

# Caribbean Integration Law

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# 1

## Introduction

The natural state of our Caribbean is fragmentation.

Shridath Ramphal<sup>1</sup>

Fragmentation ought not to be our natural state. Our fragmentation is the result of a calculated colonial practice that exploited our geography, producing an instinct of insularity and isolation instead of a culture of co-operation and collaboration.

Kenny D. Anthony<sup>2</sup>

The Caribbean region hosts two of the most successful and long-standing regional integration movements in the developing world: the Caribbean Community (CARICOM) and the Organisation of Eastern Caribbean States (OECS). These two regional organizations overlap in membership and share similar goals, but diverge in interesting ways so as to best reflect the particular needs of their members. This book introduces the reader to the legal systems of CARICOM and the OECS. It locates them in their historical and theoretical contexts and engages in a detailed exploration of their treaty structures, texts, and legal practices. It also introduces the reader to fundamental concepts of international institutional law and the law of treaties and offers comparisons with similar developments in the European Union.

This book is expressly comparative. In each section the rules and institutional structures of the two regional organizations are described, compared, and contrasted and, where helpful, analysed in light of the rules and practices of other institutions, both regional and international. For such an analysis the relevance of public international law, the law of international institutions, and precedents and rules of the European Union legal system cannot be seriously questioned. Although Caribbean integration has its own unique organizations, organs, and processes, it must be remembered that the legal rules of CARICOM and the OECS are grounded in public international law and the law of international institutions. Both regional organizations are founded upon treaties, and these constituent instruments are governed by the customary international law of treaties.

<sup>1</sup> As reproduced in Christoph Müllerleile, *CARICOM Integration: Progress and Hurdles—A European View* (Kingston, Jamaica: Kingston Publishers, 1996) 31.

<sup>2</sup> Kenny D Anthony, 'Caribbean Integration: The Future Relationship between Barbados and the OECS' (1998) 23(1) *Journal of Eastern Caribbean Studies* 35–50, at 37.

The relevance of the EU raises more interesting questions. Of course there can be no exact comparison between Caribbean and European regional organizations, and it would be deeply problematic to impose the practices and procedures of other organizations upon the Caribbean. The histories of the two regions, the nature of the members, and the powers and competences that have been allocated to each organization are clearly different. However there are certain striking parallels that cannot be overlooked. There are, for example, clear similarities in the texts of the EU and Caribbean treaties. In some cases the wordings of the treaty articles are almost, or are, identical. This is no accident. Caribbean legal drafters did not reinvent the wheel. Rather, they carefully selected and incorporated into their own treaties useful phrases and concepts which have evolved in the EU system. As a result, the role of the European Union as a comparator must be accepted, albeit with some caution. This is reflected in academic and institutional writings, and the judgments of at least one regional court, the Caribbean Court of Justice.<sup>3</sup>

Nevertheless two caveats must be urged upon the reader at this point. Firstly, it should always be kept in mind that Caribbean states and Caribbean legal drafters did not intend to create a replica of the European Union. Even if the same words are used in places, the two Caribbean legal systems which were created differ, and were meant to differ, in important and fundamental ways from the EU. As a result any parallels between the texts of the treaties of the two regions cannot be used to definitively resolve questions for Caribbean integration. Secondly, the institutional structures of the two regional models must be carefully distinguished, even if, in the case of the OECS, there is some similarity in the nomenclature used to describe the organs. This is because the various organs possess substantially different competences and the organizations as a whole place their organs in unique and interdependent relationships. A limitation in competence of one organ, for example, can have a ripple effect on the competences of other organs or the organization as a whole.

Another issue that should be addressed is the heavy reliance of this book on the texts of the constituent documents of CARICOM and the OECS. Those with intimate inside knowledge of the processes of both regional organizations may be frustrated by such a strong focus on formal texts. However this focus is both inevitable and necessary. It is inevitable because of the overwhelming tendency of Caribbean regional organizations to classify and otherwise restrict access to fundamental documentation, including basic decisions of organs. This practice has been described as being part of a 'culture of confidentiality' by the authors of a recent report, a culture in which the 'Secretariat's default setting is that documents and information are classified'.<sup>4</sup> Although calls for declassification are being made, this

<sup>3</sup> See eg *Trinidad Cement Ltd and TCL Guyana Inc v Guyana*, Judgment, [2009] CCJ 5 (OJ) 20 August 2009 [24] (citing and applying principles from European Court of Justice cases in the context of state liability).

<sup>4</sup> Richard Stoneman, Justice Duke Pollard, and Hugo Inniss, 'Turning Around CARICOM: Proposals to Restructure the Secretariat', Landell Mills Ltd/Final Report/January 2012, as available at <[http://www.caricom.org/jsp/communications/caricom\\_online\\_pubs/Restructuring%20the%20Secretariat%20-%20Landell%20Mills%20Final%20Report.pdf](http://www.caricom.org/jsp/communications/caricom_online_pubs/Restructuring%20the%20Secretariat%20-%20Landell%20Mills%20Final%20Report.pdf)> (9 February 2013) p 67.

culture is unlikely to change quickly.<sup>5</sup> Until these documents are declassified they cannot be cited in this book.

A textual focus is also necessary because the text shows us the meaning and potential of the treaties. The text tells us not only what should be done, but what can be done. In other words, a strict textual interpretation of the Revised Treaty of Chaguaramas and the Revised Treaty of Basseterre must guide any sound legal analysis of regional integration because it allows us to hold regional organizations to their assigned functions and competences. It also allows us to remind them of their future potential. Under a textual analysis the question therefore becomes not 'what happens in practice', but rather 'what does the text, in its context and in light of its object and purpose, allow'.

As a further note to the reader, it should be highlighted that this book seeks to explore the legal rules and texts related to Caribbean regional organizations at a variety of levels, given its assumed readership. Explanations of basic legal concepts and translations of Latin terms are provided for students, who will also be aided by the list of abbreviations. Detailed and at times exhaustive analysis of the texts of the constituent treaties is provided for attorneys at law who may seek guidance on particular legal problems. The index has been specifically designed to assist these readers. The comprehensive textual analysis of the treaties is also tailored to the reader who seeks a holistic overview of the current CARICOM and OECS legal systems. For ease of comprehension the pattern of the analysis in the following chapters is to describe the texts, analyse their strengths and weaknesses, examine their regional judicial interpretations, and, where possible, compare similar texts and interpretive practices from outside the Caribbean. The latter, comparative analysis of EU law and international legal developments is provided for scholars in the fields of regional integration and international institutional law, and for policy makers and judges, who will be required both to interpret the texts of the treaties and to shape the direction of CARICOM and OECS law.

The chapters that follow are divided into six parts, examining the fundamentals of Caribbean integration, the institutional frameworks of CARICOM and the OECS, their legal systems, dispute settlement procedures, and potential future developments. In Part I the present introductory chapter is followed by a chapter setting out the geographical, economic, historical, and theoretical contexts for the two regional organizations. Chapter 2 briefly traces the evolutionary trajectory of regional integration in the Caribbean, and comments on some of the factors influencing institutional design, including the EU model, the law of treaties, and the rules of international institutional law. In providing a brief overview of theories and concepts related to integration and the rules of international institutional law, it offers practical guidance to those seeking to understand the complex relations between, and applicability of, international law and regional law.

Chapter 3 initiates an examination of the institutional frameworks of CARICOM and the OECS, the focus of Part II, starting with the status of their respective

<sup>5</sup> Stoneman, Pollard, and Inniss, 'Turning Around CARICOM' (n 4).

treaties and of the organizations more generally. It also provides an overview of the objects and purposes of the organizations, and examines questions related to membership and other forms of participation. Chapter 4 analyses the structure, competences, and decision-making processes of the main and secondary organs of the organizations. It seeks to help the reader understand the institutional structure within which integration issues will be addressed, including questions related to which organ might have competence to address a particular issue, and how that organ can create and implement rules in the broader organizational context. Chapter 5 looks at the issues related to personality, legal capacity, privileges and immunities, and the final provisions of the treaties of CARICOM and the OECS.

Part III examines the general legal systems of the two regional organizations. Chapter 6 looks at the bases through which legal obligations are created, implemented, and enforced in CARICOM and the OECS. In examining the general exceptions to legal obligations in the treaties and under international law, it reveals both the concrete building blocks for, and challenges to, the uniformity of Community and OECS Economic Union obligations. It also examines the interaction of international law and domestic law in the context of the creation of binding obligations under the CARICOM and OECS treaty regimes. It sets out the practical consequences of the common law requirement for transformation of treaty obligations into domestic law, and the interpretive issues which arise as from the incorporation of Caribbean regional treaties. Chapter 7 introduces the concept of general principles of law, examining its meaning and scope in legal theory, international law, and EU law. Chapter 8 explores several general principles that have a potential basis in the treaties of the two regional organizations, either express or implicit. It compares them with general principles and other foundational concepts that have emerged in EU law, suggesting that the latter may also arise in the law of CARICOM and the OECS either as general principles, or through the interpretation of the texts of the regional treaties.

Part IV examines the substantive rules and policies set out in the constituent instruments of the two organizations. Chapter 9 focuses upon three of the four freedoms—movement of persons (including via the right of establishment), services, and capital—and their restrictions and limitations. Chapter 10 examines the core economic provisions of the two treaty frameworks related to the fourth freedom, the free movement of goods. It surveys the complex and detailed rules governing everything from the enforcement of the Common External Tariff (CET), to the abolition of duties, to the restriction of discriminatory internal taxes and unauthorized quantitative restrictions. It also examines the regimes related to subsidies and anti-dumping. These rules are complex and interdependent, and in order to clearly comprehend and apply them one must understand both the process of their creation (since some of the cross-referencing in the Revised Treaty of Chaguaramas is incorrect), and the models from which they were derived, including EU treaty models. Chapter 11 offers a very brief overview of the competition and consumer protection rules established in the two treaties, and explains the general framework in which these rules will operate. Chapter 12 rounds off Part IV by briefly surveying the policy regimes established in the two

treaties, including policies related to sectoral development, common supportive measures and development.

Chapter 13 opens the dispute settlement analysis of Part V. It examines all of the dispute settlement mechanisms, except adjudication, established in the treaties of the two regional organizations. It looks at the dispute settlement functions of the central organs of CARICOM and the OECS, and the ad hoc binding and non-binding mechanisms made available in Chapter IX of CARICOM's treaty and the Dispute Settlement Annex and Protocol to the OECS treaty. Chapter 14 focuses on the two regional courts which assist in the regional integration process, the Caribbean Court of Justice and the Eastern Caribbean Court of Appeal. It provides an overview of their competences, including the different bases on which they may take jurisdiction over a treaty-related dispute, and their remedial powers. It also examines the early jurisprudence of these courts, including the several original jurisdiction decisions of the Caribbean Court of Justice—decisions which already reveal the important role that the Court will play in the regional integration process.

Part VI contains the final chapter, which offers brief conclusions and suggestions about the legal developments that may be required to assist in moving the integration processes forward. Countering pessimistic predictions about the potential demise of CARICOM or the OECS, Chapter 15 expresses an optimistic view about the continued legal viability, even vibrancy, of the Caribbean regional integration project. The revised treaties of CARICOM and the OECS offer sound legal frameworks and create the potential for deeper regional integration. Moreover, the creation, and active use, of at least one of the two final and binding legal integration tribunals—the Caribbean Court of Justice—offers considerable hope for determinate and uniform interpretation and enforcement of treaty obligations.