

The Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy and its Implications for Fisheries in the Region

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ABSTRACT

In February 2006, The Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy (CSME) came to life with the formal launching of the Single Market. The Treaty is a framework agreement which lays down principles and rules for the operation of the CARICOM Single Market and Economy and will guide the activities of participating Member States in the areas covered by the Treaty. The CSME represents a development path of ever closer cooperation through the integration of the Member States' markets and economies in social and economic matters. The aim of the Treaty is to create an enlarged internal market and economic space without barriers where the free movement of goods, labour, capital and services, and freedom of establishment will be ensured. Business enterprises and service providers, including those connected to fisheries, which are established in a Member State, will be free to establish themselves and conduct businesses in any part of the internal market without discrimination based on nationality. The CSME also includes the development of a number of common institutions such as the Caribbean Court of Justice, as well as a number of common policies, such as, trade policy, which will govern internal and external trade, including fish imports and exports. This paper explores the provisions of the Treaty relating to fisheries and discusses the implications for sustainable use and management of coastal and marine resources, including the development of a common fisheries policy.

KEY WORDS: Treaty of Chaguaramas, fisheries management, CARICOM

El Revisado Tratado de Chaguaramas Estableciendo la Comunidad Caribeña incluyendo la Economía y el Mercado Único del CARICOM y sus Implicaciones para las Pesquerías en la Región del CARICOM

En Febrero del 2006, el Revisado Tratado de Chaguaramas Estableciendo la Comunidad Caribeña incluyendo la Economía y el Mercado Único del CARICOM y sus Implicaciones para las Pesquerías en la Región del CARICOM (CSME) entró en vigencia. El Tratado es una estructura de acuerdo en la cual descansan los principios y las reglas para la operación del Mercado Único y guiará las actividades de los Estados Miembros participantes en la áreas cubiertas por El Tratado. El CSME representa una vía de desarrollo para una cooperación aun más cercana entre los integrantes de las economías de los Estados Miembros en asuntos sociales y económicos. El Mercado y Economía Únicos indica que todos los territorios de los Estados miembros comprenderán un área interna sin barreras en donde el movimiento libre de productos, servicios, labor y capital, así como libertad de establecimiento estará asegurado. La gente de negocios y los proveedores de servicios, los cuales, presumiblemente incluye personas conectadas a la pesquería, serán libres de establecerse y llevar a cabo negocios en cualquier parte del mercado interno, por ej. Los Estados Miembros que forman parte del Mercado Único sobre la base no discriminatoria. El CSME también incluye el desarrollo de un número de instituciones comunes tales como la Corte Caribeña de Justicia, así como un número de políticas comunes tales como políticas relacionadas con comercio la cual gobernará el comercio interno y externo, incluyendo la exportación e importación de productos pesqueros. Este documento explora las provisiones que el Tratado tiene con respecto a las pesquerías y discute las implicaciones para el uso sostenible y el manejo de los recursos costeros y marinos, incluyendo el desarrollo de una política común pesquera.

PALABRAS CLAVE: Tratado de Chaguaramas, Manejo Pesquero, CARICOM

INTRODUCTION

Background on Caribbean Integration

The present initiative towards Caribbean unity has its origins in the vision of regional integration which inspired the establishment of the British West Indies Federation in 1958. Although the Federation ended prematurely in 1962, Caribbean leaders continued to pursue the vision and to strengthen cooperation in the areas that existed during the Federation. Thus, in July 1965, the Governments agreed on

a plan to establish a free trade area. The plan came to fruition in December 1965 when the Heads of Government of Antigua and Barbuda, Barbados and British Guiana (Guyana) signed an Agreement establishing the Caribbean Free Trade Association (CARIFTA).

The CARIFTA agreement came into effect on May 1, 1968, with the participation of Antigua and Barbuda, Barbados, Trinidad and Tobago and Guyana. Later that year Dominica, Grenada, St. Kitts, Nevis and Anguilla, Saint

Lucia and Saint Vincent and the Grenadines, Jamaica and Montserrat acceded to the Agreement. British Honduras (Belize) became a member in May 1971 (see CARICOM website at <http://www.caricom.org/jsp/community/carifta> for further information).

At the Seventh Heads of Government Conference in October 1972, Caribbean Leaders decided to further strengthen and deepen the integration process by transforming the free trade association (CARIFTA) into a common market, and establish the Caribbean Community of which the Common Market would be an integral part.

The Caribbean Community and Common Market (CARICOM) was established by the Treaty of Chaguaramas, signed by Barbados, Jamaica, Guyana and Trinidad & Tobago and came into effect on August 1, 1973 (CARICOM, 1973). Subsequently ten other Caribbean territories joined CARICOM bringing the membership to fourteen.

Caribbean political leaders once again decided during the Tenth Meeting of the of the Conference of Heads of Government held in Grand Anse, Grenada in 1989, that they wanted to further integrate their economies by creating a single market and economy (CARICOM, 1989).

The Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy (Revised Treaty) was signed by the CARICOM Heads of Government on 5 July 2001, at their 22nd Meeting in The Bahamas (CARICOM, 2001).

THE REVISED TREATY AND FISHERIES

In January of 2006, a significant event occurred in the Caribbean without much fanfare. The Revised Treaty came to life with the official launching of the CARICOM Single Market at a ceremony attended by CARICOM Heads of States and other high officials at the University of the West Indies, Mona, Jamaica. Although the event was relatively low-keyed it nonetheless may turn out to be of historical significance in the economic, social and political life of the Caribbean region, not unlike the establishment of the European Communities by the Treaty of Paris in 1951 and the Treaties of Rome in 1957.

The Revised Treaty replaced the 1973 Treaty of Chaguaramas, which was primarily a regime for trade in goods (Walker, 2005). The Revised Treaty on the other hand, establishes a more comprehensive regime for the integration of the markets and economies of the States Parties, and is thus a step towards closer and deeper union of the Member States.

Membership of the Caribbean Community as it now stands consist of Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago. Haiti is still in the process of becoming a Member, the process having been interrupted in 2002, due to the social and political upheaval and the installation of an interim admini-

stration, has resumed with the reinstatement of a democratically elected government in February 2006. The Revised Treaty is now applicable to all Member States of the Community except The Bahamas, Haiti and Montserrat.

The issues being explored in this paper are firstly, whether the regulations in the Revised Treaty governing the establishment and operation the CARICOM Single Market and Economy (CSME) apply to fisheries, and secondly, if they do, what are the implications for fisheries. The question could be posed another way by asking whether the fisheries sub-sector of Member States form part of the Single Market and Economy and are therefore subject to the Treaty regulations. These are not merely academic questions. They are at the forefront of the minds of policy-makers, fisheries managers, administrators, scientists, students and resource users across the Caribbean who are trying to understand the changed environment brought about by the Revised Treaty, including possible opportunities and threats to their way of life.

In January 2003, the Conference of Heads of Government of CARICOM mandated the development of a Common Fisheries Policy and Regime to ensure rational development and management of fisheries in the Community. The question that arises is whether or to what extent is the Common Fisheries Policy an instrument to give effect, in an orderly and responsible manner, to rights and obligations arising from the Revised Treaty and other legal instrument to which the Member States have already subscribed. Alternatively, is it a collateral agreement to the CSME to ensure that adequate principles, standards and rules are established to govern the sustainable use, management and conservation of fisheries and other living marine resources under the sovereignty or jurisdiction of Member States? In exploring these questions the paper looks at the Treaty provisions and considers the experience of the European Union as a source of guidance on how relevant Treaty provisions might be construed, bearing in mind that European Community Law is not authority in Caribbean jurisprudence.

Before embarking on the analysis of the Revised Treaty, it is useful to clarify the principles of interpretation to be applied. As the Revised Treaty is an agreement among sovereign states, a purposive or teleological approach should be applied. The policy and objects of the Revised Treaty ought to be determined by construing the Treaty as a whole. Furthermore, the provisions and measures contained therein should be interpreted and construed by looking at the Revised Treaty and the goals and objectives of the Community rather than just subject to the literal interpretation of the specific words used.

In this regards, the preamble to the Revised Treaty is very useful in understanding the objectives and goals, and specific measures contained therein. There are four statements in the preamble that are relevant for the purpose of elucidating the objects and scope of the Revised Treaty, and the implications for fisheries.

Firstly, the preamble speaks to the need to promote the highest level of efficiency in the production of goods and services to maximize foreign exchange earnings, achieve food security and improve the standard of living of the people of the region. Secondly, it recognizes that optimal production by economic enterprises in the Community requires the structured integration of production in the Region, and particularly, the unrestricted movement of capital, labour and technology. Thirdly, it speaks to a resolve to establish conditions which would facilitate access by nationals of the States Parties to the collective resources of the Region on a non-discriminatory basis. Fourthly, it recognizes that a fully integrated and liberalised internal market will create favourable conditions for sustained, market-led production of goods and services on an internationally competitive basis.

The preamble thus speaks clearly to an intention to create a closer union by integrating the markets and economies of Member States, thereby establishing a single economic space where the free, unrestricted movement of capital, labour, goods and technology will be assured. The purpose of which is to reposition the region's economies to survive and compete in the global economy. It thus seeks to provide new economic opportunities for nationals and enterprises of Member States. This is to be achieved by establishing a better match between the factors of production and available resources; improve productivity; and increased production of goods and services; which should lead to better standards of living and food security for the people of the Member States. The express resolve to establish conditions to "facilitate access" by nationals to the "collective resources of the region on a non-discriminatory basis" is worth emphasizing. But what exactly are these collective resources of the region? Are the fishery resources in the Caribbean Sea included? On the face of it, there seems to be a strong presumption that all nationals and economic enterprises and activities, including those connected to fisheries, aquaculture, and use of the living marine resources of Member States, are to be included in the scope of the Revised Treaty.

Goals and Objectives

The aim of the Revised Treaty is to realize closer integration of the markets and economies of the Member States to achieve greater economic development, political stability and influence on the global stage. The stated goal of the Revised Treaty is "establishing the Caribbean Community including the CARICOM Single Market and Economy." But what exactly is a single market and economy? The simple answer is that it is a functional internal area, comprising the territories of Member States, without barriers in which the free movement of goods, persons, services and capital is ensured, or to use the words in the preamble, "a fully integrated and liberalised internal market." It is a move from the common market in the direction of further liberalized and integrated internal market. The best exam-

ple of a functioning single market (and economy) is the European Community (EC). The EC formally became a single market in 1992, with the signing of the Maastricht Treaty (European Commission, 1992). Although the CARICOM countries use the terminology of a "single market and economy", whereas the Europeans use the simpler terminology of "single market", both mean essentially the same thing.

The specific objectives of the Revised Treaty, which are given in Article 6 include:

- a. improved standards of living and work;
- b. full employment of labour and other factors of production;
- c. accelerated, co-ordinated and sustained economic development and convergence;
- d. expansion of trade and economic relations with third States;
- e. enhanced levels of international competitiveness;
- f. organization for increased production and productivity;
- g. the achievement of a greater measure of economic leverage and effectiveness of Member States in dealing with third States, groups of States, and entities of any description;
- h. enhanced co-ordination of Member States' foreign and [foreign] economic policies;
- i. and enhanced functional co-operation, including :
 - i. more efficient operation of common services and activities for the benefit of its peoples;
 - ii. accelerated promotion of greater understanding among its peoples and the advancement of their social, cultural and technological development;
 - iii. intensified activities in areas such as health, education, transportation, telecommunications.

Taken together with the preamble and the historical developments starting with the Caribbean Free Trade Association in the 1950s, and the Community and Common Market in the 1970s, the express goals and objectives provide a comprehensive overview of the intention of the states in creating a single market and economy. In summary the intention is two-fold, firstly, greater political co-operation, although not federalism (at least not at this time), and secondly, deeper economic and social integration to achieve economic and social development by establishing an environment where the factors of production can freely circulate without restrictions. Notwithstanding the political motivation, which is obvious from the historical developments, at this time, the economic motives are clearly paramount in the minds of the Member States.

For present purpose, objectives (a), (b), (c), (f) and (h)

which speak to the issue of economic development and improved opportunities and standards of living for the people of the region are of particular relevance. This is so because the fisheries sector (including aquaculture) has always been recognized as an important component in the countries' economies for, *inter alia*, food security, employment, foreign exchange earning, culture, stability of rural and coastal communities, and the fight against poverty.

Key Principles

Member States of the Community have committed themselves to a number of key principles of general application in the implementation of the Revised Treaty. These are laid down in Chapter 1. For present purpose the last three are worth highlighting. They are non-discrimination on the ground of nationality, most favoured nation treatment of Member States, and a general undertaking on implementation.

The principle of non-discrimination is provided for in Article 7 and imposes a general prohibition on discrimination on the basis of nationality within the areas covered by the Revised Treaty, without prejudice to any special provisions on this subject. It is suggested that this provision is a very important one and is likely to have far reaching implication for the conduct of economic activities within the single economic space, especially when taken together with the other fundamental rights given by the Treaty, which will be discussed below.

The most favoured nation treatment provision (Article 8) imposes an obligation on each Member State to treat another Member State no less favourable than it treats a third Member State or third states. This will ensure that Members of the Community at all times receive the most favourable treatment accorded any nation in respect of rights covered by the Revised Treaty. Articles 7 and 8 taken together and in conjunction with the substantive rights granted by other sections of the Revised Treaty will no doubt prove to be a powerful weapon in the hands of those seeking to exercise the rights and ensure the effectiveness of the Single Market and Economy.

The undertaking on implementation (Article 9) obliges Member States to take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of the Revised Treaty or resulting from actions taken by the Organs and Bodies of the Community. The article goes on to emphasize the matter in the second and third sentences of Article 9 in the following terms, "They [Member States] shall facilitate the achievement of the objectives of the Community. They shall abstain from any measures which could jeopardize the attainment of the objectives of this Treaty."

The history of the CARICOM Community is replete with cases of Member States failing to comply with their obligations (West Indian Commission, 1992). For this reason this Article could be very important as it could be used in securing enhanced compliance by Member States. The

potential value may be illustrated by the European Court of Justice (ECJ) reliance on an equivalent provision in Article 5 of the original EC Treaty (now Article 10) to develop the doctrine of state liability to ensure the effectiveness of European Community (EC) law. As early as 1960, well before the development of the doctrines of direct effect or supremacy of European Community law over domestic law, the ECJ hinted that the equivalent wording in Article 86 of the Coal and Steel Treaty was capable of triggering an obligation on the part of a Member State to make good any harm resulting from a breach of the Treaty (case 6/60: *Humblet v Belgium* [1960] ECR 1125). However it was not until over 30 years later that the doctrine of state liability was developed in the case of *Francoovich v Italian Republic* [1973] 2 CLMR 66. A group of laid-off Italian workers whose employer became insolvent and unable to meet its redundancy payments sued the Italian government for non-compliance with EC Directive 80/987, which provided that Member States were required to set up a fund to cover this type of event. The Italian trial court referred to the ECJ certain questions arising from the workers' claim. The Court, relying on Article 5 of the EC Treaty (now Article 10) concluded that, as a matter of Community law, a breach by a Member State of its Community legal obligations should, subject to certain conditions, give rise to liability in damages to those harmed. They concluded that the principle of Member State liability is inherent in the system of the Treaty and in Article 5. This has turned out to be a powerful tool in enforcing EC law.

Although Article 9 of the Revised Treaty is materially the same as Article 5 in the 1973 Treaty of Chaguaramas, which cannot be said to have generated any significant degree of compliance, the circumstances have changed considerably, with the inauguration of the Caribbean Court of Justice (CCJ) in 2005, with exclusive and final jurisdiction regarding the interpretation and application of the Revised Treaty (CARICOM, 2001). The judgments of the Court constitute *stare decisis*, and Member States are obliged to comply with them promptly (Articles 221 and 215 of the Revised Treaty). In this context, these three principles could prove to be very powerful provisions in ensuring both the development of Caribbean Community jurisprudence and Member States compliance with their obligations under the Revised Treaty and that the rights given to their nationals are respected. A lot will depend upon the attitude adopted by the CCJ in exercising its jurisdiction stemming from the Revised Treaty in applying and interpreting the law. If they follow the ECJ in holding that the principle of Member State liability is inherent in the Treaty and particularly in Article 9 the implications would be far-reaching.

Freedom of Establishment, Provision of Service and Movement of Persons

The freedom of establishment, freedom to provide services, free movement of capital and free movement of

persons are the fundamental foundations of the new regime under the CSME, which are designed to accomplish the goals and objectives articulated above. They are provided for in Chapter 3 of the Revised Treaty, and are clearly designed to ensure the realization of the economic goals by securing the establishment of a single economic space in which the factors of production can freely circulate. Furthermore, these provisions will undoubtedly improve opportunities and working conditions of natural persons forming part of the work force and legal entities such as business enterprises which are operating within the Community. This will be so even if the view is taken that the granting of individual rights are incidental to the economic motive, that is, that the rights enjoyed by individuals are just a way of ensuring that labour can be imported and exported to suit the needs and demands of regional enterprises thereby enabling them to take advantage of the larger single domestic market space and can compete equally in attracting and securing labour. Any impairment or restriction of these rights beyond what is provided for by the Revised Treaty would be contrary to the objects of the Treaty and is likely to call into question the viability of the Single Market and Economy. If the view is taken that these rights are indeed fundamental for achieving the objectives of the Revised Treaty then one would expect any competent court or tribunal responsible for implementing and interpreting these provisions to do so in a liberal manner based on the goals and objectives of the Community.

The right of establishment refers to the right of nationals or legal entities that are established in a Member State to enter another Member State and stay on a long-term or permanent basis, thereby, establishing themselves, in order to “engage in any non-wage-earning activities of a commercial, industrial, agricultural, professional or artisanal nature (Art. 32(3)(1) (a)); or “create and manage economic enterprises as defined in Article 32(5)(b)” (Art. 32(3)(1) (b)). The basic objective of the concept of “freedom of establishment” is therefore to allow self-employed persons and enterprises to relocate so that they may exploit the business opportunities and conditions in another Member State thereby contributing to economic development within the Community. The concept implies that the person or entity will either reside permanently in the host state or establish a permanent professional base there.

Article 32(1) imposes an obligation on Member States not to introduce any new restrictions on the right of establishment, while 32(2) imposes an obligation to notify the COTED, the Community organ responsible for overseeing the implementation of the CSME, of existing restrictions. But, of even greater significance, is the obligation imposed by Article 33 to remove all restriction on the right to establishment, giving priority to activities related to the production of goods and the provision of services, which generate foreign exchange earnings (Article 34(a)).

The question is whether the right of establishment is a right that is available to nationals or legal entities of a

Member State who are fishermen or fishing enterprises or whether such persons are excluded. Prime facie, there is nothing to suggest that fishermen or fishing enterprises are excluded by virtue of the nature of their calling or business. Provided they are established in a Member State and satisfy the requirements laid down by Article 32(3)(1) (a) or (b), that is, they are engaged in “a non-wage-earning activity” meaning they are self-employed (Art. 32(3)(2), and their activity is regarded as “of a commercial, industrial, agricultural, professional or artisanal nature,” or alternatively they intend to “create and manage economic enterprises” which is defined as “any type of organization for the production of or trade in goods or services” (Article 32 (5)(b)). Article 2 of the Revised Treaty defines “goods” as “...all kind of property other than real property, money, securities or choses in action”. Furthermore, the main commercial species, for example, lobster, shrimp, queen conch, large tunas, deep-slope snappers and groupers, and even aquaculture products such as tilapia and shrimps, in the Member States are generally highly traded commodities produced for exportation to hard currency markets and would thus be caught by Article 34(a), that is, they fall within the priority areas for the removal of restrictions on the freedom of establishment. It will also be shown that fisheries is regarded as a component of agriculture and would thus be caught by Article 32(3)(1) (a).

In the European Union, both the British Courts and the European Court of Justice had to deal with the matter of fishermen moving from one Member State to another to fish in the waters under the jurisdiction of the second Member State. After strong complaints by British fishermen who contended that they and the fish stocks available to them in UK waters were being adversely affected by the activities of Spanish fishermen, and a series of cases involving Spanish fishermen and fishing companies which had relocated to the UK to fish under the catch quotas allocated to the UK by the European Commission (*see for example R v Ministry of Agriculture, Fisheries & Food, Ex Parte Agegate* [1989] E.C.R. 4459, and *R v Ministry of Agriculture, Fisheries and Food, Ex Parte Jaderow* [1989] E.C.R. 4509), the UK Parliament intervened by enacting the Merchant Shipping Act, 1988, to stop the Spanish fishermen from relocating to the UK to engage in fishing without first establishing stronger economic ties to the UK.

The Act introduced a new system of registration for fishing vessels, with stringent British nationality and residence requirements in order to be eligible to fish in UK waters under quotas allocated to the UK. The validity of the Act was challenged by the Spanish fishermen in a series of cases, the *Factortame* Cases (*Case C-213/89 Factortame I* [1990] ECR I- 2433; [1990] 3 CMLR 1; *Case C-221/89 Factortame II* [1991] ECR I-3905; [1991] 3 CMLR 589; and in joined Cases C-46/93 & C-48/93 *Brasserie du Pêcheur & Factortame III* [1996] 1 CMLR 889). *Factortame* and a group of Spanish fishing companies and fisher-

men (97 in number), which were not able to re-register under the 1988 Merchant Shipping Act and continue fishing in UK waters, challenged the offending provisions of the Act, on the grounds that, *inter alia*, they were incompatible with Community Law providing for the freedom of establishment.

The House of Lords referred the matter to the ECJ for a preliminary ruling. The ECJ held that the Act was partly contrary to Community law on the ground that it was incompatible with the freedom of establishment provided for by Article 52 EC Treaty (*Case C-221/89 Factortame II* [1991] ECR I-3905; [1991] 3 CMLR 589). Specifically, the Act's nationality-based conditions of registration for vessel owners and operators were declared incompatible with Article 52. It may be useful to note in passing that, in the case, the ECJ provided a definition of the freedom of establishment as follows, "the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period." The House of Lords therefore held that the offending provisions of the 1988 Act were indeed incompatible with community law and would be suspended. The *Factortame* cases are famous not so much because of the substantive issues they settled, but rather because of the constitutional questions which arose. They established the Supremacy of Community Law over UK Law and allowed a UK court for the first in modern history to effectively set aside an Act of Parliament thus modifying the long standing constitutional doctrine of Parliamentary Sovereignty.

The answer to the question appears to be that fishermen and fishing enterprises are caught by the provisions of the Revised Treaty granting freedom of establishment. As self-employed persons or business enterprises established and operating in a Member State, they are given a right to establish in another Member State and should not be subjected to any discrimination on the basis of nationality. Although this is not explicitly stated it is implicit in the logic of the arrangement establishing the CSME. The fact that fishing and aquaculture are important economic activities in all Member States providing employment, food security, and export earnings, among other benefits, and have the potential for making enhanced contribution to the economic development of the region only lend support to the contention that they are not excluded from the CSME arrangements, and in fact, are prime areas for the removal of restrictions on the freedom of establishment.

The Right to Provide Services

The right to provide services (Article 36) is similar in many respects to the right of establishment. The concept envisages a temporary presence in a host state for a limited period to provide specific services without the type of permanent, long-term stay envisaged in the case of establishment. The concept of services is defined as "services provided against remuneration other than wages in any approved sector" (Article 36(4)). The "provision of services"

is also defined as a distinct concept by Article 36(4). For present purpose it is sufficient to note that the definition of the provision of service appears broad enough to allow the provision of service to be effected either by the supplier visiting the recipient's country, or the recipient going to the host country to receive service, or the supplier in one Member State through a commercial presence or the presence of a natural person in another Member State.

As is the case with the right of establishment, Member States are obligated to not introduce new restriction on the right to provide service (Art. 36(1)), to notify COTED of existing restrictions (Art. 36(3), and ultimately to remove any restrictions (Art 37), giving priority to "services which directly affect production costs or facilitate the trade in goods and services which generate foreign exchange earnings" (Art.37(3)(a))

As is the case with the right of establishment there is nothing to suggest that fishermen and service providers connected with the fisheries and aquaculture sector, whether consultants advising on resource management or seafood marketing strategy, engineers, fishing gear technologists, trainers, or seafood safety inspectors who are called upon to provide "services" for remuneration are in anyway excluded from the CSME.

Free Movement of Persons

The provisions regarding the free movement of Community nationals are in Articles 45 and 46 of the Revised Treaty. Member States commit themselves unequivocally to the goal of free movement of their nationals within the Community. This is however being done in a gradual manner bearing the sensitivity and fears of some Member States, and started with the following specified categories of persons: (a) University graduates; (b) media workers; (c) sportspersons; (d) artistes; and (e) musicians. Member States agreed to give these persons the right to seek employment in their jurisdiction. The Conference of Heads of Government, the supreme organ of the Community may expand the categories of persons eligible for such treatment.

Fishermen and other fish-workers, apart from the few who would qualify by virtue of the fact that they are university graduates, are currently barred from the free movement provisions. This is however a temporary or transitional arrangement and it is expected that eventually the right will be extended to all Community nationals (Art.45) including fishermen and others connected with fisheries.

Derogations and Waivers of Obligations to Grant Rights

The CSME arrangements provide some measure of protection to Member States that are adversely affected by the freedoms mentioned above. The Revised Treaty makes provision for a Member State that finds that granting any of the rights mentioned in Chapter III creates serious difficulties in any sector of the economy or occasion economic

hardship in a region of the Community to apply restrictions on the exercise of the rights to resolve the difficulties or alleviate the hardships (Article 47). However, in order to apply such restrictions, the Member State is required to notify the Competent Community Organ of its intentions (Article 47(2)). Furthermore, the Member State is obligated to submit a remedial programme showing how it is going to resolve the difficulties or alleviate the hardships.

Walker (2005) quite rightly pointed out that this amounts to a derogation from the obligation, and that while it appears fairly simple to derogate from the obligations, maintaining it may be much more difficult. Once a derogation has been introduced the competent Community Organ is responsible for assessing the restrictions, and determining whether they should be continued (Article 47(4)). In making its determination, the competent Organ will have to balance the legitimate interest of a Member State for economic development and the goals and interest of the Wider Community.

Article 48 also provides some protection to Member States, by permitting the Community Council, upon application by a Member State, to grant a waiver of the requirement to grant any of the rights provided for in Chapter III. The waiver can be with respect to any industry, sector or enterprise, and can only be granted for a maximum of 5 years, after which all restrictions must be removed. The procedures to be followed in applying for a waiver are contained in Article 48(2) and include a requirement for the application to be made before establishment of the programme for removal of restrictions. Since the programmes for removal of restrictions have already been completed from 2002, it may no longer be open to Member States to apply for such derogations.

A Member States wishing to exclude fisheries from the CSME regime may derogate from the rights granted in Chapter III, but in order to do so it must be able to demonstrate that it has suffered “serious difficulties” or ‘occasional economic hardships’. In any event such derogations are meant to be temporary, must be accompanied by a remedial program and will be reviewed by the competent Community organ, which will decide how long the restrictions can remain in place. Given the central importance of the Chapter III rights to achieving the goals and objectives of the Revised Treaty, any derogation from them are likely to be interpreted in a restrictive manner.

Agricultural Policy and Fisheries

Policies for sectoral development, including the Community’s Agricultural Policy, are to be found in Chapter 4 of the Revised Treaty. The scheme of the Agricultural Policy makes express provisions for the treatment of fisheries as a component of the Agriculture sector. The general objectives and provisions for agriculture should therefore be construed as applying to agriculture in its entirety embracing all the sub-sectors including fisheries, insofar as this is possible without leading to absurdity. Such as construction

is not unique, the same approach is used by the European Union (European Commission, 2002)

The general goals of the Agricultural Policy as provided for in Article 56 of the Revised Treaty are as follows:

- a. the fundamental transformation of the agricultural sector towards market oriented, internationally competitive and environmentally sound production of agricultural products;
- b. improved income and employment opportunities, food and nutrition security, and poverty alleviation in the Community;
- c. the efficient cultivation and production of traditional and non-traditional primary agricultural products;
- d. increased production and diversification of processed agricultural products;
- e. an enlarged share of world markets for primary and processed agricultural products; and
- f. the efficient management and sustainable exploitation of the Region’s natural resources, including its forests and the living resources of the exclusive economic zone,

It is noteworthy that 56(f) speaks not only to natural resources but specifically to the living resources of the exclusive economic zone, that is, to fisheries. In passing three points may be usefully made regarding objective (f). Firstly, it speaks to the principles of “efficient management and sustainable exploitation”, which suggest a strong conservation orientation attached to any use of the natural resources. Secondly, the focus is broadly directed at the use of the ‘regions natural resources’ which include fish, whether fishfish or shellfish, or aquatic plants, wherever they occur in Member States, among other resources. However, it goes on to make it clear that natural resources are to be interpreted to include “the living resources of the exclusive economic zones” of Member States. It cannot therefore be disputed that fish, whether finfish, shellfish or aquatic plants are regarded as “natural resources” of the region, even where they are found within the EEZ beyond the territorial waters. Thirdly, the use of the word “exploitation” confirms that the intention is that these resources should be developed and utilised by the people of the region for their benefit, albeit in a sustainable manner that will not jeopardize their long-term viability or the integrity of the aquatic ecosystems, in accordance with the objects of the Revised Treaty.

Article 57 sets out the implementation arrangements for achieving the goals of the Agricultural Policy. The provisions support the proposition that fisheries and fishermen are to be regarded as an integral part of the Policy and the CSME. There are a number of specific references to fisheries which are worth highlighting to support this argument. Article 57(1)(b) speaks to the establishment of effective agricultural financing systems, including insurance, bearing in mind the special needs of *artisanal fishers*, small farmers, foresters and agro-processors. Article 57(1)(e)

speaks of the development of appropriate policies for the use of land and *marine space* with a view to increased agricultural production. Article 57(2)(d) speaks of promotion of a mechanism for the collaboration of farmers, *fishers*, foresters and the social partners in agricultural development.

Further support may be found in Article 58, which deals specifically with Natural Resource Management. Article 58(1) imposes an obligation on the Community to “adopt effective measures to assist the Member States in the management of their natural resources in support of the transformation and sustainable development of the agricultural sector.” Article 58(2) goes on to impose a similar but more specific obligation on the Community to, “adopt measures for: (a) the effective management of the soil, air and all water resources, the exclusive economic zone and all other maritime areas under the national jurisdiction of the Member States”.

A few additional points are worth highlighting. Firstly, it should be noted the Revised Treaty gives the responsibility to the “Community” to adopt the measures necessary to achieve the policy objectives. Secondly, the broad scope of the policy should again be noted with use of the phrase “effective management of....*all water resources, the EEZ and all other maritime areas under the jurisdiction of Member States.*” Third, we again see an emphasis being placed on the resources of the EEZ, but this time with the additional emphasis that all other maritime areas under the jurisdiction of Member States are included. The reference to water resources rather than living marine resources is probably deliberate and implies that attention should be directed at both the living and non-living natural resources including, the superjacent water within the EEZ and the resources of the continental shelf, seabed and subsoil, which may extend beyond the outer limits of the EEZ, as provided for under Article 76 of UNCLOS (UNCLOS, 1982). Fourthly, it should be noted that the focus of this section is on “effective management” which implies, regulating, controlling and conserving rather than use or exploitation of the natural resources.

Fisheries

Notwithstanding the above analysis, the core of the Revised Treaty’s provisions regarding fisheries is to be found in Article 60. The rationale for this might have been to draw a distinction between traditional land based agriculture and fisheries, and more importantly, to make specific provisions for their management, conservation and utilisation bearing in mind the unique nature and dynamics of the fisheries and related ecosystems, and the difference in approach to their use and management which is required in consequence.

A useful definition of fisheries resources is given at Article 60(5), which says that fisheries resources includes all the fishable resources, natural and cultured, in the inland and internal waters, territorial seas and the exclusive

economic zones of the Member States. The intention seems to be to lay down a wide definition to cover all aquatic resources capable of being exploited by man, whether naturally occurring or produced by man in confined areas, which are under the sovereignty or jurisdiction of Member States. In passing it is worth noting that this definition is consistent with and should be interpreted in light of the provisions referred to above at Articles 56(1)(f) and 58(2).

The Revised Treaty imposes a duty on the Community to promote the development, management and conservation of the fisheries resources in and among the Member States on a sustainable basis, in collaboration with competent agencies and organizations (Art. 60(1))

It also lays down a scheme by which the Community, through its competent organs and bodies (Art. 57(1), must effect the promotion and facilitation referred to in paragraph 1 of Art.60 above. The scheme includes, *inter alia*, enhancing the institutional capabilities of the Member States in various areas of fisheries (Art. 60(2)(a)); establishing mechanisms to provide assistance in the development, management and conservation of the fisheries resources, and the discharge of obligations arising under Articles 62, 63 and 64 of the United Nations Convention on the Law of the Sea (Art. 60(2)(b)); effective regional representation at international fora (Art. 60(2)(c)); establishing development programmes for aquaculture (Art. 60(2)(d)); encouraging the establishment of protected aquatic habitats for the sustainable development of fisheries resources (Art. 60(2)(e)); and establishing, facilitating and strengthening research and human resource development at the professional, technical and vocational levels (Art. 60(2)(f)).

The scheme also include obligations which the Community must undertake in collaboration with Member States (Art. 60(3)), including; the management of straddling and highly migratory fish stocks; ongoing surveillance of their exclusive economic zones; the delimitation of maritime boundaries; and safeguarding their marine environment from pollutants and hazardous wastes.

The Revised Treaty goes on to impose a specific obligation on the Council for Foreign and Community Relations (COFCOR), that is, the Ministers responsible for Foreign Affairs, regarding the management, conservation, and utilization of the living resources of the EEZ of Member States. Article 60(4) says, “Without prejudice to the provisions of Article 56, COFCOR shall promote the establishment of a regime for the effective management, conservation and utilisation of the living resources of the exclusive economic zones of the Member States.”

Although the obligations under Articles 60(2) and (3) are not assigned to any specific Organs or Bodies of the Community, the nature of the responsibilities seems to fall well within the scope of responsibility of the Council for Trade and Economic Development (COTED) (see Art. 15 (2)). The rationale for assigning specific responsibility to COFCOR is not clear but may be to ensure that not only the COTED (consisting of mainly the ministers responsible

for agriculture and fisheries when dealing with agricultural matters), but also the Ministers responsible for Foreign Affairs are engaged in the process given the trans-boundary nature of fisheries.

A brief overview of the treatment of fisheries in the European Union Treaties may be useful at this point. Fisheries and aquaculture in the Union is managed by the Common Fisheries Policy (CFP), the core provisions of which are to be found in Regulation No. EC 2371/2002 (European Commission, 2002). The CFP has its legal basis in the Treaty Establishing the European Community (European Commission, 2002a). Although there is no specific chapter dealing with fisheries, Articles 32 to 38 (ex Article 38-42 of the 1957 Treaty of Rome) of Title II of the EC Treaty set out the provisions on agriculture. Article 32 states that agriculture shall be part of the common market arrangements and also provides that fisheries is included in agriculture. Article 33 outlines the following general objectives for agriculture: to increase productivity; to ensure a fair standard of living for the agricultural community; to stabilise markets; to assure the availability of supplies; to ensure that supplies reach consumers at reasonable prices. These have been held to be the general objectives of the EU Common Fisheries Policy. On the basis of these brief statements and the general principles and measures of the Treaty the EU Member States have developed a comprehensive policy which includes a body of rules and mechanisms covering the exploitation, processing and marketing of living aquatic resources (fish, shellfish and molluscs) and aquaculture products. The scope of the policy covers all activities carried out in the territories of the Member States or in the waters under the sovereignty or jurisdiction of the Member States, or by fishing vessels flying the flags of Member States in the waters of non-member countries or in international waters.

A number of conclusions may be drawn from the above analysis regarding fisheries. Firstly, the agriculture sector forms an integral part of the CSME arrangements and is subject to the principles and rules of the CSME. Secondly, it is clear that the Agricultural Policy of the Community includes fisheries and aquaculture as a major component. Thirdly, the general objectives laid down for agriculture are to be interpreted as applying to fisheries with any qualifications that might arise from Articles 58, which deals with natural resource management, and Article 60, which deals with fisheries management and development. Fourthly, the fundamental objective regarding fisheries is that the resources under the sovereignty or jurisdiction of Member States must be developed, managed, used or exploited in a sustainable manner for improved income and employment, food and nutrition security and poverty alleviation. Fifthly, the competent community organs and bodies, and Member States have a duty to promote, support and implement the measures required to give effect to the fisheries policies.

The Common Fisheries Policy

The Conference Heads of Government, the supreme Organ of the Community (Articles 11 and 12 of the Revised Treaty), at their Fourteenth Inter-Sessional Meeting held in Trinidad and Tobago, in February 2003, considered and endorsed a proposal from the Government of Barbados on 'the imperative of elaborating a Common Fisheries Regime', and mandated the CARICOM Secretariat to undertake the necessary consultations, and propose a framework for a Common Fisheries Policy and Regime (CFP&R) to strengthen the system of governance to ensure adequate protection and sustainable benefits from the living marine resources. Since then several studies, consultations, and workshops have been held to elaborate the substantive provisions of the CFP&R. A comprehensive agreement is being prepared, consistent with the objects and policy of the Revised Treaty and international conventions and agreements to which Member States subscribe, to address the principles and common measures that should be applied to ensure conservation, protection, sustainable use and management of fisheries and aquaculture within their sovereignty or jurisdiction.

DISCUSSION AND CONCLUSION

The substantive arrangements for the CSME as specified in the Revised Treaty provide for the right of establishment, freedom to provide service, and the free movement of labour, goods and capital. They also make specific provisions for sustainable development, management and conservation of fisheries resources under the jurisdiction of Member States.

There is nothing in the Revised Treaty to suggest that the CSME arrangements are restricted to the space occupied by the territorial land masses of Member States, and do not extend to their territorial seas, internal waters, archipelagic waters, exclusive economic zones, and outer continental shelves, where they exist. On the other hand, the various provisions of the Revised Treaty, starting with the preambular paragraphs, including Chapter 4, Part 2, the Agricultural Policy, make it clear that fisheries and other marine living resources fall within the scope of the CSME.

In creating a single economic space within which to promote the free flow of goods, services, capital and labour, it would appear that the framers of the Revised Treaty intentionally establish a legally binding region-wide regime that includes the marine space and its natural resources, including fish and other living marine resources under the sovereignty or jurisdiction of Member States. The area of the EEZ and other maritime space of Member States vastly exceeds the land area and territorial space, and is likely to be the source of significant economic activity in the future. The Caribbean Sea and living resources therein, are in fact common resources. It has been long established that most of the fisheries resources of commercial importance to the Caribbean states are shared resources. Implicit in the logic of the single market and economy aimed at ensuring food security, optimizing the pro-

ductive capacity and realizing maximum sustainable utilization of common resources, is the freedom of persons connected to fishing and aquaculture to take advantage of the opportunities created.

The conclusion to be drawn is that the rights of establishment, free movement of labour, goods and capital, and the freedom to provide services do not exclude persons connected to fishing or involved in the harvesting, processing and distribution of fish and marine products in any way.

The more efficient self-employed fishers and fishing companies should benefit from expanded fishing grounds and economies of scale, increased competitiveness and lower costs, as well as realize increased profitability arising from access to both the expanded single domestic market and external markets as a result of the CSME. Likewise, consumers should benefit from access to cheaper fish and fishery products, and also increased choice of products resulting from the more competitive environment. The increased competition within the single domestic market should lead to more efficient production and harvesting of fish, and innovations, including the creation of new value added product and improved sanitary systems, thus making regionally produced fish and seafood more competitive on the global market.

There are also potential negatives. Less efficient fishers and fishing enterprises could find themselves further marginalized and forced out of fishing or the processing and distribution trade by increased competition. But worse could happen, smallscale fishers are more likely to continue fishing despite a loss of profitability due to competition. This could put additional stress on the resource base leading to overfishing and degradation of the ecosystem. Increased profitability could also attract new entrants to the fisheries leading to overcapacity, overfishing and loss of profitability. Such negative outcomes can however be avoided by putting in place the regulatory framework, and monitoring, control and surveillance systems needed to ensure proper balance between resource use and conservation. The strong emphasis placed on the principles of conservation, sustainable use and resource management, and the concurrent obligations imposed on the Community and Member States to give effect to these principles, confirms that the Revised Treaty recognized and provided for such threats.

The CFP&R should be developed as an instrument to give effect to the intentions of the CSME in respect of fisheries and aquaculture to ensure that these resources are integrated in the new regional economic order taking full account of their unique characteristics and the special approaches needed to ensure their sustainable use and conservation to provide optimum social and economic benefits to the people of the region.

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