

**The Role the Organization of Eastern Caribbean States (OECS) Plays
within the Caribbean Common Market and Community (CARICOM)
and in the Caribbean's Relationship with the World Economy**

*Prepared Exclusively for the Annual Conference of the International Studies
Association*

*Latin American and Caribbean Regionalism in the Global Economic Crisis II
New Orleans, LA., February 19, 2010*

**Thomas Andrew O'Keefe, President
Mercosur Consulting Group, Ltd.
2300 M Street, N.W., Suite 800
Washington, D.C. 20037
(202) 872-5041
E Mail: taokeefe@mercoturconsulting.net**

February 1, 2010

The Role the Organization of Eastern Caribbean States (OECS) Plays within the Caribbean Common Market and Community (CARICOM) and in the Caribbean's Relationship with the World Economy

By Thomas Andrew O'Keefe¹

Introduction

The roots of the Caribbean Common Market and Community (CARICOM) lie in the West Indies Federation (1958-1962) and the Caribbean Free Trade Area (CARIFTA) founded in 1965. The rationale behind the Federation was that the former British colonies in the Caribbean were too small to be viable economic entities on their own.² London therefore sought to move them to independence as part of a political union. The capital of this new political union would be Port of Spain in Trinidad. Unfortunately, this experiment in political federation proved short-lived, as the two largest territories, Jamaica and Trinidad and Tobago, jostled with each other to achieve preeminence in the West Indies Federation. In 1961 a plebiscite was held in Jamaica, and a majority of that country's citizens favored withdrawal. Shortly after the collapse of the West Indies Federation in 1962, initiatives were taken by the United Kingdom, Canada, and the United States to explore the possibility of some form of integration of the small islands of the Eastern Caribbean and Barbados.³ These initiatives led to the creation of the Eastern Caribbean Central Bank. In 1965, the governments of Antigua and Barbuda, Barbados, British Guiana, and Trinidad and Tobago signed the Dickenson Bay Agreement to Establish a Caribbean Free Trade

¹President of the Washington, D.C. based Mercosur Consulting Group, Ltd. [<http://www.mercosurconsulting.net>] and Lecturer in the International Relations and Earth Systems Programs at Stanford University. The author was the Legal and Economic Integration Specialist for the U.S. AID funded Caribbean Open Trade and Support project based in Antigua between 2005 and 2006.

² The West Indies Federation was made up of 10 territories: Antigua and Barbuda, Barbados, Dominica, Grenada, Jamaica, Montserrat, St. Kitts-Nevis-Anguilla, St. Lucia, St. Vincent, and Trinidad and Tobago.

³D. POLLARD, THE CARICOM SYSTEM: BASIC INSTRUMENTS 49 (2003). Despite its ultimate collapse, the West Indies Federation was successful in establishing the West Indies Shipping Service in 1962 that provided frequent service up and down the Caribbean with two ships donated by the Canadian government and the purchase of British West Indian Airlines (BWIA) from the British Overseas Airways Corporation (BOAC). The University College of the West Indies, which was established in 1948 with one campus in Jamaica, became the University of the West Indies (UWI), and a second campus opened in Trinidad and Tobago in 1960.

Association or CARIFTA.⁴ This Agreement was amended in 1968 to include other territories in the Caribbean (*i.e.*, Dominica, Grenada, Jamaica, Montserrat, St. Kitts-Nevis-Anguilla, St. Lucia, and St. Vincent and the Grenadines in 1968, and British Honduras in 1971). As outlined in Article 2 of the Agreement, the objectives of CARIFTA were to:

- 1) promote the expansion and diversification of trade;
- 2) ensure that trade took place between the member states in conditions of fair competition;
- 3) encourage the progressive development of the member economies; and,
- 4) foster the harmonious development of Caribbean trade and its liberalization by the removal of barriers.

Other objectives of CARIFTA included promoting the industrial development of the least developed member states as well as the development of a coconut oils industry in those same countries. There was also an agricultural marketing project to rationalize agricultural production among the least developed countries.

The Treaty of Chaguaramas was signed in 1973 to establish CARICOM.⁵ Interestingly, it was the Common Market Annex to the Treaty of Chaguaramas that actually replaced CARIFTA the following year with what purported to be a common market but, except for some hortatory expressions about the free movement of factors of production, was more focused on building a less ambitious customs union. The development model upon which the original Treaty of Chaguaramas of 1973 was based on was an inward-looking, protectionist, import-substitution process that was buttressed by regional industrial programming, ownership and control of regional natural resources, and regional self-reliance.⁶

The hybrid situation of a Common Market operating within the Caribbean Community allowed a country to become a member of CARICOM without necessarily participating in the

⁴A copy of the Dickenson Bay Agreement and subsequent amendments is available at POLLARD, *supra* note 3, at 51-95.

⁵The full text of the Treaty of Chaguaramas of 1973 and its Common Market Annex can be accessed through: <http://www.caricomlaw.org>

⁶POLLARD, *supra* note 3, at 25.

regional economic integration project. The Guyanese capital Georgetown was selected as the headquarters for the CARICOM Secretariat, as a way of encouraging movement to the less populated southern portions of the Caribbean region and to facilitate exploitation of the abundant natural resources of Guyana.⁷

During the period from when the Treaty of Chaguaramas was signed in 1973 through 1980, intra-regional trade increased some 26.5 percent.⁸ But because this was also a period of increased commodity prices, the CARICOM countries tended to focus their attention on serving foreign regional markets. This meant that exports to the sub-region never exceeded 10 percent of the Caribbean's total exports. Beginning in the early 1980's, most of the CARICOM countries were detrimentally impacted by the global recession following the spike in international oil prices. In order to reduce budgetary deficits and to cut back on foreign exchange outflows, Jamaica and Guyana both used Article 28 of Common Market Annex to the Treaty of Chaguaramas to impose quotas on imports from other CARICOM member states.⁹ The other CARICOM countries soon followed with their own protectionist measures, contributing to a significant contraction in intra-regional trade flows. An additional blow to CARICOM was the failure of many member states to implement the Common External Tariff (CET) by the outside target date of 1981. Additional revisions to the CET occurred throughout the 1980's, but these were also not uniformly implemented by all the member nations.¹⁰ Exacerbating the overall loss of interest in the CARICOM market during the 1980's was the collapse of the CARICOM Multilateral Clearing Facility designed to encourage intra-regional trade flows without expending hard currency reserves.

Until 1995, membership in CARICOM was made up exclusively of thirteen English-speaking Caribbean nations (*i.e.*, Antigua and Barbuda, the Bahamas, Barbados, Belize,

⁷*Id.* at 7.

⁸A.M. EL-AGRAA, ECONOMIC INTEGRATION WORLDWIDE 284 (1997).

⁹*Id.* at 287.

¹⁰*Id.* at 282.

Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago). Dutch-speaking Suriname was admitted as a member in 1995, followed by Creole-speaking Haiti in 1997. With the addition of Haiti in 1997, CARICOM's total population more than doubled from about 7 million to approximately 14 million persons. Haiti's current relationship to CARICOM is similar to that of the Bahamas, however, in that neither country participates in the economic integration process. Montserrat's full participation is limited by the fact that it is still a colony of the United Kingdom and the island has been depopulated by recurring volcanic eruptions that began at the end of the 1990's.

Given the revived interest in economic integration in the rest of the Western Hemisphere that started in the early 1990's, it is not surprising that a similar effort occurred in the Caribbean. Between 1993 and 2000, an Inter-Governmental Task Force with representatives from all the member states worked to revise the original 1973 Treaty of Chaguaramas and its Common Market Annex. The result was the Revised Treaty of Chaguaramas Establishing the Caribbean Community, including the Caribbean Single Market and Economy (CSME).¹¹ Since it was opened for ratification in 2000, additional protocols have been added to the Revised Treaty. As of 2010, the Revised Treaty had been ratified by all 15 CARICOM member states except the Bahamas, Haiti, and Montserrat. The Revised Treaty of Chaguaramas represents "a fundamental transformation and restructuring of the Caribbean Community from a conservative, inward-looking protectionist, functionally constrained organization to an open, liberalized, efficient, internationally competitive, outward-looking and deliberatively flexible institution."¹²

Trade among the CARICOM countries has remained fairly steady since the mid-1990's, averaging 20 percent of the region's total exports. Trinidad and Tobago dominates exports sent into the CARICOM stream of trade, which primarily consist of petroleum products as well as beverages, cement, foodstuffs and steel products. As a percentage of their overall exports, the CARICOM market is most important for Barbados, Dominica, St. Lucia, as well as St. Vincent

¹¹The full text of the Revised Treaty of Chaguaramas can be accessed through: <http://www.caricomlaw.org>

¹²POLLARD, *supra* note 3, at 459.

and the Grenadines. On the other hand, Barbados and Guyana, as well as many of the small Eastern Caribbean countries (but for Antigua and Barbuda) are most likely to source a greater percentage of their imports from within CARICOM.

A. The Inter-Relationship between CARICOM and the OECS

In 1981 the mini-states of the Eastern Caribbean signed the Treaty of Basseterre, which created the Organization of Eastern Caribbean States (OECS).¹³ The OECS consists of six independent countries (*i.e.*, Antigua and Barbuda, Dominica, Grenada, St. Kitts and Nevis, St. Lucia, and St. Vincent and the Grenadines) and three British colonies (*i.e.*, Anguilla, Montserrat, and the British Virgin Islands). It is important to note that Anguilla and the British Virgin Islands are not considered full members of the OECS. The original goal of the OECS was to coordinate and harmonize the foreign policy of the member states as well as to promote a monetary union as well as a common market (something which had already been attempted unsuccessfully in 1968 with the launch of the Eastern Caribbean Common Market). While monetary union and coordination of foreign policy has been achieved, trade arrangements among the OECS member states have, to date, been handled almost exclusively within the CARICOM context.

Pursuant to Article 56 of the Common Market Annex to the Treaty of Chaguaramas of 1973 that created CARICOM, the smaller and less developed countries in CARICOM (which includes all six independent member states of the OECS plus Belize) had the right to exempt certain products originating within CARICOM from free trade treatment. In particular, a lesser developed country or LDC could petition fellow LDC states to temporarily impose a tariff or quota on like or similar goods that originate in one of the four larger CARICOM countries (*i.e.*, Barbados, Guyana, Jamaica, and Trinidad and Tobago). In addition, the petition had to be supported by the votes of at least two of the larger CARICOM countries in the Council on Trade and Economic Development (COTED). The rationale behind this temporary exclusion was that it would offer the protected industry an opportunity to restructure itself and become more competitive. A July 1997 report prepared by the Commonwealth Secretariat at the request of the

¹³The full text of the 1981 Treaty of Basseterre can be accessed through: <http://www.oecs.org>

CARICOM Secretariat, however, found that Article 56 had not contributed to the development of sustainable industries in the OECS and Belize. On the contrary, it had only served to encourage and protect inefficiency. Furthermore, the protectionist measures were neither limited in scope nor temporary in nature, and had done nothing to encourage investment so as to enhance the competitiveness of the protected industries. The report found that those most harmed by the protectionist measures were the consumers of the OECS countries and Belize, particularly those with lower incomes, who were forced to pay higher prices for goods that in many cases were of inferior quality. The report recommended eliminating Article 56 no later than 2003.

The Revised Treaty of Chaguaramas includes Article 164, which is very similar in content to the old Article 56. The only significant difference is that protection is now limited to tariffs and quotas are no longer permitted (in keeping with World Trade Organization mandates). Furthermore, the decision to impose a tariff must be reviewed by COTED at the end of every five years. Among the products currently excluded from intra-CARICOM free trade under Article 164 are many of the same goods that were protected, in some cases for decades, under the former Article 56 of the older Treaty of Chaguaramas.

B. Achievements of the OECS

The most successful achievement of the OECS to date has been to establish a stable and functioning monetary union. All the sovereign members of the OECS plus at least two British colonies (*i.e.*, Anguilla and Montserrat) have one Central Bank that is headquartered in St. Kitts and they all share the same monetary unit (*i.e.*, the Eastern Caribbean dollar). The six independent member states also cooperate on foreign affairs and generally share the same embassies or diplomatic offices in the few countries where they maintain such outposts. In 2000, five of the six independent states (the exception was Antigua and Barbuda) signed a treaty that created a single authority to regulate the telecommunications sector. In doing so, they broke the monopoly of a British company, Cable and Wireless, which had forced the inhabitants of the OECS countries to pay among the most expensive telephone rates in the world. There is also an Eastern Caribbean Civil Aviation Authority based in Antigua.

In June 2006, the six sovereign states and the three British colonies that make up the total membership of the OECS signed a Declaration of Intent to replace the Treaty of Basseterre in order to establish an economic union. This move will require the establishment of institutions with supra-national authority, especially those given jurisdiction to develop and implement harmonized macroeconomic and fiscal policies in order to facilitate, among other things, the free movement of capital and labor. A draft of the new Economic Union Treaty was finally released in 2008 and it was originally expected to enter into force after a period of consultation with the citizenry and ratification by the legislative bodies of each country or territory was concluded.¹⁴ The target date for entry into force of the treaty is now set for June 18, 2010 (to coincide with the 30th anniversary of the establishment of the OECS). It should be emphasized, however, that even without this treaty, two supranational institutions already exist at the sub-regional level that already enjoy the power to make decisions that are binding on the governments of the OECS: the Eastern Caribbean Central Bank and the Eastern Caribbean Supreme Court.¹⁵

¹⁴The draft text of the new Treaty of the OECS is available at: <http://www.oecs.org>

¹⁵The judicial system of the OECS countries is regional in character. The tribunal of first instance is called the High Court and has judges resident in each of the six independent countries and the three British colonies. The intermediate appellate court is the Eastern Caribbean Supreme Court. Although based in St. Lucia, its judges travel to the different islands to hear appeals. The highest court of appeals is the Privy Council which sits in London. There is an expectation, however, that the Privy Council will eventually be replaced as the court of last resort by the new Caribbean Court of Justice that sits in Trinidad and Tobago.

TABLE SHOWING MAJOR SOCIO-ECONOMIC DATA FOR FULL OECS MEMBERS FOR 2008

COUNTRY	POPULATION	GROSS DOMESTIC PRODUCT (In Millions of US\$)	PER CAPITA GROSS DOMESTIC PRODUCT (US\$)
Antigua and Barbuda	87000	1203.3	13, 831.20
Dominica	67000	374.4	5588.40
Grenada	104000	678.5	6523.90
Montserrat (<i>Estimates</i>)	6000	29	3400.00
St. Kitts and Nevis	51000	570.1	11179.20
St. Lucia	170000	986.1	5800.40
St. Vincent and the Grenadines	109000	581.7	5336.90

Source: UN ECLAC & CIA World Fact Book

C. The OECS as an Impediment to Deeper CARICOM Integration

Despite its many internal achievements as a regional economic integration project, the OECS has manifested a tendency in recent years to serve as an obstacle to deeper economic integration at the wider CARICOM level. For example, in February 2006 the six sovereign OECS member states refused to sign the agreement that would bring the Single Market component of the CSME into force within their territories. This delay was caused, in part, by their failure to have the necessary legislation in place that would allow the free movement of skilled workers and investors. Despite having had more than a decade of advance warning, many of the OECS countries had still not modified their internal laws to accredit education obtained in other countries, eliminate work license requirements for CARICOM nationals, and to accept contributions made to other Caribbean social security systems for vesting purposes in their own schemes. In addition, the OECS governments insisted that Barbados, Jamaica, as well as Trinidad and Tobago had to first put money into a Development Fund that would compensate them for the negative impact they claimed they would inevitably suffer by competing with the larger economies.

The big dilemma confronting the OECS today is how to best integrate into the world economy and at the same time promote sustainable development. There is an appreciation at the intellectual level that the tiny size of their populations and economies require deeper economic and even political integration at the sub-regional and CARICOM level. The problem has been how to convert this imperative into a reality when the OECS countries are governed by political actors who have shorter term interests and want to preserve their power. Up until now, the OECS governments have contented themselves with asking for “special and differential treatment” whenever they deal with bigger and more developed nations. This implies offering a minimum of concessions to bigger states while at the same time expecting greater preferential access into those larger markets. The special exemption from free trade granted to the six sovereign OECS member states and Belize by Article 164 of the Revised Treaty of Chaguaramas is a manifestation of this type of non-reciprocal preferential treatment within the CARICOM context.

One of the most troubling aspects of this non-reciprocal preferential treatment is that it does nothing to encourage the type of restructuring of the economy required to enhance global competitiveness. These types of preferences actually foment the opposite by creating a mentality of entitlement and privileges that is difficult to eliminate the longer they are in place. This has been most evident with respect to the regime originally permitted by Article 56 of the old Treaty of Chaguaramas and extended by Article 164 in the revised Treaty. Many of the same products that were exempt from intra-CARICOM free trade for some three decades continue to receive that protection, even though the beneficiary industries have done nothing to transform themselves into more efficient and competitive businesses. Another problem with unilateral preferential treatment programs is that they prolong dependency on the export of a small group of primary products and do nothing to encourage diversification. This is precisely what occurred in some Eastern Caribbean countries such as Dominica and St. Vincent and the Grenadines which, for years, depended excessively on the preferential access offered into the European markets for their bananas and found themselves with few alternatives when this regime collapsed after a successful complaint filed in the World Trade Organization.

The CARICOM Development Fund finally launched in July 2008, and whose creation the six sovereign OECS countries had demanded in order for them to fully implement the CSME, also presents a series of troubling questions. It is expected that this money will be used to provide technical, financial, and development assistance to those countries, regions and sectors deemed to be disadvantaged by the implementation of the CSME. Unfortunately, if similar type programs of the past are any indication of how things will go with the new Development Fund, much of this money will likely end up being used to pay the salaries of public sector employees instead of assisting efforts at economic and structural reform. In any event, even steering money to “restructure” industries that will never be efficient because they can never hope to achieve economies of scale is a waste of resources. In the end, the only thing these monies facilitate is to hide the fact that the tiny OECS economies are not viable, and the only solution is deeper regional economic integration. It also allows the local political elites to evade the responsibility of undertaking painful decisions needed to convert these mini-states into a political union and provide the only long term hope of liberating them from an endless cycle of dependency.

D. The Caribbean’s Demand for Special and Differential Treatment in Regional and Bilateral Trade Negotiations

Almost from the day that the 34 countries of the Western Hemisphere (but for Cuba) met in Miami in December 1994 to discuss the possibility of creating a Free Trade Area of the Americas (FTAA), the CARICOM nations have clamored for recognition of “special and differential treatment” based on their level of development and the size of their economy.¹⁶ At the Denver Trade Ministerial in June 1995 it was agreed that while all countries participating in the FTAA could not opt out of any of its obligations, the adjustment concerns of smaller economies would be taken into consideration. Among other things, a longer phase in period for removing tariffs might be permitted for small economies. In addition, a working group was created to focus

¹⁶ For a more detailed discussion of the FTAA, see, *Chapter 10: The Rise and Fall of the Free Trade Area of the Americas* in T.A. O’KEEFE, *LATIN AMERICAN AND CARIBBEAN TRADE AGREEMENTS: KEYS TO A PROSPEROUS COMMUNITY OF THE AMERICAS* (2009). It is important to note that as part of CARICOM, the OECS countries are legally a party to several bilateral trade arrangements. These include agreements with Colombia (1994, amended in 1998), Venezuela (1992), the Dominican Republic (1998), and Costa Rica (2004). Because of their status within CARICOM as less developed countries they are exempt under these agreements from extending reciprocal treatment on market access.

on issues affecting the smaller countries and to make specific recommendations for facilitating their incorporation into an eventual FTAA.

When the negotiations to establish an FTAA were formally launched in Santiago, Chile following the II Summit of the Americas in April 1998, the demand for recognition of special and differential treatment continued, although this time smaller countries outside the English-speaking Caribbean also joined the chorus. A Consultative Group on Smaller Economies was created to replace the older working group and it was tasked with alerting the FTAA negotiators to issues of concern for the smaller economies and in making recommendations on how to resolve them. What precisely constituted special and differential treatment, however, remained vague. One reason for this was that the FTAA negotiations were deemed to be a “single undertaking” that, among other things, required that obligations arising under any hemispheric trade agreement had to be assumed by all the participating states without exemptions.

Not long after the III Summit of the Americas in Quebec City in April 2001, CARICOM began to delineate a more aggressive position that special and differential treatment should also mean permanent exemptions from tariff elimination requirements otherwise incumbent on the all the other participating countries.¹⁷ Given that the CARICOM governments did not negotiate separately but, since 1997, had decided to pool their resources into a single negotiating team called the Caribbean Regional Negotiating Mechanism or CRNM, it is difficult to discern if there were particular countries who were at the forefront in pushing this view. In any event, the Caribbean’s demand prospered temporarily when the FTAA negotiations entered a critical phase at the end of 2003 and it was decided to discard the “single undertaking” principle and create a two-tiered agreement. The first tier would consist of core obligations to which all 34 governments would subscribe. The second tier would be plurilateral in nature and would only bind those governments that specifically signed onto them. Under such a scenario, CARICOM’s request for non-reciprocity in any FTAA agreement now became plausible as “the need for

¹⁷See, e.g., Gomez, *Negotiations for Hemispheric Trade Liberalization and Development in Latin America and the Caribbean*, 2 J. CARIBBEAN INT’L REL 28 (2006) at 41.

flexibility to take into account the needs and sensitivities” of individual countries was recognized and it was accepted that governments could now “assume different levels of commitments”.¹⁸ Unfortunately the two-tiered compromise only postponed by several months the eventual collapse of the entire FTAA process. The United States and the MERCOSUR countries, led by Brazil, were ultimately unable to agree which disciplines would be deemed core obligations and which were to be considered optional and therefore the subject of plurilateral agreements.

Despite the death of the FTAA, CARICOM countries continue to enjoy duty-free access into the United States market for most if not all their exports. The Caribbean Basin Economic Recovery Act (CBERA) is a unilateral preferential market access program enacted in 1983 and made permanent in 1990. Although textile and apparel products (as well as petroleum, certain footwear, tuna, and watches) were excluded from duty-free treatment under CBERA, this exclusion was remedied by the Caribbean Basin Trade Partnership Act in 2000 which allows duty-free importation of clothing made in eligible Caribbean nations primarily from textiles sourced in the United States. This privilege was originally supposed to have expired either with the entry into force of the FTAA or September 30, 2008 (whichever of the two came first). With the demise of the FTAA, however, the CBTPA has since been extended to December 31, 2010 by the US Congress. The future of CBERA and the CBTPA looks precarious, however, as both are contingent on securing a waiver within the World Trade Organization (WTO) from other developing countries that do not receive similar preferential access into the US market.

Following its expiration on December 31, 2005, Paraguay refused to grant a waiver sought by the United States at the WTO for renewal of CBERA/CBTPA. It was only in March of 2009 that Paraguay acquiesced to a new waiver valid through 2014 after the U.S. indicated it might consider including the country as a beneficiary under the Andean Trade Preference and

¹⁸See, Ministerial Declaration of Miami of November 20, 2003, which can be accessed at: http://www.ftaa-alca.org/Ministerials/Miami/Miami_e.asp

Drug Eradication Act (ATPDEA).¹⁹ This latest waiver at the WTO, however, does not guarantee the continued existence of CBERA/CBTPA. For one thing Paraguay has yet to become a beneficiary of the ATPDEA, meaning it could declare its March 2009 waiver null and void. More importantly the whole concept of the United States offering unilateral duty-free access into its market is increasingly an anathema to most Americans. This attitude has been heightened by recent economic travails and massive job losses. Accordingly, US politicians are increasingly under pressure to scuttle unilateral preferential market access agreements for developing countries---particularly for those nations that have graduated from the least developed country category---in favor of bilateral free trade agreements that also open up foreign markets to US goods and services.²⁰

To date, any talk of negotiating a bilateral free trade agreement between the United States and CARICOM has, however, been met with great trepidation on the part of the OECS countries.²¹ Similar concerns have also been raised by the OECS with respect to a free trade agreement between Canada and CARICOM to replace the Canadian unilateral preferential market access arrangement called CARIBCAN whose WTO waiver expires at the end of 2011. The recently concluded Economic Partnership Agreement between the European Union and the Caribbean suggests one way of getting around OECS objections to a free trade agreement with either the United States or Canada.

¹⁹See, *Paraguay Agrees to Grant U.S. Waiver Request for AGOA, ATPDEA, CEBERA*, 27 INSIDE US TRADE 1 (March 20, 2009). In April 2009 the respective Chairmen of the U.S. Senate Foreign Relations Committee and the U.S. House Foreign Affairs Committee both introduced two identical bills to include Paraguay as a beneficiary of the ATPDEA. See, *Foreign Policy Chairmen Back More Trade Benefits for Paraguay*, 27 INSIDE U.S. TRADE 1 (April 10, 2009).

²⁰See, e.g., *Baucus Says Congress Likely to Only Extend Trade Preferences This Year*, 27 INSIDE US TRADE 1 (November 13, 2009). In 2009 an informal group of non-governmental organizations and business associations proposed replacing various preferential market access programs offered by the United States with one unified preference program offering two tiers of benefits. The second, more generous tier would offer duty-free, quota-free access for all exports to the U.S. from the world's poorest countries. See, *NGO's, Business Groups Debate Principles for Preference Reform*, 27 INSIDE US TRADE 1 (April 10, 2009). See, also, *Reif Signals Preference Program Reform May Spill Into Next Year*, 27 INSIDE US TRADE 1 (May 8, 2009).

²¹See, e.g., Hornbeck, *US Trade Policy and the Caribbean: From Trade Preferences to Free Trade Agreements*, Congressional Research Service Report for Congress (April 4, 2007).

In recognition of the increasingly bleak future for unilateral preferential market access agreements, the European Union (EU) made a decision early in the twenty-first century to substitute its program for the former European colonies in Africa, the Caribbean and the Pacific (ACP) with a so-called Economic Partnership Agreement (EPA). Under an EPA, the ACP countries would now be required to also open their markets to European goods and services if they wanted access to the EU. Negotiations for an EPA between the EU and the Caribbean Forum (CARIFORUM), representing the 14 sovereign states of CARICOM plus the Dominican Republic, began in Brussels at the end of 2002.²² With many issues still unresolved as the December 31, 2007 expiration of the WTO waiver for the EU's preferential market access arrangements for the ACP countries approached, Brussels made it clear that it would respect this expiration date. The threat forced an end to the formal negotiations between CARIFORUM and the EU on December 16, 2007, although the actual EPA was not formally signed by 13 CARIFORUM countries and the EU until October 15, 2008. Guyana waited another five days to sign the EPA, while Haiti has yet to do so.

The CARIFORUM-EU EPA incorporates the concept of special and differential treatment by not insisting on full reciprocity in the removal of tariff and quantitative restrictions on the part of the Caribbean signatories.²³ In particular, while the EU immediately removed all tariffs and quotas on the vast majority of imports (but for rice and sugar) from the Caribbean, the Caribbean states have up to 15 years to phase out tariffs on most European goods, or up to 25 years in the case of so-called sensitive products. A number of European products such as alcohol, live animals, fresh fruits and vegetables, lactate products, and chemicals are permanently exempt from ever receiving duty-free treatment when imported by the CARIFORUM countries. The Caribbean nations also received an initial three-year moratorium on starting the tariff reduction

²² The 14 sovereign states of the CARICOM were represented in the negotiations by the Caribbean Regional Negotiating Machinery (CRNM). In July of 2009, the CRNM was incorporated into the CARICOM Secretariat as a specialized department to be called the Office of Trade Negotiations.

²³ The full text of the Economic Partnership Agreement between the CARIFORUM States and the European Community and its Member States, including protocols and annexes, can be found at: <http://www.crnmm.org> Note that trade agreements are signed with the European Community and not the European Union *per se*.

process as well. Furthermore, all items excluded by the OECS and Belize from intra-CARICOM free trade pursuant to Article 164 of the Revised Treaty of Chaguaramas can also be levied a tariff when imported by these countries from the EU. In addition, the CARIFORUM countries exempted more service sectors from the cross-border liberalization commitments in the EPA, particularly those sectors dominated by small and medium sized enterprises. Finally, the EU has agreed to provide funding to improve the overall competitiveness of the Caribbean's agricultural and fishery sectors, enhance the region's export marketing capabilities as well as compliance with technical, health and quality standards, and promote private investment and public-private partnerships.

E. Special and Differential Treatment in the Multilateral Context

The WTO Secretariat in Geneva has identified 145 special and differential treatment provisions in the various WTO Agreements, and, using a typology developed in 1998, has placed the provisions into six categories that:

- i. aim to increase the trade opportunities of developing countries;
- ii. commit to safeguard the interests of developing country Members;
- iii. provide flexibility of commitments, action, and use of policy instruments;
- iv. provide transitional time periods;
- v. promise technical assistance; and,
- vi. assist least-developed country members (LDCs) only.²⁴

Special and differential treatment provisions recognize the gap in economic development between developed and developing country members and create special conditions for the latter's participation in the WTO.²⁵ However, the WTO has no definition of the term "developing country" and therefore no defined criteria as to which countries are eligible for special and differential treatment. As a result, countries "attain" this status by self-selection, leading to the

²⁴Ewart, *Small Developing States in the WTO: A Procedural Approach to Special and Differential Treatment Through Reforms to Dispute Settlement*, 35 SYRACUSE J. INT'L L. & COM. 27 (2007) at 42.

²⁵*Id.* at 41.

anomalous situation that countries with very disparate economic and trade strengths are potentially eligible for the same special and differential treatment.²⁶ The WTO's consensus approach to decision-making suggests that it could be a very long time, if ever, before the practical step of defining the term is taken.²⁷

One area where current WTO rules on special and differential treatment are ineffective and require significant reform is with respect to the dispute resolution mechanism. The WTO Secretariat in Geneva has identified some eleven special and differential treatment provisions in The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) within the WTO.²⁸ However, only a few of the provisions that have been invoked have had a positive effect on rulings issued under the WTO's dispute resolution mechanism. A primary reason for this poor application of the special and differential treatment provisions of the DSU appears to be their vagueness and failure to clearly identify procedures to guide their application.²⁹ Even with the current limitations concerning the application of special and differential treatment within the

²⁶*Id.* at 63. Caribbean trade policy expert Andrea Ewart suggests an approach for delineating which countries should be entitled to special and differential treatment. Rather than solely taking into consideration the usual criteria of *per capita* income, she recommends creating a special category of small, developing countries defined as those countries whose economies are dependent on one or two industries for survival. The term "dependent" means at least 70 percent of export earnings are derived from those industries. This level of dependency makes the entire productive capacity of such countries particularly susceptible to the onslaught of imports, to a reduced capacity to sell goods on the world market, as well as to the vagaries of nature. Thus, independent of the level of GDP, a change in world demand or prices for its major export, or a hurricane or some other natural disaster can devastate the country's economy. She emphasizes that one major benefit of this definition is that it is quantifiable and trade-based. *Id.* at 66.

²⁷*Id.* at 64. It is important to point out, however, that attempts to recognize a special category of small and vulnerable economies or SVE's has begun at WTO and the grouping was finally accepted for purposes of the Doha Round negotiations. What characterizes an SVE includes smallness; physical isolation from markets; dispersion of small pockets of population; and small and highly specialized human and physical resource base. These characteristics impede effective integration into the global economy, raise operating cost structures, and render market adjustment more difficult. *Id.* at 65. The OECS countries form part of the SVE group at the WTO and seek flexibility in market access modalities that are sensitive to their dependence on trade tax revenue. *See*, TRADE POLICY REVIEW-REPORT BY OECS-WTO MEMBERS (April 21, 2008), Document No. 08-1885, a copy of which can be accessed through: <http://www.wto.org>

²⁸Ewart, *supra* note 24 at 42. The full legal text of the DSU can be found at: <http://www.wto.org> The most significant of these provisions for purposes of this paper is: Article 21.7. If the matter [concerning implementation of adopted recommendations or rulings by the Dispute Settlement Body or DSB] is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.

²⁹Ewart, *supra* note 24 at 41.

WTO's dispute resolution system, however, Antigua and Barbuda should still have been able to utilize existing provisions more effectively in its recent WTO case against the United States. The fact that it could not is as much a reflection of the shortcomings of CARICOM, for which it has only itself to blame.

In 2003 the government of Antigua and Barbuda requested the formation of a WTO arbitration panel after consultations with the United States over federal and state laws making it unlawful to supply gambling and betting services on a cross-border basis proved fruitless. Among other things, US laws prohibited American banks from processing credit card charges to pay for gambling debts incurred by individuals based in the US accessing Internet casino or sports betting sites operated from overseas. Virtual casinos and sports betting operators based in Antigua and Barbuda were threatened with bankruptcy as a result of enforcement of these laws. Antigua and Barbuda asked the arbitration panel to declare the relevant US laws to be in violation of US obligations under the WTO's General Agreement on Trade in Services (GATS). The arbitration panel found in Antigua and Barbuda's favor declaring, *inter alia*, that the United States had not excluded internet gambling and betting from the list of services that can be offered in the US market by other WTO member states.³⁰ On appeal to the WTO's Appellate Body, the overall award in favor of Antigua and Barbuda was affirmed.³¹ The Appellate Body also found that the United States could not utilize as a defense the "protect public morals" or "maintain public order" exceptions to prevent online gambling through overseas web sites because it allowed its own citizens to use US based online gambling services related to horse racing. In 2006 Antigua and Barbuda requested a new arbitration panel determination as a result of its frustrated attempts to get the United States to comply with the earlier recommendations and rulings of the WTO's

³⁰See, United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Report of the Panel (November 10, 2004), Document No. 04-2687. The full text can be accessed at: <http://www.wto.org>

³¹See, United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Report of the Appellate Body (April 7, 2005), Document No. 05-1426. The full text can be accessed at: <http://www.wto.org>

Dispute Settlement Body concerning their dispute over online gambling.³² A ruling in March 2007 found that the United States had indeed failed to comply with the recommendations of the Dispute Settlement Body.³³ In June 2007, Antigua and Barbuda requested authorization from the Dispute Resolution Body to suspend concessions and obligations arising under the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the GATS that benefited the United States. The United States objected to the level of suspension of concessions and made a request for arbitration under the relevant DSU rules. In December 2007 the arbitrator determined that the annual level of nullification or impairments of benefits to Antigua and Barbuda as a result of US recalcitrance in adhering to the earlier WTO award was US\$ 21 million.³⁴ Accordingly, Antigua and Barbuda was authorized to suspend obligations owed to the US under the TRIPS agreement up to that amount on an annual basis.

Despite its victories at the WTO, Antigua and Barbuda has never been able to enforce the decision in its favor as the United States simply ignores it. Although Antigua and Barbuda is entitled to impose retaliatory measures on the United States, this has proved to be illusory as there is nothing Antigua and Barbuda can realistically do against US interests that would not bring even greater economic harm to its own citizens.³⁵ For example, Antigua and Barbuda is almost completely dependent on imports, particularly food and manufactured goods as well as services, many of which can only realistically be sourced from the United States. Accordingly, imposing

³²In June 2005 Antigua and Barbuda had already requested the appointment of an arbitrator under Article 21.3(c) of the DSU to make a binding determination as to when the United States had to comply with the award made by the WTO's Dispute Settlement Body in its favor. *See, United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Arbitration Under Article 21.3(c) of the DSU*, Award of the Arbitrator (August 19, 2005), Document No. 05-3683 available at: <http://www.wto.org>

³³*See, United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services - Recourse to Article 21.5 of the DSU by Antigua and Barbuda*, Report of the Panel (March 30, 2007), Document No. 07-1209. The full text can be accessed at: <http://www.wto.org>

³⁴*See, United States- Measures Affecting the Cross-Border Supply of Gambling and Betting Services - Recourse to Arbitration by the United States under Article 22.6 of the DSU*, Decision by the Arbitrator (December 21, 2007), Document No. 07-5704. The full text can be accessed at: <http://www.wto.org>

³⁵Since its loss at the WTO in 2005, the United States has sought to remove online gambling services from the list of services that can be offered in the US market by overseas service providers under the GATS but has yet to make the necessary changes to the relevant legislation that permits online inter-state horse race betting within the United States.

retaliatory measures on imported goods or services from the US would only harm the citizens of Antigua and Barbuda without causing even the slightest ripple effect on the American economy given that the total population of Antigua and Barbuda is the size of one small American city. Similarly, the WTO authorized suspension of obligations owed to the United States under the TRIPs has proven meaningless as the sum in royalties and other fees generated from the use of US intellectual property in Antigua and Barbuda is comparatively negligible (not to mention the fact that the tiny country was already awash in pirated American DVDs, CDs, games, and software). More importantly, the WTO determination does not excuse Antigua and Barbuda from complying with other intellectual property obligations arising under other international conventions and treaties.

Had CARICOM's CSME been fully implemented or its CET applied without exceptions, Antigua and Barbuda might have been able to utilize Article 21.7 of the DSU which provides that in the event of a case brought by a developing country, the Dispute Settlement Body, when monitoring the implementation of adopted recommendations or rulings, "shall consider what further action it might take which would be appropriate to the circumstances." When coupled with Article 22.4 of the DSU which states that "the level of the suspension of concessions or other obligations authorized by the Dispute Settlement Body shall be equivalent to level of the nullification or impairment", Antigua and Barbuda could have argued that its membership in CARICOM permitted the WTO's Dispute Settlement Body to permit all the CARICOM member states to impose a retaliatory measure on a service or product originating in the United States for which there are other competitively priced and high quality alternatives that can easily be sourced elsewhere in the world. After all, Article 6(g) of the Revised Treaty of Chaguaramas clearly provides that one objective of CARICOM is "the achievement of a greater measure of economic leverage and effectiveness of Member States in dealing with" another country. Unfortunately CARICOM's CSME has yet to come into full force and the CET is riddled with exceptions. Hence CARICOM currently falls short of being deemed a single market and economy or a customs union with a comprehensive CET to credibly support an argument that the entire

CARICOM should be authorized to impose a retaliatory measure. The great irony is that this situation is primarily the result of Antigua and Barbuda and the other OECS member states.

Conclusion

The six sovereign nations of the Eastern Caribbean have often served as bottlenecks to deeper economic integration within CARICOM and slowed the negotiation of trade agreements by CARICOM with the outside world. On intra-CARICOM trade, the six sovereign OECS states have retained tariffs and quantitative restrictions as part of a misguided policy to preserve a handful of jobs in obsolete sectors while penalizing larger numbers of their poorer citizens and the much more lucrative tourism industry. In this way, local politicians have often sacrificed the long term economic viability of their tiny island nations in favor of their own narrow career interests. These same politicians resist efforts at deeper economic and political integration by claiming to be defending national sovereignty. That resistance, however, only enhances dependency on foreign aid and the vagaries of unilateral preferential market access agreements that can be withdrawn at whim.

The new OECS Economic Union Treaty indicates that the OECS governments have finally acknowledged that the status quo is not sustainable and that they must move towards greater economic and political union, if they are to break the cycle of dependency and become viable in a globalized economy. The creation of an economically and politically integrated OECS may give the participating states sufficient self-confidence in order end their foot dragging to greater economic integration within CARICOM. Such a development may also diminish the importance the Caribbean as a whole has traditionally attached to demanding non-reciprocity when negotiating trade agreements with outside actors. On the other hand, the demand for special and differential treatment is unlikely to cease in the multilateral arena. An OECS economic union and a more deeply integrated CARICOM may, however, lead to more effective use of the special and differential treatment provisions of the WTO, particularly with respect to the dispute resolution system.