

OBSERVATIONS ON THE STATE OF PLAY IN THE CARICORUM/EC ECONOMIC PARTNERSHIP AGREEMENT (EPA) NEGOTIATIONS

Havelock Brewster and Norman Girvan

The Jamaican Ministry of Foreign Affairs and Foreign Trade has circularised stakeholders on the 'state of play' in the CARICORUM/EC Economic Partnership Agreement (EPA) Negotiations (Ref. No. 55/200/42 dated 14th November 2007). This is a welcome initiative in increasing transparency and assisting public understanding of the implications of the EPA.

The authors wish to offer the following observations on the information provided in the MFAFT circular as a contribution to the on-going public debate on the subject. For ease of reference, the MFAFT information is reproduced in italics, while our observations are in bold type.

1. *Trade in Goods*

On the goods side, the European Commission in response to CARIFORUM's Market Access Offer is demanding that, to meet WTO compatibility, CARIFORUM must liberalize at least 80% of imports from the European Union over a 15 year period. The remaining 20% should be allocated over phasing periods of 20 and 25 years, and the list of products to be exempted from liberalization, the Exclusions List, must be at the minimum.

1.1 What constitutes 'WTO compatibility' is subject to different interpretations. From a CARIFORUM perspective, an equally important test is the 'development compatibility' of the EPA, i.e. its contribution to the sustainable development of ACP states; a principle that is enshrined in the Cotonou Agreement. CARIFORUM might insist that the timing and extent of liberalization should be subject to two criteria of 'development compatibility':

(i) The timing and extent of import liberalization should be linked to *the development of productive capacities and competitiveness of its economies*; especially in sectors and product groups in which it has an actual and potential interest. Here, reference may be made to the long-term national strategic plans of member states (Jamaica, Barbados, Trinidad and Tobago, OECS etc) and to CARICOM'S approved Development Vision;

(ii) The timing and extent of import liberalization should be such as *not to disrupt existing production and impact negatively on the poor and on female-headed households*. In this regard, the 'benchmarking' approach merits consideration. Work has been done by this by Jessica Byron and Patsy Lewis of UWI in a report [Sustainable Development Benchmarks for an EU-CARIFORUM EPA](#) .

Criterion (ii) also brings up the issue of the role, definition and scope of Sensitive Products (SM) and Special Safeguards Mechanisms (SSM) in the EPA. The Circular makes no reference to this and an information update would be useful.

1.2 Agriculture. The Circular makes no mention of EC commitments with regard to elimination of subsidies on agricultural products exported to CARIFORUM. It should be emphasised that any elimination of such agricultural subsidies should include not only export subsidies but *all trade distorting subsidies provided to agriculture which impact the importing country*. We are aware of the argument that this subject will be addressed in the WTO Doha Agreement; but given the uncertainty regarding the successful completion of the

Doha negotiations this would not be acceptable, since it will expose CARIFORUM agricultural producers to competition from EU agricultural products that benefit from EU subsidies other than export subsidies.

The EC has also stipulated that the Exclusions List must not contain products for generating government revenue such as motor vehicles and their parts, as well as alcoholic beverages (wines) and certain agricultural products; all products produced in the EU. In fact, the EC's optimum position would be to have CARIFORUM liberalize 90% of imports from the EU by year 15 with the remaining 10% allocated to the 20 and 25 year phasing periods and the Exclusions List of about 6% of imports. The EC has offered a moratorium or grace period of one (1) year which means that liberalization would commence one (1) year after the entry into force of EC commitments.

The EC has further demanded the phasing out of Other Duties and Charges (ODCs) used for revenue purposes over a five (5) year period.

1.3 These provisions would fall very heavily on some OECS states that are heavily dependent on customs duties for their government revenue, which finances spending on economic infrastructure and on human development related and poverty reduction related social spending. It is not consistent with the stated objectives of the EPA that it should have the effect of (a) increasing fiscal deficits and public indebtedness, (b) making more difficult the adjustment of CARICORUM economies to a more open trading environment, and (c) hindering progress in poverty alleviation, human development and gender-related human development; and even reversing the hard-won gains made by several countries in these areas.

CARIFORUM might therefore press for a *special regime for customs revenue dependent states* as an integral element in the architecture of the EPA. Such a regime would allow more exemptions in respect of products that generate significant revenues, longer phase-in periods, and special assistance for such states in reforming their taxation systems to reduce reliance on customs duties, including financial compensation for lost revenues in a specified transition period. This is consistent with, and in principle equivalent to, the Special Regime for Disadvantaged Countries in the Revised Treaty of Chaguaramas. Furthermore, EC commitments with respect to assistance and compensation should be stated with the same level of in precision as tariff liberalisation commitments; i.e. in quantifiable, monitorable, and 'justiciable' terms.

It should be noted that the EC is holding separate negotiations with the Dominican Republic in a bid to be accorded the same treatment as that country has accorded to the USA under the US/Central America Free Trade Agreement (CAFTA).

1.4 This could be good for CARICOM states insofar as pressure from the EC to adopt the CAFTA-DR provisions within the EPA, and for a CARICOM-DR Customs Union, represented a major difficulty. However it could work to the disadvantage of CARICOM if the DR concluded an EPA with the EC first, which gives it access to the EU market for exports such as sugar and bananas on better terms than CARICOM. Thus, CARICOM should insist that any DR-EC EPA should not put it at a disadvantage vis-à-vis the DR with respect to its existing level of access to the EU market.

The European Commission, in its Market Access Offer to CARIFORUM, has offered duty free and quota free access for all products exported by countries of the African, Caribbean and

Pacific (ACP) Group of countries including CARIFORUM. There will continue to be a managed market for sugar up to 2015, but the Sugar Protocol will cease to exist after 2009. EU Trade Commissioner Peter Mandelson confirmed to CARIFORUM, in a letter to Honourable Bruce Golding, Prime Minister of Jamaica that, to meet WTO compatibility, the EC could support CARIFORUM liberalizing at least 80% of imports over 15 years with a one (1) year moratorium.

1.5 See observations 1.1 and 1.2 above.

1.6 The EC statement on the Sugar Protocol removes one source of uncertainty regarding the treatment of CARICOM's sugar exports under a GSP or GSP+ regime, that is, that sugar will not be subject to GSP or GSP+ duties.

1.7 Most significantly, the EC offer omits the need to address the EC's onerous Rules of Origin (ROO) and non-tariff barriers including Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS). These have been a major obstacle to ACP countries taking advantage of their market access to the EU market in the past. Without EC commitments on this subject in the EPA it is not clear what additional advantage CARIFORUM countries will derive from the EPA over and above the Cotonou Agreement. In this regard, we would like to reiterate the following observations and suggestions made previously by one of us.

Rules of Origin.

The current rules are too complex for effective operation and fall very heavily on small countries and on small and medium enterprises (SMES). They act as a severe disincentive on exports to the EU market and therefore on the EPA objective of harnessing trade to the goal of sustainable development. CARIFORUM should develop specific proposals, in consultation with the private sector, for simplifying the current rules to make them more firm-friendly and hence more development-friendly. The cumulation principle is currently limited to the ACP-wide group and the EC; this principle should be extended to the world as a whole. The rules also need to be customized by product rather than harmonized across all product categories.

Technical Barriers to Trade (Standardization and Certification)

CARIFORUM should identify for remedial action those instances in which technical barriers have been unnecessary, inappropriate, unfair, restrictive or discriminatory; and those areas in which mutual recognition of CARIFORUM standards is sought. Furthermore, the WTO Agreement on Technical Barriers to Trade provided for SDT of developing country Members through a variety of means.

Sanitary and Phytosanitary Measures (SPS).

CARIFORUM countries, like other ACP partners, are especially vulnerable to the application of SPS measures to their food and feed exports, especially given the potential of these products in promoting their development. The WTO SPS Agreement includes (Article 10) provisions relating to SDT in respect of SPS measures. However, new developments in the European Union in respect of its food laws (Regulation 882/2004 on Official Food and Feed Controls) threaten to erect stringent and pervasive barriers to the export of food and feed product from CARIFORUM and other ACP countries. Given the potential of EU food and feed legislation for erecting even more impenetrable barriers to the export of

CARIFORUM foods and feed products, the issue needs to be specifically addressed in the EPA, and its importance underlined as a development-related aspect of the Agreement. The Cotonou and WTO provisions should be invoked in respect of the adequacy of the consultative and coordination process, participation of the affected Parties, particularly in the risk assessment procedures, and the application and strengthening of the WTO provisions in respect of SDT as it relates to SPS measures, so as to make them firmer and less discretionary.

It will be recalled that CARIFORUM Heads of Government Meeting in Montego Bay, 4-5 October 2007, had agreed on CARIFORUM's position as follows:

- i. Liberalization of 85% of total trade (77.5% of imports) with an Exclusions List of 15% of total trade (22.5% of imports), with a three (3) year grace period (moratorium) across the board. This means that liberalization would commence in the fourth year of liberalization periods of 5, 10, 15, 20 and 25 years.*
- ii. Other Duties and Charges (OD Cs) would be liberalized over a 10 year period with a stand- still period of seven (7) years which should be non-negotiable.*

CARIFORUM negotiators have stated that the region is willing to accept the Mandelson proposal to meet WTO requirements by liberalizing 80% of imports which would be in the range of its own proposal. They have stressed the importance to the region of revenue from import duties and other duties and charges, and CARIFORUM's requirement for a long phase-out period for ODCs.

1.8 See observations 1.1 and 1.2 above. It is not clear what concessions CARIFORUM negotiators have requested/secured from the EC above by moving from the previous offer of 77.5% to 80%. The CARICOM negotiating stance may need to move beyond “stressing the importance to the region of revenue from import duties and other duties and charges, and CARIFORUM's requirement for a long phase-out period for ODCs” to concrete proposals in these areas with a view to securing specific, monitorable and justiciable commitments from the EC.

2. Trade in Services

On Trade in Services, the European Commission has expressed disappointment with the Offer presented by CARIFORUM stating that it does not reflect enough ambition in its sectoral coverage and cannot be considered to be WTO compatible. They have requested that the Offer be improved and be harmonized on a regional basis in sectors of interest to the EU such as tourism, marine transport, computer and related services, banking and financial services, and courier services. It should be noted that the WTO's General Agreement on Trade in Services (GA TS) recognises that Trade in Services is a new area of trade for developing countries and permits them flexibility in liberalization of their market in negotiations with developed countries.

The EC is of the view that it has made a very generous and comprehensive offer to the CARIFORUM by liberalizing its market by 95% over all sectors in the following modes:

- i. Cross border supply*
- ii. Consumption abroad*
- iii. Commercial presence*
- iv. Movement of Natural Persons*

For Mode 4, the EC argues that it has made an historic offer and has gone to the limits of its competence without infringing the domestic policies of Member States.

However, within CARIFORUM, there is the view that, while the EC's Offer is generous, it may not be economically viable as it is laced with restrictions such as economic needs test, national treatment, qualification, and residency requirements as well as general limitations related to language requirements and the accessibility of the Market. In Mode 4, it also fails to provide substantial and meaningful access to areas of core interest to CARIFORUM such as entertainment and recreational services, as well as cultural and creative industries, the latter being the sectors of greatest comparative advantage for CARIFORUM.

2.1 We completely agree with the stated CARIFORUM position. The same principles apply with respect to market access in goods vis-à-vis Rule of Origin, Technical Barriers to Trade and Sanitary and Phytosanitary Standards.

In accordance with positions taken by CARIFORUM Heads of Government in Montego Bay, CARIFORUM negotiators have urged the EC to show greater flexibility in accordance with GATS, and to improve its offer in the core areas of interest to CARIFORUM. In an effort to ensure that an agreement is signed which includes services, CARIFORUM negotiators have indicated that they will urge Member States to improve offers and to liberalize additional sectors to meet at least a 65% sectoral coverage by all Member States and to strive to harmonize sectors where possible.

2.2 We believe that any such offers by CARFORUM with respect to services should be carefully crafted to ensure that they do not adversely affect the development of service activities in which CARIFORUM has an actual or potential interest. Several such activities are identified by member states' national plans and strategies and in the Development Vision. One of us has made a specific proposal that in areas of interest to the EC such as banking and finance, business services, including information technology; maritime, air and road transport; telecommunications; construction and engineering, wholesale and retail trade, liberalized market access may be linked to access to the production of complementary imports, which may themselves become CARIFORUM exportables to the EC and to third countries.

3. Trade Related Issues

In Trade-related Issues, which included protection of personal data, intellectual property rights and innovations, environment, social issues (such as labour standards), government procurement and governance in tax matters, the negotiations are concluded on nearly all issues.

3.1 The circular gives no information as to what has been agreed in the above areas. We believe that it is of the utmost importance that the commitments made by CARIFORUM be disclosed and explained to the public. They are all areas that impact on sustainable development. They can involve legislative and institutional commitments, commitments that could negatively impact on policy space, that impact on the ability of local producers to access technology, that relate to environmentally sustainable development, and those that are of interest to the labour movement. The experience of the WTO agreement, of Trade Agreements between the EC and other developing countries, and of NAFTA, to give some examples; is that these subject areas can have far-reaching implications for development and for the flexibility of governments to employ development policies.

For example in Intellectual Property Rights, although CARIFORUM countries are circumscribed by their WTO commitments on Trade Related Intellectual Property Rights TRIPS, they could invoke the Cotonou provision on ‘the conclusion of agreements aimed at protecting trademarks and geographical indications (Article 46 (4))’ to negotiate in the framework of the EPA a separate Protocol on IPR that would include its particular interests, such as in respect of Caribbean cultural practices and products, including expression of folklore, other traditional knowledge and Caribbean heritage, plant varieties that can be accorded IPR protection, and procedures and support for identification of other plant varieties to be so treated; geographical indications; and specific commitments that would operationalise and extend the TRIPS Article (66(27)) on developed countries providing incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technological transfers.

On government procurement, it was decided that the matter could be revisited once a regional regime was in place. CARIFORUM Ministers, and particularly CARICOM, have indicated their unwillingness to engage in negotiations on governance in tax matters. The issue now is whether they will agree to continuing dialogue on this issue.

3.4 We support this position. However, much depends on the exact wording of the text of the EPA, so as to avoid any interpretation that CARIFORUM has made firm legal commitments to provide national treatment for EU firms on government procurement at some time in the future. This would deprive CARIFORUM governments of a policy tool to foster local production and development of competencies in new areas (such as for example construction services), a tool that EU governments have themselves employed to great effect in the past.

3. The Draft Legal Text

On the draft legal text, the major outstanding section is that dealing with development which had to be redrafted to strengthen the text given the central role of development in the agreement and the priority attached to this by CARIFORUM Member States. There are a few outstanding provisions to be agreed in the sections on goods and the general provisions of the agreement including a provision on regional preferences, and an EC demand for Most Favoured Nation Treatment as it relates to any free trade agreement which CARIFORUM or CARICOM may conclude with developed and certain categories of developing countries. CARIFORUM has been resisting the latter proposal in relation to its extension to developing countries.

4.1 We have previously expressed our concern that the language of the Draft Legal Text, insofar as it addresses development-supporting measures by the EC, insufficiently binds the EC to commitments that are specific, time-bound, justiciable and monitorable. If there is to be chapter on Development, then we suggest that it should avoid making broad statements of general principles and focus on summarising firm and binding commitments made in the body of the agreement as a whole and on how they will be monitored. At all costs, we need to avoid accepting the view that CARIFORUM’s development concerns are to be handled separately from the consequences of EPA provisions in trade, agriculture and the other sections, or that trade liberalisation in and of itself will generate development in an automatic manner (contrary to past CARIFORUM experience and the evidence of a great deal of research), or that the ‘development dimension’ is to be equated with development assistance, which is not the case.

In this regard it should be noted that in a 2002 paper, the EC itself recognized that a trade policy framework, this will have "to be complemented by development policies in areas such as regional integration, macroeconomic and social policies, environmental policies, good governance (e.g., administrative and legal reforms), supply-side measures (e.g., private sector support, infrastructure, education, health), fiscal reform and assistance in trade-related areas, such as customs administration, investment, competition policies and standards". The onus is therefore on CARIFORUM countries to specify the development programs and put in place the complementary policy and governance reforms that are needed for sustainable development. It would appear that CARIFORUM has not addressed this requirement as part of the on-going trade negotiation process and every effort must now be made to address this deficiency.

Development Support

This is a key issue for CARIFORUM and the EC has offered, for the building of trade capacity, through the regional allocation of the 10th EDF, 30% of €132million and an additional €33million (totalling about €76m) for EPA in CARIFORUM, and €1billion per annum by 2010 under the WTO's Aid for Trade programme to be allocated to the 79 members of the ACP on a 'first come first serve' basis.

4.2 The EC offer is woefully inadequate both as to quantity and to content. The 10th EDF is not yet in operation and in any case does not form part of the EPA and is therefore not legally actionable. Eur. 39 million is a pittance in relation to the kind of public investment that CARIFORUM will need for adjustment to a more open trading environment. The WTO Aid for Trade initiative on a 'first come first served' basis involves CARIFORUM in an unseemly competition with other ACP/developing countries and leaves discretionary authority in EC hands. Most importantly, this commitment does not speak to the cumbersome, time-consuming and resource costly methods of accessing EC resources that have turned off many private and public sector organizations from even attempting to utilize these resources and account for the slow disbursement and under-utilization of these resources. CARIFORUM should develop specific proposals to make these procedures more user-friendly and firm-friendly if EC development assistance is to make an effective contribution to sustainable development.

4. *Reverting to Trade under the EC's Generalized System of Preferences (GSP)*

The EC has given the cut-off date for concluding the EPAs as mid - November. Given the outstanding issues in goods and services, CARIFORUM will be unable to meet this deadline. The next round of negotiations with the EC is scheduled for 28-30 November with a meeting of the Principal Negotiators on 1 December 2007.

If CARIFORUM cannot conclude these negotiations by 1 December at the latest, the EC has made it clear that, with the expiration of the Cotonou trade arrangements, exports from those CARIFORUM countries not in a position to sign an EPA will receive GSP treatment in the EU market.

This means that at least 25% of products exported by Jamaica to the EU will attract duty on entry into the markets of the EU after 31 December 2007. The list of products likely to attract duty is attached.

5.1 The EC threat to impose GSP duties on CARIFORUM exports if no agreement is reached by December 1 is in clear contravention of its legal, moral and political commitments under Article 37 (6) of the Cotonou Partnership Agreement (CPA), which commits the EC to provide states that do not join an EPA with a ‘new framework for trade which is equivalent to their existing situation...’ In this regard we quote from a recent report prepared by the London-based Overseas Development Institute for the Commonwealth Secretariat:

“The report concludes that application of the Standard GSP regime does not fulfil the commitment made by the EU in Article 37 (6) of the Cotonou Agreement. It would result in the EU taxing ACP exports, generating revenue that compares unfavourably with aspects of Union-level aid, and is likely to result in the complete cessation of some ACP exports to the EU with significant adverse economic effects.

Another conclusion is that application of the Standard GSP would not put the ACP on a level playing field with other suppliers to the EU. In many cases competitors receive more favourable, non-reciprocal access than would the non-LDC ACP. The ACP would be disadvantaged compared to some other developing countries, increasing the likelihood that exports will slump.” (The Costs to the ACP of Exporting to the EU under the GSP Final Report March 2007. London: Overseas Development Institute; Executive Summary.)

CARIFORUM must hold the EC to this commitment and be prepared to take it up as a political and diplomatic matter directly with the states of the EU and other stakeholders if necessary. It is clear that the large number of unresolved issues make it virtually impossible for there to be an agreement by December 1 that adequately addresses CARIFORUM’s development needs.

Were CARIFORUM to come to an unsatisfactory agreement in order to meet this completely unrealistic deadline, it would, in our view, be extremely prejudicial to the region’s ability to have sustainable development for decades into the future. This is because whatever is agreed in the EPA will unavoidably become the template for CARICOM’s negotiating position in the Doha Development Negotiations and for all other trade agreements concluded by CARICOM with other countries in the future. Thus, it would be no exaggeration to say that a bad agreement could extinguish the future possibility of having independent, sustainable development in the interests of the people of the region.

We therefore totally support the position taken at the CARICOM Prime Ministers Bureau meeting of November 16, as stated by Prime Minister Gonsalves of St Vincent and the Grenadines, to the effect that it would be ‘better for the region to take time in reaching an agreement that is in the best interest of the people, rather than merely seeking to meet the deadline’ (Jamaica Sunday Gleaner November 18, 2007). We also concur with the earlier statement by the CRNM Director-General that “the region is willing to carry on the negotiations as long as necessary. The team of negotiators, which I lead on behalf of the CARIFORUM countries, is fully committed to getting the best possible agreement and under no circumstances would we sacrifice the quality of the agreement to meet any given schedule” (Jamaica Daily Gleaner of October 31, 2007). These assurances are welcome and to be taken very seriously.

As the deadline approaches, there is also the possibility that alternatives will be offered in the form of an ‘EPA-lite’, a ‘Goods Only EPA with a built-in agenda’, a ‘Framework Agreement’, or GSP-plus treatment. We would wish to strongly caution against ready acceptance of such offers; insofar as this may bind CARIFORUM states to

undertaking commitments, now and in the future, that foreclose their negotiating positions and development policies in ways that are unfavourable to the region.

We feel that the best course of action is to urgently put in place a strategy aimed at securing a *de jure* or *de facto* roll-over of the existing WTO waiver, for a specified period, in order to complete the negotiations on mutually agreeable terms. Such a strategy would entail the highest level approaches to the WTO Membership, particularly the more influential developed and developing countries, to the EU Member States, to our ACP partners, and to the WTO Director General. An important aspect of such an approach would be to illustrate how a better development-oriented EPA would be in the longer interest of the universality of WTO membership, developing and developed countries alike.

The sooner CARIFORUM proceeds to craft and implement such a strategy the better. To begin with, some careful drafting of a circular memorandum needs to be quickly undertaken, as there is not now time to undertake diplomatic missions. In this connection it may be noted that any appeal in the WTO by non-ACP members against the temporary maintenance of the Cotonou Arrangements, even if it did materialize, would take considerable time to be adjudicated; and would provide a breathing space for the conclusion of negotiations.

In closing, we would wish to point out that even if the above strategy succeeds, there is no easy ride ahead for CARIFORUM economies, especially those that are significantly reliant on exports to the EU market. Preference erosion is well advanced and is set to continue unabated, EPA or no. The ending of the sugar protocol in 2009, the continued challenges to the banana regime and the extension of GSP+ status to non-ACP countries all indicate that the region's preferential status in EU markets is all but over.

Paradoxically, this strengthens the argument against agreeing to an EC-imposed deadline for the EPA merely to avoid the loss of existing market access to the EU. For the reality is that the value of such market access has shrunk rapidly due to preference erosion and changes in domestic EU policies on sugar. Thus there is danger of trading certain long-term development possibilities and options of the region in return for an advantage that is highly temporary, when the adjustment to the new situation is in any case unavoidable. Such adjustment needs to proceed as a matter of urgency, and in an efficient and coherent manner, in accordance with CARICOM's own Development Vision and the Regional Strategic Development Plan now under preparation.

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