ON REGIONAL GOVERNANCE**

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**CARICOM Governance Reform**

The directions indicated in Section A of the Rose Hall Declaration (July 5, 2003) are in some respects ("mature regionalism," "automatic resource transfers") an advance on the issue of regional governance. Those aspects move in the direction that the Community should have taken in 1989 when the CARICOM Single Market and Economy (CSME) was inaugurated, since the latter, taken seriously, could not have proceeded, and cannot now, under the intergovernmental method.

However, having lost fourteen years, some care should be taken in plunging headlong, and without democratic consultation, into a European Union type system which, despite its impressive successes, has encountered serious frictions and other shortcomings (apart from being enormously costly). The issues are numerous and complex, and thus it would be strongly advisable that some time should be spent on the study of them, including understanding the EU experience (perhaps with EU technical assistance), and on wider and more open consultation, to better appreciate what it would be desirable and feasible to adopt and to avoid in the Caribbean context.

The desire to move towards a more mature regionalism exposes a basic contradiction that gives rise to some skepticism about how realistic that aspiration is. In Europe, the advance towards supranationalism was propelled largely by transnational interests (transactors). In most EU countries, 60 to 90 percent of export transactions (goods and services) are derived from intra-regional commerce. It is even higher in such sectors as telecommunications, air transport, tourism, technology, and currency transactions.

Transnational interests, therefore, had much to gain from the deepening of integration, and much to lose from its failure to advance. The opportunity cost of "non-integration" was very high for both the private sector and governments.

In CARICOM this is not the case. A transnational constituency, and thus a source of pressure, for the CSME, whether of business or civil interests, is almost wholly absent. Intra-regional exports of goods and services are a tiny fraction of the Member States' total export transactions. In Jamaica, nearly one-half of the regional market, it is only 1.8 percent. In Barbados, 9.1 percent; and in Trinidad and Tobago, 7.4 percent (excluding mineral fuel exports that are not dependent on the Common Market arrangements). In such sectors as telecommunications, air and maritime transport, tourism, information technology, and currency transactions the market is even thinner.

Transactors therefore have little or no interest in organizing themselves as a pressure group, as has been the situation in Europe. It is worth noting here that in Europe, while citizens' support was of positive value in promoting integration, it has been far less influential than the role of transnational interests. The CARICOM nation-States thus find themselves in the ambivalent situation of being, at one and the same time, the guardians of national sovereignty and the (unwilling) promoters of supranationalism.

### **European Union Governance Reform: Lessons for Change**

The EU Commission's White Paper on European Governance (2001) is a salutary caution on the potential dangers that await CARICOM. The following lessons for change, selected from that Paper, are noteworthy:

- The Union must renew the Community method by following a less top-down approach and implementing its policy tools more effectively with non-legislative instruments.
- No matter how EU policy is prepared and adapted, the way this is done must be more open and easier to follow and understand.

- To improve the quality of its policies, the Union must first assess whether action is needed and, if it is, whether it should be at the Union level. Where Union action is required, it should consider the combination of different policy tools.
- When legislating, the Union needs to find ways of speeding up the legislative process. It must find the right mix between imposing a uniform approach when and where it is needed and allowing greater flexibility in the way that rules are implemented on the ground.
- In respect of the above, the Commission's undertakings include among others, promoting greater use of different policy tools (regulations, "framework directives," co-regulatory mechanisms); simplifying further existing EU law and encouraging Member States to simplify the national rules which give effect to EU provisions;
- More effective enforcement of Community law, this being necessary not only for the sake of efficiency of the internal market, but also to strengthen the credibility of the Union and its institutions.
- The EU institutions and Member States must work together to set out an overall policy strategy (ensuring coherence and identifying long-term objectives). They should refocus the Union's policies and adapt the way they work.

### **CARICOM as a Community of Sovereign States**

It is rare, perhaps unknown, for States forming a Community to begin by affirming their national sovereignty, and that regional integration will proceed in that political and juridical context. Such a "reaffirmation" is made in paragraph A.1. of the Rosehall Declaration. To begin with, the "reaffirmation" is inadmissible since it is actually not a principle originally affirmed in the Treaty of Chaguaramas. The Treaty states simply in Article 2 that:

"The Community is hereby established and recognized in the Protocol hereto as successor to the Caribbean Community and Common Market."

Article 3.1 proceeds to list the Members of the Community, while Article 3.2 states:

"Membership of the Community shall be open to any other State or Territory of the Caribbean Region that is, in the opinion of the Conference, able and willing to exercise the rights and assume the obligations of membership."

The "reaffirmation" proclaimed in the Rosehall Declaration is a regrettable step backward in Caribbean integration and an incomprehensive statement in the context of an edit intended to create a more mature regional governance.

The Treaty establishing the European Community also did not proclaim any principle of the sovereignty of the Member States, and that that principle is the political and juridical context of their integration. The explanation, at least in part, of the absence of such proclamations in integration treaties is that pure national sovereignty is *de facto* not the unique political and juridical context in which the integration objectives of the cooperating States proceed.

Other contexts may include the deliberate exercise of sovereignty collectively when so desired by the Member States for specific purposes; and the incremental acquisition of supranational qualities through a variety of means, administrative, quasi-legal, legal as a result of decisions by the Community Court of Justice, and procedural as a consequence of the work of international organizations and international conferences. Indeed, it is now generally accepted that integration among States is better represented as a continuum along a path of intergovernmentalism and supranationalism. Progression along the path is not necessarily and always by means of premeditated acts suppressing national sovereignty.

## **Establishment of a CARICOM Commission**

Numerous and complex issues arise with regard to the proposal made in Paragraph 2 to establish a CARICOM Commission, if this is truly intended to serve the purposes announced in the Declaration. There would need to be agreement on whether the Community, with the Conference of Heads of Government at its apex, has "powers to take decisions," "powers to legislate," "powers to implement" in respect of all the provisions included in the Revised Treaty of Chaguaramas. If not, which powers should it have, in respect of which policy domains, and what should be the applicable voting modalities (unanimity, majority, qualified majority, weighted qualified majority).

It should be recalled that the Treaty of Chaguaramas was and still is based on "the intergovernmental mode of cooperation," and thus it is as yet undetermined which powers Member States would be prepared to transfer to the Conference, and in respect of which domains, when it acts in a "Community mode," (and whether the competence so transferred is exclusive to the Community). For example, Article 12(2) of the Treaty states simply that "the Conference shall determine and provide policy direction for the Community," while Article 12(7) states that "The Conference may issue policy directives of a general or special character to other Organs and Bodies of the Community concerning the policies to be pursued for the achievement of the objectives of the Community and effect shall be given to such directives." However, it is anticipated in Article 12(5) that "Subject to the relevant provisions of the Treaty, the Conference shall exercise such powers as may be conferred on it by or under any instrument elaborated by or under the auspices of the Community."

The authority conferred on the Community council of Ministers (responsible for Community Affairs) similarly stops short of powers to make and implement decisions. Article 2 states that:

"The Community 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 areas of economic integration, functional cooperation and external relations."

Article 3 specifies that:

"... the Community Council shall ... have responsibility for promoting and monitoring the implementation of Community decisions in Member States."

While Article 4(c) authorizes the Community Council to:

"establish, subject to the provisions of Article 26 (on the Consultative Process), a system of regional and national consultations in order to enhance the decision-making and implementation processes of the Community."

Further, Article 4(a) describes the Council's authority as to:

"promote, enhance, monitor and evaluate regional and technical assistance service."

It is thus clear enough that the Community, in its Community mode, whether at the level of the Conference or of the Council, does not have decision-making/legislative and implementation powers.

By contrast, the Consolidated Version of the Treaty Establishing the European Community States in Article 202 states that "... the Council shall, in accordance with the provisions of the Treaty:

- have powers to take decisions;
- confer on the Commission, in acts which the Council adopts, powers for the implementation of the rules which the Council lays down...."

The EC Treaty is normally explicit on the powers of the Council in respect of specific policy domains, (though these have evolved under various influences, administrative and legal, including, in particular, decisions of the European Court); the exclusivity of the competence so conferred; the instrument(s) or combination thereof by which it shall act; and the voting modality to be used. The requirement to consult with specified bodies is also usually laid down. Competence is described as "exclusive" where external responsibilities are exercised entirely by the Community (e.g. the common agricultural policy) and "mixed" where they are shared with the Member States (e.g. transport policy). The distinction has been defined in European Court of Justice case law and is based on the principle of implicit responsibility, whereby external responsibility derives from the existence of internal responsibility. The Treaty itself confers explicit responsibility in only two cases: commercial policy and association requirements.

The following are a few examples of how different domains have been treated in the EC Treaty:

"The Council shall, on a proposal from the Commission (on the common agricultural policy) and after consulting the European Parliament, acting by a qualified majority, make regulations, issue directives, or take decisions, ...."

"The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market."

"Where (commercial) agreements which one or more States or international organizations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations."

"The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it."

Further issues arise in respect of the expediency of Community level action, and the nature of the legislative instruments to be used, in terms of their graduated "directly binding force of law." For example, in respect of the former, the EU has been increasingly applying the principles of "subsidiarity" and "proportionality." Subsidiarity requires that action be justified at the Community level, *vis-à-vis* the national, regional and local levels. While proportionality requires that action by the Community not go beyond what is necessary to achieve the objectives of the Treaty. In respect of the latter, the graduated range of instruments, in terms of their legally binding power, include Regulations, Directives, Framework Directives, Decisions, Recommendations and Opinions. The Final Act and Declaration of the Single European Act (1986) went further to state (re article 100a of the EC Treaty) that "the Commission shall give precedence to the use of the instrument of a directive if harmonization involves the amendment of legislative provisions in one or more Member States." (Note however, that, in respect of the area of the harmonization of fiscal legislation, the Single European Act made an amendment to the EC Treaty (Article 99) to the effect that "the Council shall ... adopt provisions for the harmonization of (fiscal) legislation ... to the extent that such harmonization is necessary to ensure the establishment and functioning of the internal market within the time-limit laid down...")

The formulations in Paragraph 3 of the Declaration—"facilitate the deepening of regional integration...", "exercise full-time executive responsibility for further implementation" are operationally meaningless. They are a mandate for responsibility without power to execute. A Commission can only have implementation authority if this is delegated to it by the Conference, and the Conference itself is endowed with the corresponding powers by the Community. The Commission's powers would need to be defined in respect of

specific policy domains. It thus cannot be applied *carte blanche*, as Paragraph 4 envisages, to the CARICOM Single Market and Economy, which embraces virtually everything in regional integration, from market access to sectoral development to macroeconomic policies and monetary integration.

The establishment of a Commission also raises the question of the role of the existing political Organs of the Community, such as COTED, COFAP and COFCOR. Presumably, the Commission would be a politically appointed body of "independent" officials. It would thus not be a political body in its own right. The formulation in Paragraph 5, therefore, that the "Commission will be accountable to the Conference of Heads of Government and will be responsive to the authority of other Organs of the Community within their areas of competence" is a recipe for continuing conflict between the Commission and the responsible political Organs of the Community, unless the powers and responsibilities of these bodies were to be clearly demarcated. Important amendments to the Revised Treaty of Chaguaramas would be necessary.

In the EU, the Commission presents its proposals to the Council which is composed of Ministers of all the Member-States responsible for the area of activity on the agenda (e.g. trade, finance, agriculture, industry, transport ...). The Council, by virtue of the powers conferred on it by the Community, would make decisions on the proposal before it and on specific instruments by which it is to be implemented (e.g. Regulations, Directives, etc.). Before presenting its proposals to the Council, the Commission would have engaged in an extensive process of mandatory and other consultations. It would have consulted with working groups of the appropriate national government officials. The European Parliament as well as the European Economic and Social Committee would have been consulted on most proposals. The Commission itself would have had to come to a decision of its own on the proposal in question, and voted thereon under the modality applicable to the policy domain concerned. By the time proposals are put on the agenda of the Council, there would have been a high state of readiness for decision-making (though the Council may and has revised or declined proposals).

The Council is served by its own General Secretariat and Secretary-General (as distinct from the Directorates-General serving the Commission). In the EU, the Committee of Permanent Representatives (COREPER) also plays a preparatory/intermediating role between the Commission and the Council. It is said to occupy "a pivotal position in the Community decision-making system, in which it is at one and the same time a forum for dialogue (among the Permanent Representatives and between them and their respective national capitals) and a body which exercises political control..." In practice, based on the Commission's proposals, decisions are prepared by COREPER, assisted by working parties of national government officials.

The political implications and cost of a Commission system also needs to be borne in mind. Given its proposed responsibility for the implementation of CARICOM decisions in diverse policy domains, and indeed also for making policy proposals, all States necessarily would want to, and should be, represented in its composition. This is an expensive proposition. In the case of the European Commission, each Member State has one representative and the larger States two. It has a President and two Vice Presidents. It is appointed for a five-year term by the Council, acting by qualified majority, in agreement with Member States—and is subject to a vote of appointment by the European Parliament, to which it is answerable. Each of the twenty Commissioners has responsibility for a specific policy domain (assisted by Directorates-General, i.e. Secretariat Divisions). These domains generally correspond to the structure of the EC Treaty. They include, for example, Transport and Energy, Health, Trade, Economic and Monetary Affairs, Agriculture, Taxation and Customs Union, External Relations, Justice and Home Affairs, Research.

The proposed new system also raises difficult issues with respect to participation in the work of international organizations. The European Community, having been conferred with jurisdiction over certain policy domains, found that it was accorded only "observer" status with international organizations in which that jurisdiction was to be exercised. The basic problem was that traditional international law can accommodate only nation States, or groupings of nation States. According to one source: "The key issue for the

Commission has been to gain for the Community a separate 'right of access to, and participation in, the work of the deliberative organs of international organizations and conferences.' It was not sufficient for the Member-States to agree to a common position among themselves and then have one of them state it within an international organization. The Community wanted to be recognized as a distinct entity with an international personality, and the acquisition of a separate status within international organizations symbolized that recognition."

Over the years, the Community has been able to acquire that status in most international organizations and conferences, including at the WTO, as a matter of practice on an *ad hoc* case-by-case basis, rather than through the formal general recognition of precedents in international case law. It has been described as a "hard fought battle," and indeed up to the present day the Community still does not have status with the Security Council, the Trusteeship Council, and the International Court of Justice, and is not allowed to address the UN Plenary Assembly.

A further complicating issue is that the Community does not have "exclusive competence," in some policy domains. Some domains (those of mixed competence) fall under both Member States and Community jurisdiction. This has led to the working arrangement of "dual representation" whereby the Community is represented by both the Commission and the Member State holding the Presidency of the Council. Thus both the supranational and the intergovernmental faces of the Union are present. The Commission typically would speak on those issues which fall under the Community's exclusive competence.

The implications for CARICOM are that the Community and by extension the Commission, could find itself conferred with powers, even exclusive competences, which it cannot exercise in the relevant international organizations. Areas in which this is a distinct possibility are those concerned with the negotiations and functioning of the WTO, the FTAA and Economic Partnership Agreements with the European Union; environmental matters in UNEP; air transport in IATA; and foreign, security and criminal

issues arising in United Nations bodies. Although the European Community has made advances in this respect, it may take an equally hard fought battle for CARICOM to secure a similar status, and one in which its Community/Commission is likely to be held to the same jurisprudential standards as the European Community.

### **Automaticity of Resource Transfers**

The CSME involves the creation of a number of new regional institutions. They include a Caribbean Court of Justice, a Standards Organization, a Competition Commission, a Conciliation Commission, a Regional Securities Commission, a Regional Property Rights Office, a Regional Development Fund, a Phyto-sanitary Organization, a Regional Fisheries Organization. To these may be added institutions necessary for the implementation of the Rosehall Declaration—a Caribbean Commission (and possibly related servicing bodies), a Revenue Authority, and an upgraded Caribbean Assembly of Parliamentarians. In due course, other institutions will be needed consequent upon the development of mature regionalism, such as a Court of Auditors, a Caribbean Central Bank, an Economic and Social Committee, an Ombudsman's Office, a Regional Environmental Organization.

Already the Member States support a large number of regional organizations, including the Community Secretariat, the Caribbean Regional Negotiating Machinery, some parts of the University of the West Indies, the Caribbean Agricultural Research and Development Institute, the Caribbean Center for Development Administration, the Caribbean Disaster Emergency Response Agency, the Caribbean Tourism Organization, among others. The institutional terrain is thus becoming ever more challenging. The financial and organizational demands of the institutions foreseen are undoubtedly going to be intolerable and unmanageable. The Rosehall Declaration has made a step in the right direction (Paragraph 6) by the "adoption of the principle of automatic resource transfers for the financing of Community institutions, ..."

This formulation, however, is open to varying interpretations. It is not literally the "automatic transfer of resources" that is at issue. If a CSME truly exists (or will) it would have *ipso facto* a proprietary interest in revenues accruing as a result of measures/policies that are the creation of the Community. In the EU, this is the common VAT. An agreed percentage is allocated to the Community as its "own resources" which is collected by the Member States and transferred to the Community under compensated collection arrangements. The only revenue yielding measure in CARICOM that could be said to be the creation of the Community is the Common External Tariff. It is important to have a rationale for "own resources," lest the mere "automaticity of resource transfer" be viewed merely as a gratuitous concession on the part of the Member States that may be breached under circumstances they consider appropriate.

### **Closer Cooperation Arrangements**

Sometimes, the agreed objectives of integration treaties cannot be secured by all Member States moving together, and at the same time and pace. It may then be desirable for like-minded States to take the initiative in moving forward, in a way that opens the way for all Members eventually to follow. This has been the case in the EU, notably in respect of such domains as monetary integration/common currency and a common foreign and security policy.

Closer cooperation could be a useful device for deepening CARICOM integration. There are opportunities for its application among like-minded Member States to such domains as CARICOM citizenship, free movement of people, free movement of capital, the appellate function of the Caribbean Court of Justice, collective defense, harmonization of legislation in some fields, air transport, a multilateral fisheries regime, the common organization of agricultural markets, and a common currency.

But there could also be dangers in going this route since closer cooperation arrangements among subsets of countries could take on a permanent life of their own, create enormous complexities and conflicts and frustrate the broader aspirations of Caribbean integration.

"Closer cooperation" cannot therefore be left completely open ended, subject to its being only "legitimate and feasible" for a group or groups of Member States to do so. It would need to be guided by appropriate principles and constraints.

The EU experience on "closer cooperation" would be helpful in respect of this matter. In the EU, closer cooperation must meet a number of conditions: cover an area which does not fall within the exclusive competence of the Community; be aimed at furthering the objectives of the Union; respect the principles of the Treaties and the Community acquis; involve a minimum number of Member States (currently eight); allow the gradual integration of other Member States; must not jeopardize the internal market or economic social cohesion; be used only as a last resort, where the objectives of the Treaties could not be attained by applying the relevant procedures laid down therein.

### **Assembly of Caribbean Community Parliamentarians**

As the collective/supranational decision-making and implementation authority of the Community develops it would be desirable, if not logically necessary, *pari passu*, to have this power emanating from a Parliament of the Community. Otherwise, there will still exist at the Community level a kind of supranationality that ultimately is still based, to a large extent, on the discretionary exercise of national sovereignty; that has no counterpart in a real Community legislature. Also, instituting a system by which the Conference of Heads of Government/Council of Ministers could make decisions that have the force of law throughout the Region would greatly exacerbate the large democratic deficit that already exists in CARICOM in respect of regional integration. There are thus compelling reasons for the development of a real CARICOM Parliament. The notional formulation in Paragraph 9 is at variance with CARICOM governments' professed desire for a more mature regionalism and their commitment to democratic governance. The EU has made remarkable progress in this respect, though the European Parliament (EP) is still very much underdeveloped, compared with the powers of a national Parliament.

The following aspects of the EP are worth nothing in further deliberations on upgrading the status, role and functions of the Assembly of Caribbean Community Parliamentarians. The EP is the assembly of the representatives of the Union citizens. They are (currently) elected by direct universal suffrage and distributed among Member States by reference to their population. The EP's main functions are to consider the Commission's proposals, and be associated with the Council in the legislative process, in some cases as co-legislator, by means of various procedures (codecision procedure, cooperation procedure, assent, advisory opinion, etc); to exercise power of control over the Union's activities through its confirmation of the appointment of the Commission (and the right to censure it), and through the written and oral questions it can put to the Commission and the Council; to share budgetary powers with the Council in voting on the annual budget, rendering it enforceable through the President of the Parliament's signature, and overseeing its implementation.

### **The Democratic Deficit in CARICOM**

The adoption of a major edit like the Rosehall Declaration on Regional Governance on the occasion of the thirtieth anniversary of CARICOM would be inconceivable in a democratic society without some form of civil consultation. Yet the political Organs of CARICOM, including in particular the Conference of Heads of Government, have urged persistently greater involvement of citizens in furthering the process of integration, and solicit their support in the drive to implement the CSME. To this end, there have been small-scale programs of public information and public lectures. While citizens' support for integration is likely, as mentioned above, to be less influential than the role of transnational interests, it would certainly be of positive value. It could even become the main dynamic force for integration, for there are more effective mechanisms for fostering citizens' support than occasional radio and TV programs, brochures, public lectures and sporadic encounters with civil society. If CARICOM were truly serious about the involvement of their citizens as a dynamic pressure group for integration, their participation would need to be organized as a formally recognized standing body of the Community with defined substantive responsibilities.

A useful example to draw on in this regard is the European Community's arrangements. Reference will have been noticed at various points in this paper to the EC Treaty requirement to consult with the European Economic and Social Committee (EESC) in respect of proposals in specific policy domains. This was set up by the original Treaty of Rome establishing the European Economic Community in 1957 to represent the interests of various economic and social groups. It consists of 222 members falling into three categories: employers, workers and representatives of particular types of activity (such as farmers, craftsmen, small business and industry, the professions, consumer representatives, scientists and teachers, cooperatives, families, environmental movements). Members are appointed by unanimous Council decision for four years, a term that may be renewed. The EESC is consulted before the adoption of instruments on a wide range of policy domains. It may issue opinions on its own initiative and it may also be consulted by the European Parliament.

### **Concluding Remarks**

As the tasks addressed to the Community have expanded and become more complex—in particular through the provisions of the Revised Treaty of Chaguaramas—it needs to be recognized that that institution cannot function effectively without significant powers being transferred to its exclusive competence. On the other hand, it is acknowledged that anything like a federal or unitary State is unlikely to be brought into existence in the foreseeable future. In CARICOM, however, there are no transnational pressures for deepening integration and thus governments find themselves in the contradictory situation of being both the guardians of national sovereignty and the promoters of supranationalism.

The tasks addressed to the Community are of widely varying salience to national sovereignty and to the process of integration and development. The necessity for action at the Community level also varies, while the instruments usable for their implementation, in terms of their binding legal force, are quite different from one policy

domain to another. Moreover, the trajectory of a Community's powers is neither static nor predictable. The process, as the EU experience shows, moves along a continuum of intergovernmentalism and supranationalism. It can also be affected by the dynamics of administration (agenda setting, the mechanics of dense and complex technical tasks), transnational pressure groups and, of course, by decisions of the Community Court.

It would seem then that the move to a more mature regionalism would better be served by a customized approach that allows for expedience in Community action, differentiated treatment of policy and legislative domains, and the use of different and combined policy, legal and non-legal tools. Careful consideration of the issues, drawing on lessons from the EU, is strongly recommended. So is the development of authentic mechanisms for the participation of citizens in the integration process, both at the level of a Community Parliament and of organized civil society. Democratic consultation would neither be easy nor cheap, but in the end, the by-pass alternative could be more difficult and costly.

Washington, DC

July 12, 2003

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