

**IN THE CARIBBEAN COURT OF JUSTICE
Original Jurisdiction**

CCJ Advisory Opinion No AOOJ2019/001

**In the matter of a request for an Advisory Opinion by
the Caribbean Community pursuant to Article 212 of
the Revised Treaty of Chaguaramas and Rule 11.3(1) of
the Caribbean Court of Justice (Original Jurisdiction)
Rules 2019**

THE COURT,

composed of A Saunders, President, and J Wit, W Anderson, M Rajnauth-Lee and D Barrow, Judges

having regard to the request for an Advisory Opinion filed at the Court on 6th March 2019, together with the annexures thereto, the written submissions filed on behalf of the Caribbean Community on 24th April 2019, the written submissions filed on behalf of the State of Barbados on 23rd April 2019, the written submissions filed on behalf of the State of Grenada on 9th May 2019, the written submissions filed on behalf of the first Amicus Curiae, The University of the West Indies, Mona Campus on 22nd July 2019, the Affidavit filed on behalf of the State of Barbados on 16th August 2019, the Affidavit filed on behalf of the Caribbean Community on 20th August 2019, the Affidavit filed on behalf of the State of Antigua and Barbuda on 20th August 2019, the further written submissions filed on behalf of the State of Grenada on 20th August 2019, the written submissions filed on behalf of the Federation of St Kitts and Nevis on 20th August 2019, the written submissions filed on behalf of the State of Antigua and Barbuda dated 20th August 2019, the written submissions filed on behalf of the Caribbean Community in Reply on 10th September 2019, the written submissions filed on behalf of the second Amicus Curiae, The University of the West Indies, Cave Hill Campus on 1st October 2019, the written post-hearing submissions filed on behalf of the Caribbean Community on 6th November 2019

and after considering the written submissions of the first Amicus Curiae, The University of the West Indies, Mona Campus by Mr Andre Sheckleford both the written submissions and oral observations of:

- The Caribbean Community, by Dr Corlita Babb-Schaefer, General Counsel appearing with Mr O’Neil Francis
- The State of Barbados, by Ms Donna K Brathwaite, QC, Deputy Solicitor General, appearing with Ms Sandra Rawlins
- The State of Grenada, by Ms Dia C Forrester, Solicitor General
- The Federation of St Kitts and Nevis, by Ms Simone Bullen Thompson, Solicitor General, appearing with Ms. Tashna Powell-Williams
- The State of Antigua and Barbuda, by Dr Carla Brookes-Harris, Deputy Solicitor General, appearing with Dr Vanessa Moe, Crown Solicitor
- The second Amicus Curiae, The University of the West Indies, Cave Hill Campus, by Dr David S Berry, appearing with Mr Westmin James, Ms Nicole Foster and Dr Jan Yves Remy

issues on this **18th day of March 2020** the following:

ADVISORY OPINION

Introduction

[1] Article 212 of the Revised Treaty of Chaguaramas¹ (“the RTC” or “the treaty”) grants ‘exclusive jurisdiction’ to the Court ‘to deliver advisory opinions concerning the interpretation and application of the Treaty.’ A request for an advisory opinion may come only from Member States parties to a dispute or the Caribbean Community (“the Community” or “CARICOM”).² The process for dealing with advisory opinion requests is neither adversarial nor contentious. Invariably, the factual background to the questions is agreed so that the Court’s remit extends to hearing submissions from interested persons and furnishing a comprehensive legal opinion in answer to the questions submitted.

¹ Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy (adopted 5 July 2001, entered into force 4 February 2002) 2259 UNTS 293 (RTC).

² Ibid.

- [2] Requests for an advisory opinion provide opportunities for a principled interaction between the Court, on the one hand, and Member States and the Community on the other. The latter may obtain the Court's advice on whether specific policies or procedures, established or proposed, are in conformity with Community Law. This dialogue helps to assure the integrity of the RTC, clarify its provisions and promote public trust and confidence in CARICOM and the Court.
- [3] On 6 March 2019, the Community requested the Court's advice on two specific questions. It was the first occasion on which the Court was requested to provide an advisory opinion. The Court was grateful to receive assistance by way of written and oral submissions from the Community, four Member States and two academic bodies appearing as friends of the Court.
- [4] Among international courts generally, opinion appears to be divided on the manner in which an advisory opinion should ideally be drawn. Should the court's advice be circumscribed so that it is narrowly tailored only to answer the specific question(s) posed? Or should the court consider itself entitled to advise on matters that are collateral to those questions? International courts have diverged on these matters. The European Court of Human Rights (ECtHR), for example, has stated that the scope of their advisory opinions should be narrow.³ On the other hand, the Inter-American Court of Human Rights (IACtHR) has not demonstrated any desire to limit its advice to merely responding to the literal wording of the questions posed or even to the specific subject matter raised by the question(s).⁴
- [5] Ultimately, this Court must be guided by its determination of what, in each particular case, best discovers and advances the object and purpose of the treaty and the Court's role in that process.

³ See: *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*, Advisory Opinion P16-2018-001, European Court of Human Rights (10 April 2019) [25] and [28].

⁴ See: *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*, Advisory Opinion OC-23/17, Inter-American Court of Human Rights Series A No 23 (15 November 2017) [34] – [36].

[6] In presenting this Opinion, the Court will a) provide an overview of the background to the request; b) summarise the submissions received by the Court; c) set out in full the provisions of the RTC that are most relevant to answering the questions; d) analyse the relevant law and e) provide the Court's answers to the questions posed. In the process, the Court shall make such general observations as the Court considers to be relevant and useful.

The Background to the Request

[7] Under Article 46 of the RTC, Member States may agree a list of categories of Community nationals who enjoy the right to move freely and seek employment throughout the Community ("the list"). At the time of the signing of the treaty, the list included university graduates, media workers, sportspersons, artistes and musicians. Since then, the Conference of Heads of Government of the Community ("the Conference") has from time to time expanded the list in accordance with Article 46(4)(a) of the RTC.⁵

[8] The Conference held its 18th Special Meeting on the CARICOM Single Market and Economy ("the CSME") in Port of Spain from the 3rd to 4th December 2018 ("the 18th Special Meeting"). Mindful of the commitment to free movement set out in Article 45 of the RTC and recognising that, consistent with Article 46 of the RTC, the movement of skills represents the first step towards that goal,⁶ one of the issues requiring consideration by the Conference was the expansion of the list.

[9] Accordingly, at the 18th Special Meeting, the Conference decided to enlarge the list to include Agricultural Workers and Security Guards. In this Opinion, we refer to this Conference decision as "the enlargement decision". It was further

⁵ In July 2006, the Conference at its 27th Meeting in St Kitts and Nevis expanded the list of skilled nationals to include non-graduate Nurses and Teachers. In February 2007, the Conference at its Eighteenth Inter-Sessional Meeting in St Vincent and the Grenadines agreed that the free movement of Artisans would commence upon the launch of the Caribbean Vocational Qualification (CVQ) in July 2007. In March 2008, the Conference at its Nineteenth Inter-Sessional Meeting in The Bahamas agreed to expand the categories of skilled nationals to include holders of Associate Degrees and equivalent qualifications from 31 December 2007. In July 2009, the Conference at its 30th Meeting in Guyana agreed that household domestics who have obtained a CVQ or equivalent qualification would be allowed to move and work freely from 1 January 2010.

⁶ See: CARICOM Secretariat, 'Eighteenth Special Meeting of the Conference of Heads of Government of the Caribbean Community on the CARICOM Single Market and Economy: Confirmed and Unconfirmed Summary of Conclusions', HGC(Spec)2018/18/CUSC, 3 – 4 December 2018.

agreed by the Conference in Port of Spain that the administrative modalities to facilitate the enlargement decision were to be achieved by 28 February 2019 and that legislative implementation should be completed by 31 July 2019.

[10] The Conference held its 30th Inter-Sessional Meeting (the “30th Inter-Sessional Meeting”) from 26th to 27th February 2019 in Basseterre, St Kitts and Nevis. The Conference agreed on two measures that set the stage for these proceedings. In acknowledgment of the socio-economic concerns of Antigua and Barbuda and St Kitts and Nevis as well as the possible impact on those States of the enlargement decision, the Conference agreed⁷ that –

- (i) for a period of five years, a special dispensation would be given to Antigua and Barbuda and St Kitts and Nevis pursuant to Article 27(4) of the RTC, to opt out of the implementation of the decision of the Conference taken at its 18th Special Meeting,⁸ and
- (ii) the Community would request an Advisory Opinion from the Court on two legal questions⁹, namely:
 - a. whether a Member State can, pursuant to Article 27(4) of the Revised Treaty, lawfully opt out of a decision of the Conference taken under Article 46 concerning the enlargement of the classes of persons entitled to move and work freely in the Community (“the first question”); and
 - b. whether the principle of non-reciprocity would enable nationals of those Member States which opt out of a decision under Article 27(4) of the Treaty to nevertheless derive the benefits of the decision (“the second question”).

[11] On 6 March 2019, the Community, through its Secretary General, duly communicated to the Registrar of the Court the request for an Advisory Opinion

⁷ See: CARICOM Secretariat, ‘Thirtieth Inter-Sessional Meeting of the Conference of Heads of Government of the Caribbean Community (CARICOM): Confirmed and Unconfirmed Summary of Conclusions’, INS/HGC/2019/30/CUSC, 26 – 27 February 2019.

⁸ *Ibid.*, 3.

⁹ CARICOM Secretariat, ‘Thirtieth Inter-Sessional Meeting of the Conference of Heads of Government of the Caribbean Community (CARICOM): Confirmed and Unconfirmed Summary of Conclusions’, INS/HGC/2019/30/CUSC, 26 – 27 February 2019, 2.

on the two questions posed. Following this communication, on 11 March 2019, the Court notified all Member States and the Community that they had 42 days to make written submissions on the questions posed.

- [12] Initially, the Community, four Member States, and one friend of the Court or *amicus curiae* made written submissions. The Community's submissions were received from its General Counsel, Dr Corlita Babb-Schaefer. The four Member States making submissions were: the State of Grenada, represented by Ms Dia Forrester; the Federation of St Kitts and Nevis, represented by Ms Simone Bullen-Thompson; the State of Antigua and Barbuda, represented by Ms Carla Brookes-Harris and Dr Vanessa Moe; and the State of Barbados, represented by Ms Donna K Brathwaite, QC. The *amicus curiae* was the University of the West Indies, Mona Campus ("UWI Mona Campus"), represented by Mr Andre Sheckleford.
- [13] On 30 July 2019 the Court held a Case Management Conference in which permission was given to the parties to file Written Submissions in Reply on or before 10 September 2019. Only the Community decided to make Submissions in Reply. These were filed on 10 September 2019.
- [14] Later in the proceedings a second *amicus*, The University of the West Indies, Cave Hill Campus ("UWI Cave Hill Campus"), represented by Dr David Berry, Mr Westmin James, Ms Nicole Foster and Dr Jan Yves Remy expressed a desire to participate in the proceedings. The Court issued an order granting an extension of time allowing the UWI Cave Hill Campus to file Written Submissions on or before 1 October 2019.
- [15] On 23 September 2019, the Court issued a Notice declaring that the oral proceedings of the Request for the Advisory Opinion would be heard at the Seat of the Court in Trinidad and Tobago on 22nd and 23rd October 2019.
- [16] All the parties save UWI Mona Campus made oral submissions at the Hearing, whether in person or via video conference. On 27 October 2019, the Court granted the Community's request to file, on or before 8th November, Post

Hearing Submissions on the second question. The Court imposed the condition that such Submissions must be served on all the parties who participated in the proceedings.

Summary of the written and oral submissions

[17] As regards the first question, the critical issue addressed by the parties was whether the particular opt out being here considered was prejudicial to the fundamental objectives of the Community as laid down in the RTC. As regards the second question, the parties focussed much of their attention on the legal consequence of the opt out and specifically, whether the opting out States were entitled to do so on a reciprocal or non-reciprocal basis, that is, whether the nationals of a State that opted out were also automatically barred from enjoying the rights embodied in the decision. The submissions received are summarised below.

State of Barbados

(i) First question

[18] Counsel for the State of Barbados concluded that the opt out granted to the Federation of St Kitts and Nevis and the State of Antigua and Barbuda was lawful. Counsel based this conclusion on three factors. Firstly, opt outs were previously granted by the Conference at its 30th Regular Meeting (“the 30th Regular Meeting”) when Antigua and Barbuda had been granted a five-year derogation on the free movement of household domestics.¹⁰ This derogation was extended for a further three years at the Conference’s 36th Regular Meeting held from 2nd to 4th July 2015 in Bridgetown, Barbados.¹¹ Counsel asserted that these decisions of the Conference formed secondary legislation and established a precedent that should be observed. Counsel also cited the Vienna Convention on the Law of Treaties¹² (“the Vienna Convention”) in support of the proposition that in interpreting the RTC and the legality of an opt out, the Court was entitled to take into account ‘Any subsequent practice in the application of

¹⁰ CARICOM Secretariat, ‘Thirtieth Meeting of the Conference of Heads of Government of the Caribbean Community: Summary of Recommendations and Conclusions’, HGC/2009/30/DEC.B.1.7, 2 – 5 July 2009, 18.

¹¹ CARICOM Secretariat, ‘Thirty-Sixth Regular Meeting of the Conference of Heads of Government of the Caribbean Community: Confirmed Decisions’, HGC 2015/36/CD, 2 – 4 July 2015, 31.

¹² Vienna Convention on the law of treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention).

the treaty which establishes the agreement of the parties regarding its interpretation'.¹³ Secondly, counsel noted that in the present case, the opting out states were less developed Member States of CARICOM in keeping with Article 4 of the RTC. Counsel submitted that this circumstance weighed in favour of granting the opt out. Thirdly, counsel noted that the opt out in question here was of a temporary nature and that this circumstance safeguarded against any continuing prejudice.

(ii) Second question

[19] On the question of opt outs generally, counsel contended that, by necessary implication, if a Member State opted out of its obligations, it also automatically opted out of any corresponding rights or benefits. Counsel linked Article 27(4) of the RTC, which provides for opt outs, with Article 48. Article 48 addresses waivers of obligations to grant rights and Article 48(1) permits a Member State to apply to the Community Council for a waiver of the requirement to grant any of the rights mentioned in Article 30(1) in respect of any industry, sector or enterprise¹⁴. Counsel appeared to treat opt outs under Article 27(4) and waivers under Article 48 as if they were one and the same or, alternatively, that the terms of Article 48 should inform interpretation of Article 27(4). Counsel therefore found that since Member States that were granted a waiver under Article 48 were not entitled to espouse a claim on behalf of their nationals in respect of the rights for which the waiver was granted¹⁵, then by parity of reasoning, for the duration of the opt out granted under Article 27(4) to a Member State, the nationals of that Member State could not take advantage of any rights derived from the decision from which that Member State had opted out.

CARICOM

(i) First question

[20] The General Counsel noted that freedom of movement was not an objective laid down in Article 6 of the treaty but that this Court, in *Myrie v State of Barbados*,¹⁶ did express the view that freedom of movement was a fundamental principle

¹³ Ibid, art 31(3)(b).

¹⁴ Article 30 of the RTC speaks to the rights of establishment, to provide services and to move capital.

¹⁵ See RTC (n 1), art 48(5).

¹⁶ [2013] CCJ 3 (OJ), (2013) 83 WIR 104.

and goal of the community. Notwithstanding, counsel contended that, in the present context, freedom of movement had to be considered against several factors including the principle of proportionality, the temporary nature of the opt out and the fact that the opting out Member States were less developed countries of CARICOM. In light of those factors, counsel concluded that the opt out was lawful.

(ii) Second question

[21] The Community's General Counsel regarded an opt out as a form of relief from the obligation to receive nationals in the enlarged categories. Counsel stated that, by necessary implication, an opt out extended to the right of the opting out State to send its nationals to other Member States. Counsel contended that reservations under the Vienna Convention¹⁷ and opt outs under Article 27(4) of the RTC, though different in terms of procedure, were similar in terms of their legal effect. Counsel submitted that the principle of reciprocity was inherent in both reservations and opt outs. Counsel concluded that skilled nationals of the opting out Member States who fell into the enlarged categories had no legal right to seek employment in the Member States that did not opt out. Nonetheless, on a bilateral basis, a Member State that had not opted out retained a discretion to permit Security Guards or Agricultural Workers from either of the opting out Member States to derive the benefit of the enlargement decision. In support of the view that opt outs should, in principle, be enjoyed only on a reciprocal basis, counsel drew the Court's attention to the Conference's decision at its 17th Inter-Sessional Meeting¹⁸ which, according to counsel, evidenced adherence to the principle of reciprocity. The latter decision, made in January 2006 under Article 27(4), permitted six Member States i.e., Dominica, St Lucia, St Vincent and the Grenadines, St Kitts and Nevis, Antigua and Barbuda, and

¹⁷ Vienna Convention (n 12), art 21.

¹⁸ CARICOM Secretariat, 'Summary of Recommendations and Conclusions of the Seventeenth Inter-Sessional Meeting of the Conference of Heads of Government of the Caribbean Community', 9 – 10 February 2006, 4. At that Meeting, the Heads:

Decided that, pursuant to –

(i) The agreement made by Heads of Government of the Caribbean Community who participated in the Inauguration of the Single Market in Kingston, Jamaica on 30 January 2006;

(ii) Article 27(4) of the Revised Treaty -

The following six Member States: Antigua and Barbuda, Dominica, Grenada, St. Kitts and Nevis, Saint Lucia, and St. Vincent and the Grenadines shall be given until 30 June 2006 to become CARICOM Single Market compliant; and that the rights and obligations in Chapter Three and in Articles 7, 8 and 9 of the Revised Treaty relating only to the CARICOM Single Market shall be suspended in respect of these Member States and shall remain so suspended until such time as the Member State becomes compliant provided that this shall be not later than 30 June 2006".

Grenada, a five-month period to become compliant with their obligations under the CSME. In that interim period, the rights and obligations in Chapter 3 and in Articles 7, 8 and 9 of the RTC, relating only to the CSME, were suspended in respect of those Member States.

Amicus Curiae: UWI Mona Campus

(i) First question

[22] Counsel for the UWI Mona Campus contended that freedom of movement ought to be treated as a fundamental objective of the treaty. It was so fundamentally obvious and sewn into the fabric of the Revised Treaty that it did not require an explicit reference. Therefore, Member States are ineligible from opting out of the obligations inherent in the operationalising of a fundamental objective. Counsel suggested that if the enlargement decision created economic hardship then the correct recourse of the two States was to invoke Article 47 which allows a Member State unilaterally to apply restrictions to curtail the hardship so created.

(ii) Second question

[23] Counsel found that there were similarities between opt outs and reservations. In similar effect to a reservation, in counsel's view, where a Member State was permitted to opt out of a decision, then a national of that Member State was equally unable to enjoy the benefit of that decision.

State of Antigua and Barbuda

(i) First question

[24] Counsel for Antigua and Barbuda noted that this Court in *Myrie* had declared that freedom of movement was a fundamental principle. Counsel contended, however, that in approaching the first question, the principle of proportionality had to be considered. In that regard, since a five-year limitation period had been imposed by the Conference on the duration of the opt out, and because of the rationale given for the opt out, namely, the prevailing socio-economic situation of each of the two Member States, the decision to grant the opt out was not prejudicial and it was, therefore, lawful.

(ii) Second question

[25] Counsel understood the opt out in the present case as being confined to a release from the obligation to receive Agricultural Workers and Security Guards of other Member States. Counsel found similarities between opt outs and reservations. In both cases, the State did not wish to be bound by certain terms of a treaty. In that regard, counsel stated, the principle of reciprocity, which was inherent in a reservation, was also applicable to opt outs. Counsel concluded that the opting out Member States could not, in the circumstances, reasonably expect their Security Guards or Agricultural Workers to receive the benefits of the enlargement decision.

Federation of St Kitts and Nevis

(i) First question

[26] Counsel for the Federation of St Kitts and Nevis contended that even though freedom of movement was not listed under Article 6 of the RTC as a Community objective, it nevertheless was still a fundamental Community goal. Counsel concluded that the opt out had to be viewed against the principle of proportionality. Since the opting out States were classified as less developed countries in CARICOM by the RTC, the reason for the opt out had to do with the socio-economic concerns of the particular Member States and the duration of the opt out was not indefinite but, rather, limited by time. The opt out was legal.

(ii) Second question

[27] Counsel emphasised that Article 27(4) was confined to an opt out of the obligations arising from the relevant decision. In this case, this was the obligation to receive nationals from those Member States that had not opted out. Unless there were words in the Conference decision which clearly expressed a contrary intention, it could not be concluded that the nationals of the opting out Member States were not lawfully entitled to receive the benefits of the enlargement decision. Counsel stated that non-reciprocity should be the default position for all opt outs and that the Conference lacked the authority to strip

away the rights of Community nationals by requiring a Member State to opt out on a reciprocal basis.

State of Grenada

(i) First question

[28] Counsel for the State of Grenada noted that although Article 6 of the RTC did not list freedom of movement as a fundamental objective, Article 6 was not exhaustive of all the fundamental objectives of the Community. Counsel's view was that freedom of movement was a fundamental objective, considering that it was referenced as a "goal" in Article 45. Notwithstanding the foregoing, counsel concluded that on this occasion the Conference had established parameters which safeguarded against prejudice. Counsel therefore concluded that the opt outs granted were lawful.

(ii) Second question

[29] Counsel observed that the RTC did not stipulate whether, in relation to opt outs, reciprocity or non-reciprocity would be applicable in the circumstances. Counsel contended that it could not be implied that an opt out related to the rights inherent in the relevant decision. If the Conference intended for it to relate to the rights, then the Conference could have exercised its powers to make it explicit that reciprocity was applicable. Since this was not expressly defined, Counsel concluded that non-reciprocity should be the default position.

Amicus Curiae: UWI Cave Hill Campus

(i) First question

[30] Counsel for UWI Cave Hill Campus considered the first question against the backdrop of Article 46(1) which indicated that Member States undertook, as a first step towards achieving the goal of free movement of their nationals set out in Article 45, to accord to certain categories of Community nationals the right to seek employment in their jurisdictions. Counsel contended that the opt out in question here related to the obligation to *receive* skilled nationals in the enlarged categories. Article 46(1) did not impose an obligation to *send* skilled nationals. Counsel did not accept that the fundamental objectives of the Community could

be confined only to those objectives listed in Article 6. Counsel submitted that the Court had the power to determine what constituted a fundamental objective bearing in mind that a fundamental objective was one that was integral and indispensable to the establishment and integrity of the CSME. Counsel were of the view that free movement of skilled workers was indispensable to achieving many of the broad objectives listed in Article 6 and it therefore qualified as a fundamental objective of the Community. As to whether the opt out was lawful, Counsel pointed out that it could not be the case that every opt out which impinged upon a fundamental objective was by that reason alone impermissible. It was for the Conference in the first instance to strike the balance between adherence to a fundamental objective and the general interest of the Community, considering the fundamental principle of proportionality. It was ultimately for the Court to decide whether the Conference achieved the right balance. Counsel proposed the following test for determining whether an opt out would prejudice a fundamental objective –

- (i) firstly, the opt out must be necessary. It should be fair and not arbitrarily requested or granted. It should be carefully designed to achieve the Member State's objective and rationally connected to that objective;
- (ii) secondly, the opt out should impair the fundamental objective in question as little as possible;
- (iii) thirdly, there must be proportionality between the effects of the limiting measure (or opt out) and the achievement of the policy objective of the opting out Member State. The least restrictive means of impinging on the fundamental objective of the Community must be employed. The more severe the consequences of an opt out, the more important the policy objective of the opting out Member States must be; and
- (iv) finally, the opt out should not run counter to the development of Community Law.

Counsel added that the burden of proof rested on the Member State that sought to invoke the opt out.

(ii) *Second question*

[31] Counsel contended that the Conference had the power to impose the principle of reciprocity as a condition for an opt out, but since that was not done in the present case, by default, the present opt out was non-reciprocal. Counsel did not agree that opt outs and reservations were one and the same. Counsel considered the legal effect of the two to be different. Counsel supported the view that non-reciprocity was the appropriate default position by noting that a reciprocal opt out would hinder uniformity of and erode Community Law.

Relevant Provisions of the RTC

[32] The submissions of counsel referred to various Articles of the RTC. The Court has placed in an Appendix to this Opinion *all* the Articles to which reference was made. We set out here, however, some of the more critical provisions.

[33] The issue of the movement throughout the Community of Community Nationals, and in particular skilled nationals, lies at the heart of the request for this Opinion. It is therefore useful to set out here in full Articles 45 and 46 of the treaty that address this issue:

ARTICLE 45

Movement of Community Nationals

Member States commit themselves to the goal of free movement of their nationals within the Community.

ARTICLE 46

Movement of Skilled Community Nationals

1. Without prejudice to the rights recognised and agreed to be accorded by Member States in Articles 32, 33, 37, 38 and 40 among themselves and to Community nationals, Member States have agreed, and undertake as a first step towards achieving the goal set out in Article 45, to accord to the following categories of Community nationals the right to seek employment in their jurisdictions:

- (a) University graduates;

- (b) media workers;
- (c) sportspersons;
- (d) artistes; and
- (e) musicians,

recognised as such by the competent authorities of the receiving Member States.

2. Member States shall establish appropriate legislative, administrative and procedural arrangements to:

- (a) facilitate the movement of skills within the contemplation of this Article;
- (b) provide for movement of Community nationals into and within their jurisdictions without harassment or the imposition of impediments, including:
 - (i) the elimination of the requirement for passports for Community nationals travelling to their jurisdictions;
 - (ii) the elimination of the requirement for work permits for Community nationals seeking approved employment in their jurisdictions;
 - (iii) establishment of mechanisms for certifying and establishing equivalency of degrees and for accrediting institutions;
 - (iv) harmonisation and transferability of social security benefits.

3. Nothing in this Treaty shall be construed as inhibiting Member States from according Community nationals unrestricted access to, and movement within, their jurisdictions subject to such conditions as the public interest may require.

4. The Conference shall keep the provisions of this Article under review in order to: (a) enlarge, as appropriate, the classes of persons entitled to move and work freely in the Community; and (b) monitor and secure compliance therewith.

[34] Article 27 of the RTC addresses ‘Common Voting Procedures in Community Organs and Bodies’. The entire Article is included in the Appendix to this Opinion. The specific provision that authorises opt outs is Article 27(4). Since that is the nub around which the request for the Opinion is premised, the same is set out below:

ARTICLE 27

Common Voting Procedures in Community Organs and Bodies

1. ...
2. ...
3. ...
4. Subject to the agreement of the Conference, a Member State may opt out of obligations arising from the decisions of competent Organs provided that the fundamental objectives of the Community, as laid down in the Treaty, are not prejudiced thereby.

[35] Article 6 lists the “Objectives of the Community”. In light of the reference in Article 27(4) to “fundamental objectives”, Article 6 is also set out here in full:

ARTICLE 6

Objectives of the Community

The Community shall have the following objectives:

- (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) organisation 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; and
- (i) 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.

[36] Article 28 of the RTC states how voting in the Conference is carried out. Given some of the reasoning of this Opinion, the Court considers it important to set out Article 28 in full:

ARTICLE 28

Voting in the Conference

1. Save as otherwise provided in this Treaty and subject to paragraph 2 of this Article and the relevant provisions of Article 27, the Conference shall take decisions by an affirmative vote of all its members and such decisions shall be binding.

2. For the purpose of this Article abstentions shall not be construed as impairing the validity of decisions of the Conference provided that the Member States constituting three-quarters of the membership of the Community, vote in favour of such decisions.

3. Omission by a Member State to participate in the vote shall be deemed an abstention within the meaning of paragraph 2 of this Article.

4. Parties to a dispute or against which sanctions are being considered shall not have the right to vote on the issue falling to be determined.

[37] A long preamble introduces the Articles of the RTC. The preamble is set out in a number of different paragraphs. They are all extremely helpful in

understanding the purpose and underlying philosophy behind the establishment of the Community. The Court sets out here paragraphs, 6, 7 and 20 that are of particular relevance to these proceedings. In these preambular paragraphs, the Member States signify that, in establishing the CSME, they are –

PARAGRAPH 6

Conscious of the need to promote in the Community the highest level of efficiency in the production of goods and services...

PARAGRAPH 7

Aware 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.

PARAGRAPH 20

Acknowledging further that some Member States, particularly the Less Developed Countries, are entering the CSME at a disadvantage by reason of the size, structure and vulnerability of their economies.

The Court's Analysis

The first question:

Whether a Member State could, in keeping with Article 27(4) of the RTC, lawfully opt out of the decision of the Conference taken under Article 46 concerning the particular enlargement of the classes of persons entitled to move and work freely in the Community.

[38] The first question is cast in narrow terms. It relates not to opt outs generally but to the specific opt outs that were requested and granted with reference to the enlargement decision. Notwithstanding the narrow manner in which the question was framed, the Court considers it reasonable to make some remarks of a general nature.

[39] Article 27(4) is the provision of the RTC that references opt outs. It is the only Article that does so. Comparisons have been made, in the context of the RTC, between opt outs and treaty reservations. At first blush, it might be tempting to compare an opt out to a treaty reservation, especially in the context of the RTC which caters for both and requires, in each case, acceptance by all the parties (in the case of opt outs, by all the members of the Conference, and in the case of reservations by all the signatory States). The classic definition ascribed to a “reservation” is:

[A] *unilateral* statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State” [emphasis added].¹⁹

The RTC, however, allows reservations only ‘with the consent of the signatory States’²⁰ and so, reservations with respect to the RTC are therefore never “unilateral” but are, like the opt outs of Article 27(4), “negotiated options.”²¹

[40] The underlying premise for the consensual approach to treaty reservation in the RTC is to be found in Article 20(2) of the Vienna Convention which states:

When it appears from the limited number of negotiating states and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

The RTC is such a treaty.

[41] An Article 27(4) opt out, like a reservation, purports to exclude or modify a legal effect, although, in the case of an opt out, not of provisions of the RTC in their application, but of ‘obligations arising from the decisions of Competent Organs’. Reservations belong to and must be interpreted within the context of

¹⁹ See: Vienna Convention (n 12), art 2(d).

²⁰ RTC (n 1), art 237.

²¹ See Jean Galbraith, ‘Treaty Options: Towards a Behavioral Understanding of Treaty Design’ (2013) 53 (2) Virginia Journal of International Law 309.

general public international law. The opt out of Article 27(4), on the other hand, belongs to, and must be interpreted within, the specific context of the new and unique legal order created by the RTC.

[42] Finally, unlike reservations, Conference decisions granting opt outs must be justified by some form of succinct reasoning. Opt outs are also specifically constrained by the requirement that the fundamental interests of the Community remain intact. It would therefore not be right to regard an opt out as a reservation.

[43] Nor can an opt out be favourably compared to a waiver of obligation to grant rights as provided for in Article 48. The latter provision involves the Community Council waiving the requirement to grant rights concerned with the right of establishment, the right to provide services and the right to move capital in the Community, not generally but ‘in respect of any industry, sector or enterprise.’²² On the other hand, opt outs of enlargement decisions are dealt with, not by the Community Council (which takes decisions by a qualified majority vote of no less than three-quarters of the membership of the Community²³), but by the Conference, where decisions are made ‘by an affirmative vote of all its members’.²⁴

[44] In interpreting Article 27(4), the ordinary meaning should be given to its terms in their context and in the light of the object and purpose of the RTC.²⁵ In this regard, it is significant to note that opt outs are not restricted to decisions on enlargement decisions. Opt outs, as envisaged by Article 27(4), are in principle permissible in relation to *any* decision of any competent Organ of the Community.

[45] Five conditions are prescribed for the effective implementation of an opt out as contemplated by Article 27(4). Firstly, one or more of the Member States must make a request to opt out of a decision. In this particular case, opt out requests were made by the States of St Kitts and Nevis and Antigua and Barbuda, respectively.

²² See: RTC (n 1), art 48(1) which references art 30(1).

²³ RTC (n 1), art 29.

²⁴ See: RTC (n 1), art 28(1).

²⁵ See: Vienna Convention (n 12), art 31(1).

- [46] Secondly, the decision maker must be a competent Organ of the Community. There can be no dispute that the Conference is a competent Organ. Article 10 of the RTC describes the Conference as one of the principal Organs of the Community and, indeed, Article 12 declares that the Conference is the supreme Organ of the Community.
- [47] Thirdly, the Conference must agree to the request of the Member State(s) to opt out of the relevant decision, even if that decision was taken by another Community Organ. It is also clear here that such an agreement was made and that the two Member States were permitted to opt out of the enlargement decision. This agreement is evidenced by the Confirmed Summary of Conclusions of the 30th Inter-Sessional Meeting of the Conference. In that Summary, the Conference expressly stated that it agreed to permit St Kitts and Nevis and Antigua and Barbuda to opt out of the implementation of the enlargement decision for a period of five years. The Court notes that in agreeing to grant an opt out, the Conference must act in a manner that is reasonable in the circumstances. Further, as the exclusive ultimate arbiter of disputes concerning the interpretation and application of the treaty,²⁶ the Court has the competence to review that agreement to ensure that it is compliant with the rule of law. It must not be arbitrarily made and it must be consistent with the treaty and in particular with the fifth condition stated below.
- [48] Fourthly, the opting out Member State is entitled only to opt out of *the obligations* arising from the decision. This is specifically prescribed in Article 27(4). The provision clearly states, among other things, that ‘a Member State may opt out of obligations arising from decisions’. This is also evident with respect to the opt outs here as the two States were allowed to opt out of the *implementation* of the enlargement decision, that is, the implementation of the obligation to facilitate that decision, first administratively and then legislatively. More will be said on this later when the second question is addressed.
- [49] Fifthly, an opt out is permissible only if the fundamental objectives of the Community, as laid down in the treaty, are not prejudiced by the opt out. The question whether this condition was fulfilled in relation to the enlargement

²⁶ Subject to, for example, Article 12(8) of the RTC. See: RTC (n 1), art 211.

decision is pivotal to this Opinion. A determination of this question requires the Court first to assess whether freedom of movement of Community nationals is a *fundamental objective* of the Community. The RTC does not explicitly “lay down” any “fundamental objectives” of the Community. What is properly to be regarded as ‘a fundamental objective of the Community’ that is ‘laid down in the treaty’ must ultimately be culled from the treaty by the Court.

- [50] The adjective “fundamental” placed before “objective” conveys the sense that the objective in issue is of central importance; that it lies at the core of the spirit, nature and aspirations of the Community. The nine objectives included in Article 6 indicate what the establishment of CARICOM aims to achieve. These objectives are stated in general terms. It would be a mistake automatically to assume that each of these nine objectives is “fundamental”, or that a “fundamental objective” of the Community is necessarily to be extracted only from among them. The treaty also specifically references a variety of “goals” that should also be considered when interpreting the meaning of Article 27(4).²⁷ The Court considers that there may also be an unstated objective or goal that is so inextricably central to and indispensable for the full attainment of one or more of the objectives or goals specified in the treaty that it can itself properly be described as being both fundamental and an objective in its own right.
- [51] To determine whether the movement of Community nationals, and in particular skilled Community nationals, is a fundamental objective of the Community, one may have regard to its role in the experience of other communities. Freedom of movement of workers lay at the foundation of the European Community. It was integral to the establishment of the common market and fundamental to the development of the economic activities and relations among the European States. The free movement of people - alongside free movement of goods, services and capital - was one of the four founding principles of the European Union. It is firmly entrenched in Article 3(2) of the Treaty on European Union²⁸ (TEU); Article 21 of the Treaty on the Functioning of the European Union²⁹ (TFEU); Titles IV and V TFEU; and Article 45 of the Charter of Fundamental

²⁷ See for example: Articles 45 and 46 re Freedom of Movement; Article 51 re Community Industrial Policy; Articles 56 and 57 re Community Agricultural Policy; Article 78 re Community Trade Policy; Article 134 re Community Transport Policy and Article 169 re Community Competition Policy.

²⁸ Consolidated Version of the Treaty on European Union (Consolidated Version) [2016] OJ C202/13 (TEU).

²⁹ Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU).

Rights of the European Union³⁰. Unsurprisingly, the Revised Treaty of Basseterre³¹ (“RTB”) also secures freedom of movement of nationals of Member States within the relevant Economic Union Area.³²

[52] Freedom of movement of skilled nationals is essential for the achievement of a seamless economic space. It is a critical factor for the success of any regional trading bloc. So it is that in Article 45 of the RTC, the Member States commit themselves to the goal of free movement of their nationals within the Community. Paragraph 7 of the RTC’s Preamble also asserts that optimal production by economic enterprises in the Community requires the unrestricted movement of capital, labour and technology. Additionally, freedom of movement is vital to the achievement of many of the broad objectives listed in Article 6. In *Myrie*, this Court referred to freedom of movement both as a ‘*fundamental Community goal*’³³ and as ‘*a fundamental principle*’.³⁴

[53] Given all the foregoing, the Court considers that freedom of movement of skilled nationals is properly categorised as a fundamental objective of the Community. The more important issue to be considered is whether the decision to grant the two opt outs of the enlargement decision prejudiced this fundamental objective. This is a question that is to be determined utilising principles of proportionality. Regard must be had to several competing considerations and a balance must be struck among them. These considerations include:

- (i) the promotion and incremental realisation of the fundamental objective of freedom of movement through, among other possible measures, the continued expansion of the categories of skilled nationals consistent with Article 46 of the RTC, requiring unanimous decisions of the Conference;

³⁰ Charter of Fundamental Rights of the European Union [2016] OJ C202/389.

³¹ Revised Treaty of Basseterre establishing the Organisation of Eastern Caribbean States Economic Union (adopted 18 June 2010, entered into force 20 January 2011).

³² *Ibid*, Protocol of Eastern Caribbean Economic Union, art 12. The relevant Member States are Antigua and Barbuda; The Commonwealth of Dominica; Grenada; Montserrat; Saint Christopher and Nevis; Saint Lucia; and Saint Vincent and the Grenadines

³³ *Myrie* (n 16) [62].

³⁴ *Myrie* (n 16) [67] and [68]

- (ii) the desire that this fundamental objective should not be thwarted or unduly retarded by the temporary inability of one or more Member States to fulfil obligations inherent in any such expansion; and
- (iii) the need to pursue the objectives of the Community set out in Article 6.

[54] All the circumstances surrounding the decision to grant an opt out must be weighed when considering whether any such decision should be rejected by the Conference on the basis that one or more of the fundamental objectives of the Community, as laid down in the treaty, has been or will be prejudiced. The degree of detriment that must be occasioned to the Community must be carefully assessed. Minimal prejudice will not suffice. It would be unwise, in the abstract, to lay down a precise marker to denote the extent of the detriment that is sufficient. It will be for the Conference, and if necessary the Court, on a case by case basis, ultimately to determine whether the proper balance has been struck. It may, however, be said that, for a proposed opt out to be denied on this basis, the prejudice to the fundamental objectives of the Community should be grave and irremediable.

[55] The Court took into account the following circumstances:

- (i) the opt out was made available to two Member States each of which is categorised under Article 4 of the RTC as a less developed country;
- (ii) the duration of the opt out was temporary, lasting for a five-year period; and
- (iii) the opt out related only to two categories of skilled nationals.

[56] Having regard to these factors the Court considers, in the absence of any evidence whatsoever to suggest otherwise, that the impact of the opt out on the freedom of movement of skilled nationals was such that the Conference could reasonably have come to the conclusion that the requisite threshold of detriment to the Community was not met here. The Court is therefore of the opinion that the fundamental objectives of the Community were not prejudiced by the decision of the Conference to grant the two Member States an opt out of the obligations arising from the enlargement decision.

The second question:

Whether the principle of non-reciprocity would enable nationals of those Member States which opt out of a decision under Article 27(4) of the Treaty to nevertheless derive the benefits of the decision.

[57] Here too, the question posed to the Court is couched in specific terms. In answering the question, it is convenient to start with an explanation of the principle of reciprocity. International relations and treaties are generally governed by this principle. The principle comprehends at least two meanings. Firstly, privileges, favours, or benefits that are granted by one State to the citizens or legal entities of another, should be returned in kind. Secondly, that behaviour of one State to the detriment of another may in principle and without more be reciprocated or counter-balanced by measures adopted by the latter State³⁵. This second meaning is a form of using the principle of reciprocity as an enforcement mechanism³⁶. To allude to a principle of non-reciprocity is to suggest a significant variance with these meanings.

[58] The Court makes the following observations of a general nature. The Caribbean Community is a unique organisation. Parallels may be drawn with the European Union, especially as some of the clauses of the RTC have been inspired by, if not borrowed from, the TFEU³⁷. But the difference between the two organisations is stark. The text of Article 27(4) reflects some of the difference.

[59] Opt outs under Article 27(4) are largely governed by a process that is consensual and political, constrained only by adherence to the fundamental objectives of the Community and the rule of law. Significantly, under Article 28 of the RTC, as stated earlier, the Conference may take decisions only by an affirmative vote of all its Members although an abstention will not impair the validity of decisions if three-quarters of the membership of the Community vote in favour of such decisions. This formula for voting in the Conference effectively accords

³⁵ For the different roles of reciprocity, see: Shahrad N. Fard, *Reciprocity in International Law. Its impact and Function* (1st edn, Routledge 2016).

³⁶ *Ibid.*

³⁷ See for example: Article 18 of the TFEU and Article 7 of the RTC which both refer to the prohibition of non-discrimination on the grounds of nationality. Title II of the TFEU which refers to measures that must be taken at the community level to facilitate trade liberalisation in respect of the free movement of goods and the reflective Article in the RTC, though briefly addressed, Article 79. Title IV of the TFEU which comprises provisions that establish procedures to facilitate the free movement of capital, persons and services and the reflective provisions in the RTC which are comprehensively set out in Chapter Three.

to each Member State the power to veto a proposal that might otherwise have become a decision of the Conference. The principled request for and grant of an opt out further the interests of the Community because they allow decisions of the Conference to be taken and implemented in circumstances where those decisions might otherwise have been vetoed by a Member State that was not, at the time, in a position to bear the obligations inherent in the proposal for the decision. Instead of voting against a decision, a Member State may decide to vote in favour of it with the assurance that it may obtain an opt out.

[60] Treaties generally embrace the principle of reciprocity. Indeed, two examples of RTC provisions, in a very limited context, specifically mention the principle: Articles 14(2)(d)³⁸ and 75(2)(b)³⁹. There is also a small number of RTC provisions that expressly allow Member States to react reciprocally to the acts of other Member States that are detrimental to them, although almost always after approval or authorisation by a Community Organ (usually the Council for Trade and Economic Development (“COTED”)).⁴⁰ The text of the RTC, however, is replete with specific derogations from the principle of reciprocity. Perhaps the first and most important reason for these derogations is the nature of the legal order created by the RTC. That legal order is essentially meant to be applied ‘in its entirety between all the parties’,⁴¹ thus emphasising the RTC’s integrity through solidarity, consent-oriented consultation and Community-driven processes in lieu of allowing a mosaic and looser legal playing field characterised by automatic and unrestrained reciprocal interaction between the States. The RTC requires as a starting point, therefore, the universal application of the rights and obligations arising out of it.

[61] Secondly, the treaty openly acknowledges that some Member States were entering the CSME at a disadvantage by reason of the size, structure and vulnerability of their economies.⁴² To this end, the Member States considered it necessary to establish ‘a special regime for the Less Developed Countries in order to enhance their prospects for successful competition within the Community, and redress, to the extent possible, any negative impact of the

³⁸ Convertibility of currencies ‘on a reciprocal basis’.

³⁹ The promotion of reciprocal social security agreements among Member States

⁴⁰ See: RTC (n 1), arts 47(8), 48(5), 93(2), 94(8), 133, 151(4) and Sch III, art 16.

⁴¹ See: Vienna Convention (n 12), art 20(2).

⁴² See: RTC (n 1), Preamble [20].

establishment of the CSME.⁴³ Article 143(1) outlines that the objective here is to assist ‘disadvantaged countries, regions and sectors towards becoming economically viable and competitive by appropriate interventions of a transitional or temporary nature.’

[62] Article 27(4) contains a further example of a derogation from the principle of reciprocity. It specifies that a Member State may opt out of *the obligations* arising from a decision made by a competent Organ. The Article could easily have mandated the principle of reciprocity by providing that the opt out extended to foregoing the rights to be enjoyed from the decision and not alluding merely to the obligations that must be borne by the opting out State.

[63] There is another, and an even more substantial, basis on which opt outs of the kind considered here must be understood as being enjoyed on a non-reciprocal basis. Article 8 requires each CARICOM Member State to accord to another CARICOM Member State treatment no less favourable than that accorded to, *inter alia*, a third CARICOM Member State. Subject to the provisions of the RTC, there is therefore an onus on the Member States to extend to the Agricultural Workers and Security Guards of Antigua and Barbuda and St Kitts and Nevis the right to seek employment in their respective States. Opt outs impact on the universal application of the rights and obligations embraced by the treaty. Interpretation of Article 27(4) in a way that suggests an opt out is non-reciprocal causes the least possible erosion of those rights.

[64] These observations lead the Court to the conclusion that an opt out is to be treated as being non-reciprocal in character. There is nothing to prevent nationals of a State that opts out of a decision from enjoying the benefit of that decision even as their own State, for a period of time, is permitted not to be bound by the obligations of the decision.

The Court’s answers to the questions posed

[65] *In response the first question*, the Court advises that it was lawful for the States of Antigua and Barbuda and St Kitts and Nevis to request an opt out of the

⁴³ See: RTC (n 1), art 142(1).

obligations arising from the enlargement decision of the Conference. It was also lawful for the Conference to grant the opt outs in all the circumstances. The said opt outs did not prejudice the fundamental objective of freedom of movement of skilled nationals.

[66] *In response to the second question*, the Court advises that the principle of non-reciprocity applies to enlargement decisions so that nationals of the States of Antigua and Barbuda and St Kitts and Nevis who are Security Guards and Agricultural Workers are entitled to enjoy the benefits of the enlargement decision.

s/ A Saunders

The Hon Mr Justice A Saunders (President)

/s/ J Wit

The Hon Mr Justice J Wit

/s/ W Anderson

The Hon Mr Justice W Anderson

/s/ M Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee

/s/ D Barrow

The Hon Mr Justice D Barrow

ANNEX

Provisions of the RTC referred to in the Advisory Opinion

PREAMBLE

The States Parties to the Treaty Establishing the Caribbean Community and Common Market signed at Chaguaramas on 4 July 1973,

Recalling *the Declaration of Grand Anse and other decisions of the Conference of Heads of Government, in particular the commitment to deepening regional economic integration through the establishment of the CARICOM Single Market and Economy (CSME) in order to achieve sustained economic development based on international competitiveness, co-ordinated economic and foreign policies, functional co-operation and enhanced trade and economic relations with third States;*

Recognising *that globalisation and liberalisation have important implications for international competitiveness;*

Determined *to enhance the effectiveness of the decision-making and implementation processes of the Community;*

Desirous *of restructuring the Organs and Institutions of the Caribbean Community and Common Market and redefining their functional relationships so as to enhance the participation of their peoples, and in particular the social partners, in the integration movement;*

Conscious *of the need to promote in the Community the highest level of efficiency in the production of goods and services especially with a view to maximising foreign exchange earnings on the basis of international competitiveness, attaining food security, achieving structural diversification and improving the standard of living of their peoples;*

Aware *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;*

Resolved *to establish conditions which would facilitate access by their nationals to the collective resources of the Region on a non-discriminatory basis;*

Convinced *that market-driven industrial development in the production of goods and services is essential for the economic and social development of the peoples of the Community;*

Cognisant *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;*

Desirous further *of establishing and maintaining a sound and stable macro-economic environment that is conducive to investment, including cross-border investments, and the competitive production of goods and services in the Community;*

Believing that differences in resource endowment and in the levels of economic development of Member States, may affect the implementation of the Community Industrial Policy;

Recognising also the potential of micro, small, and medium enterprise development to contribute to the expansion and viability of national economies of the Community and the importance of large enterprises for achieving economies of scale in the production process;

Mindful that co-operation and joint action in developing trade relations with third States and in establishing appropriate regulatory and administrative procedures and services are essential for the development of the international and intraregional trade of Member States;

Determined further to effect a fundamental transformation of the agricultural sector of the Community by diversifying agricultural production, intensifying agro-industrial development, expanding agri-business, strengthening the linkages between the agricultural sector and other sectors of the CSME and generally conducting agricultural production on a market-oriented, internationally competitive and environmentally sound basis;

Acknowledging the vital importance of land, air and maritime transportation for maintaining economic, social and cultural linkages as well as facilitating emergency assistance among the Member States of the Community;

Recognising further the importance of the establishment and structured development of transport links with third States for the accelerated and sustained development of the CSME;

Conscious also of the importance of promoting adequate air and maritime transport services for the continued viability of the tourism industry and of reducing the vulnerability of the CARICOM Region resulting from its reliance on extra-regional carriers;

Convinced also that a viable transport policy for the Community will make a significant contribution in satisfying the demands for the intra-regional movement of people and products in the CSME;

Acknowledging further that some Member States, particularly the Less Developed Countries, are entering the CSME at a disadvantage by reason of the size, structure and vulnerability of their economies; and

Believing further that the persistence of disadvantage, however arising, may impact adversely on the economic and social cohesion in the Community;

Conscious further that disadvantaged countries, regions and sectors will require a transitional period to facilitate adjustment to competition in the CSME;

Committed to establish effective measures, programmes and mechanisms to assist disadvantaged countries, regions and sectors of the Community;

Mindful further that the benefits expected from the establishment of the CSME are not frustrated by anti-competitive business conduct whose object or effect is to prevent, restrict, or distort competition;

Convinced further that the application and convergence of national competition policies and the cooperation of competition authorities in the Community will promote the objectives of the CSME;

Affirming that the employment of internationally accepted modes of disputes settlement in the Community will facilitate achievement of the objectives of the Treaty;

Considering that an efficient, transparent, and authoritative system of disputes settlement in the Community will enhance the economic, social and other forms of activity in the CSME leading to confidence in the investment climate and further economic growth and development in the CSME;

Affirming also that the original jurisdiction of the Caribbean Court of Justice is essential for the successful operation of the CSME;

Recalling further the Charter of Civil Society adopted by the Conference of Heads of Government on 19 February 1997 reaffirming the human rights of their peoples,

ARTICLE 4 **Less Developed Countries and** **More Developed Countries**

For the purpose of this Treaty the States specified in sub-paragraphs 1(b), (c), (g), (h), (m) and (n) of Article 3 shall be more developed countries and the remainder listed in the said paragraph shall be less developed countries.

ARTICLE 6 **Objectives of the Community**

The Community shall have the following objectives:

- (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) organisation 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; and*
- (i) *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.*

ARTICLE 7
Non-Discrimination

1. *Within the scope of application of this Treaty and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality only shall be prohibited.*
2. *The Community Council shall, after consultation with the competent Organs, establish rules to prohibit any such discrimination.*

ARTICLE 8
Most Favoured Nation Treatment

Subject to the provisions of this Treaty, each Member State shall, with respect to any rights covered by this Treaty, accord to another Member State treatment no less favourable than that accorded to:

- (a) *a third Member State; or*
- (b) *third States.*

ARTICLE 9
General Undertaking on Implementation

Member States shall take all appropriate measures, whether general or particular, to ensure the carrying out of obligations arising out of this Treaty or resulting from decisions taken by the Organs and Bodies of the Community. They shall facilitate the achievement of the objectives of the Community. They shall abstain from any measures which could jeopardise the attainment of the objectives of this Treaty.

ARTICLE 14
The Council for Finance and Planning

1. *The Council for Finance and Planning shall consist of Ministers designated by the Member States. Each Member State shall be entitled to designate alternates to represent it on COFAP.*

2. *Subject to the relevant provisions of Article 12, COFAP shall have primary responsibility for economic policy co-ordination and financial and monetary integration of Member States and, without prejudice to the generality of the foregoing, shall:*
 - (a) establish and promote measures for the co-ordination and convergence of national macro-economic policies of the Member States and for the execution of a harmonised policy on foreign investment;*

 - (b) promote and facilitate the adoption of measures for fiscal and monetary cooperation among the Member States, including the establishment of mechanisms for payment arrangements;*

 - (c) recommend measures to achieve and maintain fiscal discipline by the Governments of the Member States;*

 - (d) pending the establishment of a monetary union in the Community, recommend arrangements for the free convertibility of the currencies of the Member States on a reciprocal basis;*

 - (e) promote the establishment and integration of capital markets in the Community, and*

 - (f) undertake any additional functions remitted to it by the Conference arising under this Treaty.*

3. *Under the direction of COFAP, the Committee of Central Bank Governors shall assist in the performance of the functions mentioned in paragraph 2 of this Article.*

ARTICLE 27
Common Voting Procedures
in Community Organs and Bodies

1. *Subject to paragraph 2 of this Article, each Member State represented on Community Organs and Bodies shall have one vote. A simple majority of Member States shall constitute a quorum.*

2. *Member States, whose contributions to the regular budget of the Community are in arrears for more than two years, shall not have the right to vote except on matters relating to the CSME, but may otherwise participate in the deliberations of Community Organs and Bodies. The Conference may, nevertheless, permit such Member States to vote if it is satisfied that the failure to contribute is due to conditions beyond their control.*

3. *Decisions on procedural issues in Community Organs shall be reached by a simple majority of Member States.*

4. *Subject to the agreement of the Conference, a Member State may opt out of obligations arising from the decisions of competent Organs provided that the fundamental objectives of the Community, as laid down in the Treaty, are not prejudiced thereby.*

5. *Prior to taking decisions on any issue falling to be determined by Community Organs, the Secretariat shall bring to the attention of the meeting the financial implications of such decisions and any other matters which may be relevant.*

6. *Recommendations of Community Organs shall be made by a two-thirds majority of Member States and shall not be legally binding. Member States omitting to comply with recommendations shall inform the Secretariat in writing within six months stating the reasons for their non-compliance.*

7. *Subject to the relevant provisions of this Treaty, Community Organs and Bodies shall establish their rules of procedure.*

ARTICLE 30 **Scope of Application**

1. *Save as otherwise provided in this Article and Article 31, the provisions of this Chapter shall apply to the right of establishment, the right to provide services and the right to move capital in the Community.*

2. *Activities in a Member State involving the exercise of governmental authority shall, in so far as that Member State is concerned, be excluded from the operation of this Chapter.*

3. *For the purposes of this Chapter, “activities involving the exercise of governmental authority” means activities conducted neither on a commercial basis nor in competition with one or more economic enterprises, and includes:*

- (a) activities conducted by a central bank or monetary authority or any other public entity, in pursuit of monetary or exchange rate policies;*
- (b) activities forming part of a statutory system of social security or public retirement plans;*
- (c) activities forming part of a system of national security or for the establishment or maintenance of public order; and*
- (d) other activities conducted by a public entity for the account of or with the guarantee or using financial resources of the government.*

ARTICLE 45
Movement of Community Nationals

Member States commit themselves to the goal of free movement of their nationals within the Community.

ARTICLE 46
Movement of Skilled Community Nationals

1. *Without prejudice to the rights recognised and agreed to be accorded by Member States in Articles 32, 33, 37, 38 and 40 among themselves and to Community nationals, Member States have agreed, and undertake as a first step towards achieving the goal set out in Article 45, to accord to the following categories of Community nationals the right to seek employment in their jurisdictions:*

- (a) University graduates;*
- (b) media workers;*
- (c) sportspersons;*
- (d) artistes; and*
- (e) musicians,*

recognised as such by the competent authorities of the receiving Member States.

2. *Member States shall establish appropriate legislative, administrative and procedural arrangements to:*

- (a) facilitate the movement of skills within the contemplation of this Article;*
- (b) provide for movement of Community nationals into and within their jurisdictions without harassment or the imposition of impediments,*

including:

- (i) the elimination of the requirement for passports for Community nationals travelling to their jurisdictions;*
- (ii) the elimination of the requirement for work permits for Community nationals seeking approved employment in their jurisdictions;*
- (iii) establishment of mechanisms for certifying and establishing equivalency of degrees and for accrediting institutions;*
- (iv) harmonisation and transferability of social security benefits.*

3. *Nothing in this Treaty shall be construed as inhibiting Member States from according Community nationals unrestricted access to, and movement within, their jurisdictions subject to such conditions as the public interest may require.*

4. *The Conference shall keep the provisions of this Article under review in order to:*

(a) *enlarge, as appropriate, the classes of persons entitled to move and work freely in the Community; and*

(b) *monitor and secure compliance therewith.*

ARTICLE 47

Restrictions to Resolve Difficulties or Hardships Arising from the Exercise of Rights

1. *Where the exercise of rights granted under this Chapter creates serious difficulties in any sector of the economy of a Member State or occasions economic hardships in a region of the Community, a Member State adversely affected thereby may, subject to the provisions of this Article, apply such restrictions on the exercise of the rights as it considers appropriate in order to resolve the difficulties or alleviate the hardships.*

2. *Where a Member State:*

(a) *intends to apply restrictions in accordance with paragraph 1 of this Article, it shall, prior to applying those restrictions, notify the competent Organ of that intention and the nature of the restrictions;*

(b) *is unable to comply with sub-paragraph (a) of this paragraph, it shall, upon applying the restrictions in accordance with paragraph 1, immediately notify the competent Organ of the application and nature of the restrictions.*

3. *The Member State shall, at the time of application of the restrictions mentioned in paragraph 1, submit to COTED or COFAP, as the case may require, a programme setting out the measures to be taken by that Member State to resolve the difficulties or to alleviate the hardships.*

4. *The competent Organ shall give its earliest consideration to the programme, and:*

(a) *make a determination in respect of the appropriateness of the restrictions and whether they shall be continued; and*

(b) *where it decides that the restrictions shall be continued, determine:*

(i) *the adequacy of the programme; and*

(ii) *the period for which the restrictions should continue.*

The competent Organ, in making a determination under sub-paragraph (b) of this paragraph, may impose such conditions as it considers necessary.

5. *Restrictions applied by a Member State pursuant to paragraph 1 of this Article shall be confined to those necessary:*

- (a) to resolve the difficulties in the affected sectors;*
- (b) to alleviate economic hardships in a particular region.*

6. *In applying restrictions mentioned in paragraph 5, Member States shall:*

- (a) minimise damage to the commercial or economic interests of any other Member State; or*
- (b) prevent the unreasonable exercise of rights granted under this Chapter, the exclusion of which could impair the development of the CSME.*

7. *The Member States, in applying restrictions pursuant to paragraph 1 of this Article, shall not discriminate and:*

- (a) shall progressively relax them as relevant conditions improve;*
- (b) may maintain them only to the extent that conditions mentioned in paragraph 1 of this Article continue to justify their application.*

8. *If COTED or COFAP, as the case may require, is not satisfied that Member States applying restrictions are acting in accordance with the provisions of paragraph 6 of this Article, it may recommend to the Member States adversely affected thereby alternative arrangements to the same end.*

ARTICLE 48

Waiver of Obligations to Grant Rights

1. *Notwithstanding any provision in this Chapter, a Member State may apply to the Community Council for a waiver of the requirement to grant any of the rights mentioned in paragraph 1 of Article 30 in respect of any industry, sector or enterprise.*

2. *An application for a waiver within the meaning of paragraph 1 of this Article shall:*

- (a) be made prior to the establishment of the relevant programme for the removal of restrictions on the rights mentioned in paragraph 1;*
- (b) identify the rights in respect of which the waiver is required;*
- (c) set out the circumstances justifying the grant of the waiver; and*
- (d) indicate the period for which the waiver is required.*

3. *The Community Council may require the applicant to furnish such additional information as the Council may specify.*

4. *Where the Community Council is satisfied that the waiver should be granted, it shall grant a waiver for a period not exceeding five years, subject to such terms and conditions as the Community Council may determine.*

5. *A Member State which has been granted a waiver within the meaning of paragraph 1 of this Article:*

(a) shall not, while the waiver is in force, be entitled to espouse a claim on behalf of its nationals against another Member State in respect of the rights for which the waiver was granted;

(b) shall:

(i) at the termination of the period of the waiver, remove the restrictions and notify the Community Council; or

(ii) where the Member State removes the restrictions before the end of the period of the waiver, notify the Community Council accordingly.

ARTICLE 51

Objectives of the Community Industrial Policy

1. *The goal of the Community Industrial Policy shall be market-led, internationally competitive and sustainable production of goods and services for the promotion of the Region's economic and social development.*

2. *In fulfilment of the goal set out in paragraph 1 of this Article, the Community shall pursue the following objectives:*

(a) cross-border employment of natural resources, human resources, capital, technology and management capabilities for the production of goods and services on a sustainable basis;

(b) linkages among economic sectors and enterprises within and among the Member States of the CSME;

(c) promotion of regional economic enterprises capable of achieving scales of production to facilitate successful competition in domestic and extra-regional markets;

(d) establishment of a viable micro and small economic enterprise sector;

(e) enhanced and diversified production of goods and services for both export and domestic markets;

- (f) sustained public and private sector collaboration in order to secure market-led production of goods and services;*
- (g) enhanced industrial production on an environmentally sustainable basis;*
- (h) balanced economic and social development in the CSME bearing in mind the special needs of disadvantaged countries, regions and sectors within the meaning of Article I; and*
- (i) stable industrial relations.*

ARTICLE 56
The Community Agricultural Policy

1. *The goal of the Community Agricultural Policy shall be:*
 - (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,*

bearing in mind the differences in resource endowment and economic development of the Member States.

ARTICLE 57
Implementation of the Community Agricultural Policy

1. *For the achievement of the goal set out in Article 56, the Community shall, through competent Community Organs and Bodies, promote and support:*
 - (a) the production, diversification, processing and marketing of agricultural products;*

- (b) the establishment of effective agricultural financing systems, including insurance, bearing in mind the special needs of artisanal fishers, small farmers, foresters and agro-processors;*
- (c) the establishment of linkages among the Member States with complementary natural resources, industries, agricultural skills and technical abilities;*
- (d) the development of human resources and delivery systems responsive to the requirements of the agricultural sector;*
- (e) the development of appropriate policies for the use of land and marine space with a view to increased agricultural production;*
- (f) appropriate land tenure systems to provide the farmer with security of tenure;*
- (g) the establishment of effective information and market intelligence services;*
- (h) research and development with a view to the adaptation, dissemination and application of appropriate technologies at all levels of the sector and all stages of production;*
- (i) the adoption of effective measures for rural enterprise development;*
- (j) public education to enhance the economic and social profiles of agriculture, particularly among the youth;*
- (k) the establishment of an effective regime of sanitary and phytosanitary measures;*
- (l) the establishment of a policy environment designed to attract investment to the agricultural sector; and*
- (m) technical co-operation and the dissemination of knowledge in agriculture.*

2. For the purpose of assisting the Member States to implement the agricultural policy set out in paragraph 1, COTED shall establish effective support measures including:

- (a) strengthening the relevant administrative and institutional framework to modernise and enhance the competitiveness of agriculture by:
 - (i) improving the capability of the Member States to undertake policy analysis, formulation, planning, execution and resource mobilisation for the development of the sector;**

(ii) investigating and analysing developments in the agri-food sector; and

(iii) improvement of the collection, analysis and dissemination of empirical data and other relevant information;

(b) upgrading of national and regional capabilities in the areas of sustainable natural resources management;

(c) enhancement of the capabilities of the Member States in the areas of agricultural trade analysis and negotiations; and

(d) promotion of a mechanism for the collaboration of farmers, fishers, foresters and the social partners in agricultural development.

3. *The Community shall:*

(a) promote collaboration among the Member States and competent regional organisations in the areas of policy formulation and implementation of regional agricultural policies; and

(b) establish an effective regime to protect regional agricultural production from dumping, subsidisation and other unfair trading practices.

4. *The Community shall, as a matter of priority, and in collaboration with national, regional and international agencies and organisations, promote and adopt measures relating, inter alia, to:*

(a) the provision of appropriate inputs; and

(b) the development of infrastructure, such as port facilities, drainage, irrigation, access roads, post-harvest handling and marketing facilities.

ARTICLE 75

Development of Social Infrastructure

1. In establishing its industrial policy, the Community shall promote appropriate measures for the establishment of adequate social infrastructure, the alleviation of poverty, and securing social stability in the Member States.

2. Without prejudice to the generality of the foregoing, the Community shall promote in the Member States:

(a) the establishment and improvement of health, education, sports and social security institutions and facilities;

(b) conclusion of reciprocal social security agreements among Member States in order to facilitate the movement of skills; and

(c) training and retraining of workers, mobility of instructors and trainees, cooperation among educational and training institutions, and the development of distance education.

3. The Member States shall engender an understanding and appreciation of the Community through effective public relations, educational, cultural and youth exchange programmes.

ARTICLE 78

Objectives of the Community Trade Policy

1. The goal of the Community Trade Policy shall be the sustained growth of intra-Community and international trade and mutually beneficial exchange of goods and services among the Member States and between the Community and third States.

2. In fulfilment of the goal set out in paragraph 1 of this Article the Community shall pursue the following objectives:

(a) full integration of the national markets of all Member States of the Community into a single unified and open market area;

(b) the widening of the market area of the Community;

(c) the active promotion of export of internationally competitive goods and services originating within the Community;

(d) the securing of the most favourable terms of trade for Community goods and services exported to third States and groups of States.

3. In order to achieve the objectives of its Trade Policy, the Community shall:

(a) undertake:

(i) the establishment of common instruments, common services and the joint regulation, operation and efficient administration of the internal and external commerce of the CSME;

(ii) where possible, the employment of common negotiating strategies in the development of mutually beneficial trade agreements with third States and groups of States;

(iii) participation and joint representation as appropriate in international and regional organisations which negotiate, establish and apply disciplines governing international and regional trade;

(b) prohibit the imposition by the Member States of new restrictions on imports and exports of products of Community origin.

4. *Member States shall eliminate existing restrictions on imports and exports of goods of Community origin, other than those authorised by this Treaty.*

ARTICLE 134
Objectives of the Community Transport Policy

1. *The goal of the Community Transport Policy shall be the provision of adequate, safe and internationally competitive transport services for the development and consolidation of the CSME.*

2. *In fulfilment of the goal set out in paragraph 1 of this Article, the Community shall pursue the following objectives:*

(a) the organisation of efficient, reliable, affordable transport services throughout the Community;

(b) the development and expansion of air and maritime transport capabilities in the Community;

(c) the promotion of co-operative arrangements for the provision of transport services;

(d) the development of efficient internationally competitive ancillary transport services;

(e) the development of human resources for employment in all areas and at all levels of the transport sector;

(f) the implementation of standards for the development of safe road, riverine, sea and air transport services.

ARTICLE 142
Scope of Application

1. *The provisions of this Chapter shall have effect for the purpose of establishing a regime for disadvantaged countries, regions or sectors within the framework of the Treaty as well as a special regime for the Less Developed Countries in order to enhance their prospects for successful competition within the Community, and redress, to the extent possible, any negative impact of the establishment of the CSME.*

2. *As soon as practicable after the entry into force of this Treaty, the Conference shall, on the recommendation of the Community Council and in accordance with Article 1, designate disadvantaged countries, regions and sectors and may, from time to time, make such further designations or terminate such designations as circumstances warrant.*

3. *Wherever in this Treaty reference is made to disadvantaged countries, regions and sectors or to the Less Developed Countries, the Organs of the Community shall take the measures required to give effect to the spirit and intent of this Chapter.*

ARTICLE 169

Objectives of Community Competition Policy

1. *The goal of the Community Competition Policy shall be to ensure that the benefits expected from the establishment of the CSME are not frustrated by anti-competitive business conduct.*

2. *In fulfilment of the goal set out in paragraph 1 of this Article, the Community shall pursue the following objectives:*

(a) the promotion and maintenance of competition and enhancement of economic efficiency in production, trade and commerce;

(b) subject to this Treaty, the prohibition of anti-competitive business conduct which prevents, restricts or distorts competition or which constitutes the abuse of a dominant position in the market; and

(c) the promotion of consumer welfare and protection of consumer interests.

ARTICLE 211

Jurisdiction of the Court in Contentious Proceedings

1. *Subject to this Treaty, the Court shall have compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Treaty, including:*

(a) disputes between the Member States parties to the Agreement;

(b) disputes between the Member States parties to the Agreement and the Community;

(c) referrals from national courts of the Member States parties to the Agreement;

(d) applications by persons in accordance with Article 222,

concerning the interpretation and application of this Treaty.

2. *For the purpose of this Chapter, “national courts” includes the Eastern Caribbean Supreme Court.*

ARTICLE 212
Advisory Opinions of the Court

1. *The Court shall have exclusive jurisdiction to deliver advisory opinions concerning the interpretation and application of the Treaty.*

2. *Advisory opinions shall be delivered only at the request of the Member States parties to a dispute or the Community.*

ARTICLE 237
Reservations

Reservations may be entered to this Treaty with the consent of the signatory States.