ADVISORY LEGAL OPINION - ENERGY

1. The Conference of Heads of Government, at its Twenty-Fourth Meeting in Montego Bay, Jamaica in July 2003, decided to refer the issue of the national treatment and nondiscrimination in respect of access to, and pricing of natural resources as these relate to energy within the context of the CSME to the Secretary-General of the Caribbean Community for an advisory legal opinion. The Conference also decided that the Opinion should be submitted to the Community Council of Ministers in time for recommendations to the Conference at its Special Meeting in November 2003, and recommended that interested Member States submit briefs or information to the Secretary-General on the issues to be addressed by the Advisory Legal Opinion.

2. This Opinion is hereby submitted to the Community Council in accordance with the mandate of the Conference.

3. For the reasons expounded below, the Council is advised as follows:

   a) The issue of the national treatment and nondiscrimination in respect of access to, and pricing of natural resources as these relate to energy within the context of the Revised Treaty Establishing the Caribbean Community Including the CARICOM Single Market and Economy (CSME), is eminently an international legal question and therefore one susceptible of legal analysis based upon the sources of international law.

   b) The concepts of “national treatment” and “non-discrimination” as used in the Revised Treaty are for all relevant purposes one and the same. The pertinent objective is to prevent distortions in the CSME leading to the division of the market along national lines, a development that would frustrate the attainment of the objectives of creating a single space for economy activity.

   c) The prohibition of discrimination on grounds of nationality is an obligation falling upon all Member States parties to the Revised Treaty. Moreover, that obligation permeates all the Treaty provisions and is foundational to the very notion of the CSME.

   d) The prohibition of discrimination on grounds of nationality includes matters of access to and the pricing of energy. Member States may therefore not discriminate between their nationals and other Community nationals as regard such access or pricing.

   e) Where governmental practice or policy determines or critically influences the ‘price’ or ‘pricing policy’ for energy, the Member State is enjoined to ensure access by all Community nationals on the basis of non-discriminatory pricing.

   f) Where prices are set by private sector entities in the market place, there is a related but different obligation upon the Member State to ensure there is no anti-competitive business practice. Such practices may include predatory pricing and price discrimination.
g) A determination of whether anti-competitive business practices exist in relation to access to and pricing of energy is beyond the remit of the question posed to the Secretary-General.

h) On virtually any view of modern competition policy, including that described in the Revised Treaty, price discrimination is permissible in respect of different products and different markets. As presently advised, the market organization that currently exists is one in which natural gas (NNG) is, but LNG is not, sold on the Trinidad and Tobago market. As Jamaica proposes to purchase LNG and not NNG the crucial question arises as to whether the same product is in issue; a matter requiring evidence of a technical, scientific and, possibly, economic nature not now available to the Secretary-General.

i) The Most Favoured Nation (MFN) treatment requires each Member State of the Caribbean Community to accord to another Member State treatment no less favourable that that accorded to any other State. MFN treatment must be accorded to all Member States exercising any rights covered by the Treaty, including those pertaining to the free movement of goods at non-discriminatory pricing.

j) The question of whether Trinidad and Tobago is breaching its MFN obligation to Jamaica by permitting operation of differentiated pricing in relation to LNG or the natural gas that goes into LNG cannot be resolved without the offer of further evidence of the relevant facts. Where entities from third states are favoured by differential pricing as the result of action taken by private entities in a Member State of the Caribbean Community, the appropriate remedies appear to lie in the realm of Competition Law.

k) The notification of the Revised Treaty under Article 24 of GATT anticipates that Member States of CARICOM will assume greater obligations as among themselves than exist among members to the GATT. Fidelity to the obligations undertaken in the Revised Treaty will not be cause for re-examination of the compatibility of the Revised Treaty with Member States’ GATT/WTO obligations or the taking of counter-measures against Member States by other Members of the GATT/WTO.

BACKGROUND

4. The issues in contention arose out of and were put to the Secretary General because of a disagreement between Jamaica and Trinidad and Tobago regarding access to and pricing of liquid natural gas (LNG), or the natural gas that goes into making LNG, to be purchased by persons in Jamaica from persons producing this product in Trinidad and Tobago. In contest is whether arrangements for access and pricing fall within and are controlled by the provisions of the Revised Treaty.

5. The Revised Treaty is being provisionally applied among all the Members of the Community except The Bahamas and Montserrat1; in particular, the Treaty is now provisionally applicable between Jamaica and Trinidad and Tobago. Provisional application will continue until and unless terminated by notification by a participating Member State of its intention not to

become a party to the Treaty (Vienna Convention, 1969, Article 25), or until the Treaty formally enters into force in accordance with Article 234 thereof.

6. The parties in disagreement did not choose to invoke the dispute settlement arrangement under Article 190 of the Revised Treaty involving formal notification of the existence and nature of a dispute and employment of the good offices of the Secretary-General to settle the dispute. Instead, the request came from the Conference and was framed by Conference in the general, without reference to any particular Member State. All Member States were invited to submit briefs. Although only Jamaica and Trinidad and Tobago submitted formal briefs:

a) Other Member States participating in the Working Group of the CARICOM Task Force on Energy at its 23-24 October 2003 Meeting in Barbados considered and commented upon the broad outline of the Draft Opinion presented to that Meeting by the Secretariat.

b) There are initiatives under consideration in the Task Force such as the construction of a pipeline between Trinidad and Tobago and the Eastern Caribbean, which could make the pricing of natural gas of interest to other Member States in the short term.

c) The Working Group has recommended that the Conference establish an energy policy in which natural gas would be one of the preferred fuels for the production of energy in the CARICOM Single Market and Economy.

7. A regional energy policy is widely regarded as critical but the interests of Member States do not necessarily converge. For energy exporting countries, such as Trinidad and Tobago, expansion in natural gas output is anticipated to have positive impacts of seismic proportions in relation to such key macro-economic variables as GDP, Balance of Payments, government revenue and expenditure, and industrial competitiveness. For energy importing countries, such as Jamaica, access to regional natural gas is welcomed as a means of reducing dependency on imported oil by diversifying the energy mix, protecting the economy from the destabilizing impact of oil price volatility and, generally, enhancing the competitiveness of the productive sector.

8. Industrial competitiveness is among the most immediate concerns. Energy is a significant cost component in the production process. Access by the productive sector in Trinidad and Tobago to natural gas at lower net back prices than is available to the productive sector in other Member States, has been claimed to have had a devastating impact upon the manufacturing industry and balance of payment profile in many of Trinidad and Tobago’s traditional trading partners within the Community. This impact has been said to so grave as to be unsustainable.

LEGAL ARGUMENTS

2 Jamaica’s Brief was received on 12 August 2003, and the Brief from Trinidad and Tobago on 13 August 2003. As both Briefs were presented at or about the same time, neither country had the benefit of reviewing the arguments presented by the other in the first instance. Accordingly, Jamaica submitted a Reply Brief which was received on 1 October 2003, and the Reply of Trinidad and Tobago was received on 10 October 2003. The Briefs submitted by Jamaica and Trinidad and Tobago have helped considerably to clarify the issues in dispute, and correspondingly, to define the scope of this Advisory Opinion.
Beyond economic dislocation, the Jamaica brief argues that differential pricing for natural gas and derived energy products such as electricity is contrary to the “national treatment” and “non-discrimination” obligations in the Revised Treaty Establishing the Caribbean Single Market and Economy (CSME). The CSME is intended to create a single space for economic activity whereas price discrimination is said to have the contradictory effect of distorting the single market in which the private sectors of the various Member States compete. Moreover, it further argues, having established a prima facie case of discrimination between the prices at which energy is accessed by the productive sector in Trinidad and Tobago as compared with that available to the productive sector in Jamaica, the burden of proof is shifted to Trinidad and Tobago to justify that discrimination. In particular, there is an obligation to prove that the discrimination is not based on grounds of nationality only.

Trinidad and Tobago argues that the private sector, acting without governmental control or involvement, sets prices for natural gas and LNG and that this is both consistent with and in furtherance of the market-led model of economic development underpinning the CSME. From this perspective, and relying on jurisprudence developed in general international trade law, “national treatment” is considered to be irrelevant to the question of the pricing of energy or energy-related products in as much as that concept refers to the proscribing of certain governmental activities that discriminate between nationals and persons from other countries. The Trinidad and Tobago brief emphasizes that the Government of Trinidad and Tobago is not involved in the setting of prices for LNG or the natural gas that goes into LNG.

The obligation to prohibit “any discrimination on the grounds of nationality only” is construed as operative only in respect of Treaty provisions that are intended to confer identifiable rights upon foreign nationals. In respect of such provisions, it is conceded that Trinidad and Tobago has the obligation to ensure that there is no discrimination on grounds of nationality only. But, as maintained by the Trinidad and Tobago brief, there is no right as such to a particular price for natural gas, or LNG, and accordingly no relevant obligation assumed by Trinidad and Tobago is engaged.

It is of some moment that both sides agree that the Secretary-General was not asked to make determinations in relation to Chapters 5 and 8 of the Revised Treaty dealing, respectively, with Trade Policy and Competition Policy. The task of making such determinations, whilst within the ambit of function of the Secretary-General in providing good offices to settle disputes, would, for example, require findings of fact going beyond the remit of the mandate from the Conference. One would venture to suggest that these provisions might, ultimately, be decisive of the matters in disagreement.

However, this is not to suggest that provisions on Trade Policy and Competition Policy are irrelevant to this Opinion. They clearly are relevant in helping to interpret the scope and significance of the CSME. As such they assist in indicating the meaning to be attached to “national treatment” and “nondiscrimination” in the context of the Caribbean Single Market and Economy.

**Sources of Law**

The meaning to be ascribed to provisions in any Treaty is eminently an international legal question and therefore susceptible of legal analysis on the basis of the sources of international law. The determination of the meaning of a treaty provision is a problem of interpretation of the treaty and consequently a legal question (Membership in United Nations
case, 1948). The resolution of the question must be based primarily on an examination of the text of the Treaty itself in the light of the relevant rules and principles of international law.

15. The classical list of the sources of international law is found in Article 38 (1) of the Statute of the International Court of Justice (ICJ). This provides that the ICJ, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: international conventions; international custom; general principles of law recognized by civilized nations; and, as subsidiary means for determination of rules of law, judicial decisions and the teachings of the most highly qualified publicists. Application of judicial decisions is expressly subject to the general rule that the decision of the Court has no binding force except between the parties and in respect of that particular case. In other words, that there is no rule of stare decisis, as known to common law jurisprudence.

16. It bears mention that the classical sources of law are precisely those to be employed by the Caribbean Court of Justice (CCJ) in hearing and determining disputes concerned with the interpretation and application of the Revised Treaty. The Court will have compulsory and exclusive jurisdiction over such disputes in the exercise of its original jurisdiction. Article 217 provides that in exercising that jurisdiction, the Court “shall apply such rules of international law as may be applicable.”

17. Caution must, however, be exercised in the use of general international law to interpret the provisions of a Treaty meant to create special community arrangements among its Member States. The notions of “national treatment” and “non-discrimination” as well as the related “Most Favoured Nation” principle appear in general international trade law and have been the subject of judicial decisions. In particular, these concepts have been the subject of commentary in GATT and WTO jurisprudence. They may not, however, carry the identical meaning in relation to the regional treaty arrangements establishing the CSME.

18. The very notion of the notification of the Revised Treaty establishing the CSME under Article 24 of GATT is relevant here. Derogation from the GATT regime is premised on the idea that members of a regional economic integration organization are allowed to advance their internal market liberalization at a faster pace than that to which the non-members have agreed. Members of the regional economic integration organization are expressly not required to extend the same treatment to nationals of third countries. It follows, for example, that MFN treatment cannot mean the same thing in context of GATT/WTO as it does in relation to CSME.

19. The European Court of Justice has had to deal with a similar issue in relation to justifying the special status of the Treaties creating the European Community. That Court has concluded that these Treaties create a special species of international law, quite different from general international law (Van Gend en Loos [1963] ECR 1; Costa v ENEL [1964] ECR 585).

20. Accordingly, in order to contextualize the notions of “national treatment” and “non-discrimination” in relation to access to and pricing of natural resources within the CSME, it is imperative to traverse some well known features of CSME as established by the Revised Treaty.

THE CARIBBEAN SINGLE MARKET AND ECONOMY

21. The deepening of the regional economic integration was the single most important objective and the rationale for revising the 1973 Treaty of Chaguaramas and consolidating the nine attendant Protocols into the Revised Treaty Establishing the Caribbean Community
including the CARICOM Single Market and Economy. Establishment of the CSME is anticipated in the Preamble of the Revised Treaty as the preferred basis for achieving 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. To that end the States Parties to the Revised Treaty resolved, inter alia, to facilitate access by Community nationals to the resources of the region.

22. The Treaty makes provision for institutional arrangements to support the functioning of the Community, the four freedoms enjoyed by Community nationals, and policies for sectoral development. The latter include industrial policy, agricultural policy, trade policy, transport policy, competition policy and consumer protection. There are special regimes for disadvantaged countries, regions and sectors, as well as for less developed countries. There are also important provisions on dispute settlement, including the original jurisdiction of the CCJ.

23. Underpinning these provisions are the broad obligations binding upon Member States in respect of non-discrimination, most favoured national treatment, and the general undertaking to take appropriate measures to implement the Treaty.

24. What emerges from the Revised Treaty is the intention to create a comprehensive regional arrangement whereby the integration process is employed for the specific purpose of sustained economic development. The arrangement is emphatically not designed to refashion geography or to ensure a more equitable distribution of resources than allotted by nature. Nor is it intended to nullify the geographical advantage of being proximate to natural resources. Rather, the CSME is established to make natural resources available to promote the highest level of efficiency in the production of goods and services, and to enhance productivity and competitiveness, recognizing that globalization and liberalization have important implications for international competitiveness.

25. An important complication issues from the fact that the Revised Treaty does not create the CSME at once and out of nothing, but rather allows for graduated integration and contemplates variability of integration among Member States. Variability is evident in a number of the provisions of the Treaty. Reservations may be entered in respect of any Treaty provision with the consent of the signatory States (Article 237). The Conference may admit countries to Associate Membership “on such terms and conditions as Conference thinks fit” (Article 231). Differentiated regimes exist for less developed as distinct from more developed countries (Chapter 7) and special derogations have been allowed in this regard. More generally, any Member State is allowed to opt out of any obligations arising from the decisions of the competent Organs provided agreement of the Conference is obtained and provided that fundamental objectives of the Community are not thereby prejudiced (Article 27 (4)). Member States commit themselves to the goal of freedom of movement of community nationals but accept specific obligations, in the first instance, only with regard to skilled community nationals (Articles 45, 46).

26. It is also instructive that Conference is currently considering key requirements for implementation of the CSME by December 2005; but the single market will then come into being only in relation to specific matters such as goods; services, capital, and establishment; and the movement of skilled persons.

27. Variability and graduation in the integration process are not necessarily fatal or even inimical to community building; it need not threaten the integrity of the Community provided there is convergence in the long term. There is always a risk, but thankfully not an imminent
one of the integration process breaking up into disjunctive circles of co-operation. What is highlighted here is that the CSME is a work in progress and as such that it may be impermissible to draw a priori conclusions from the mere concept of a single market. Whatever deductions are drawn must be anchored in the provisions of the Treaty as they exist and as are applicable between and among the relevant Member States, at the relevant time.

ACCESS TO NATURAL RESOURCES AS THESE RELATE TO ENERGY

28. The issue of access to energy is not treated directly in the Revised Treaty. It is reasonably clear, however, that the Treaty contemplates that the resources of the region will be accessible to Community nationals in order to further the objectives of the CSME.

29. For example, energy and energy-related products come within the meaning of the term “goods” defined in Article 1 to mean “all kinds of property other than real property, money, securities or choses in action.” As such energy and energy-products fall within the objectives of the Community Trade Policy. The goal of this Policy is the sustained growth of intra-Community and international trade and mutually beneficial exchange of goods and services among the Member States (Article 78). Specifically, Member States are obligated to establish and maintain a regime for the free movement of goods within the CSME (Article 79), and have the further obligation to:

“refrain from trade policies and practices, the object or effect of which is to distort competition, frustrate free movement of goods and services, or otherwise nullify or impair benefits to which other Member States are entitled under the Treaty” (Article 79 (2)).

30. These are important and relevant obligations, binding upon Member States, to which we will return in due course.

31. There are other provisions touching and concerning the question of access. In relation to Competition Policy, a Member State is obliged, within its jurisdiction, to prohibit anti-competitive business conduct. The latter includes, inter alia, the limitation or control of production, markets, investment or technical development; and the artificial dividing up of markets or restriction of supply sources (Article 177 (2)).

32. The Preamble to the Revised Treaty is also highly relevant. It emphasizes the resolve of Member States to establish conditions, which would “facilitate access by their nationals to the collective resources of the Region on a non-discriminatory basis.” While it does not itself establish the right of access, the Preamble can be used as part of the context in which the Treaty provisions are interpreted and to be understood (Vienna Convention on the Law of Treaties, 1969 Article 31 (2); Wimbledon Case PCIJ Series A No 1 (1923)).

33. The Preamble is more than hortatory; it describes the purpose, spirit and intention of the Treaty. In the premises, the preambular reference to non-discriminatory access to the collective resources unifies and makes coherent the disparate provisions from which the right of access is deduced. In short it confirms that the Treaty is intended to confer a right of access on all community nationals to the natural resources of the Region, including energy resources for the purpose of advancement of the objectives of creating the envisaged CSME, as outlined above.
34. Within the context of the European Community, similar provisions and scheme of regional integration have been held to provide for the right of equal access to natural resources. This is the teaching from an impressive line of cases of which *R v. Secretary of State for Transport, ex parte Factortame (No. 2)*, [1991] 1 AC 603; [1990] 3 CMLR 375, happens to be the most well known example.

35. Access is potentially critical in the context of energy security. A matter not placed before the Secretary-General but which may exercise the minds of Member States on a subsequent occasion, is whether Members States of the CSME, prices and pricing aside, have a prior claim upon the energy resources of the Region in times of shortages in the international market. Shortages are especially likely in times of global crises and emergencies.

36. The present concern is whether the right of access includes the right to non-discriminatory pricing. As a matter of commonsense and business practice, price and pricing must be related to access. At the most extreme, exorbitant prices can clearly render the notion of access illusory. Similarly discriminatory pricing imposes an additional fetter to access on the person unfavourably treated. At this point, however, the issue of access is commingled with and becomes inseparable from the issue of pricing.

**PRICING OF NATURAL RESOURCES AS THESE RELATED TO ENERGY**

37. Having established that access to energy and energy-related products falls within the scope of the CSME as defined in the Revised Treaty, it must now be ascertained whether the pricing of these products is also a matter dealt with in the Agreement. We are of the view that it is.

38. First, Chapter 8 places clear obligations upon Member States relating to pricing in relation to Competition Policy and Consumer Protection. As we have seen, a Member State is obliged, within its jurisdiction, to prohibit anti-competitive business conduct. Among the conduct thus proscribed are actions by which an enterprise abuses its dominant position within the Community, and any other like conduct whose object or effect is to frustrate the benefits expected from establishment of the CSME (Article 177 (1) (b), (c). Anti-competitive business conduct is defined to include price fixing, predatory pricing and “price discrimination” (Article 177 (2)).

39. Procedures are established for determination of anti-competitive business conduct. This includes a process whereby a Member State makes a request to the Community Commission established to implement the Community Competition Policy, for an investigation where it has reason to believe that business conduct by an enterprise located in another Member State prejudices trade and prevents, restricts or distorts competition in the territory of the requesting Member State (Article 175 (1)). A similar request for an investigation may be made by the COTED where that Council has reason to believe that business conduct within the CSME prejudices trade and prevents, restricts or distorts competition within the CSME (Article 175 (2)).

40. The Competition Commission is yet to be established, a further indication of the graduated process of integration.

41. This Opinion makes no determination of whether the particular entities responsible for the production and sale of natural gas or LNG in Trinidad and Tobago occupy a dominant position, a factual matter outside the remit of this opinion. The burden of the point being discussed is that pricing is not automatically and irretrievably divorced from the obligations of
Member States. Whilst the Revised Treaty contains important references to market-led production of goods and services, and while it may be reasonable to assume that prices for those goods and services are to be fixed by market forces, there remains the governmental obligation, in accordance with the terms of the Treaty, to ensure the creation of the legislative environment that prohibits anti-competitive business conduct in relation to pricing.

42. Secondly, there are other obligations in the Revised Treaty that, while not referring to pricing specifically, would appear to support the contention that pricing is a matter in respect of which Member States have regulatory or governmental obligations. Without imposition of the appropriate regulatory framework, it is clear that the pricing practices of private entities could frustrate the objectives of the Community’s Trade Policy. The goal of “mutually beneficial exchange of goods and services among Member States”, referenced above, (Article 78) could be nullified by the decisions of private entities engaging in discriminatory pricing. Issues concerning “subsidies” and “dumping”, both dealt with in extenso in the Revised Treaty (Chapter Five, Parts Three, Four, Five) are by their nature and effect, matters of pricing.

43. Furthermore, the obligation on Member States to establish and maintain a regime for the free movement of goods and services within the CSME, (Article 79 (1)) is a direct injunction to encourage the liberalization of trade. Member States have the right to expect that goods, including natural resources such as energy and energy-related products, will be allowed to move freely within the Community. Free movement requires that national rules, regulations and procedures must not unlawfully inhibit movement; unlawful inhibition could be price-related. Article 79 (2) makes the matter tolerably clear. It requires that:

“Each Member shall refrain from trade policies and practices, the object or effect of which is to distort competition, frustrate free movement of goods and services, or otherwise nullify or impair benefits to which other Member States are entitled under the Treaty.”

44. This obligation would appear to go beyond the strict requirement of providing the legislative framework and into the area of policy making and state practices. Evidently, where a Member State pursues a policy of subsidizing local industries, so as to create lower prices for the subsidized product than would be applicable without the subsidy, it would hardly be sufficient to suggest that the prices of the products are set by market forces and is not a matter for governmental involvement.

45. Although the actual resolution of the disagreement is outside the scope of this Opinion and is contingent upon facts yet to be adduced, two important considerations may be noted. First, there appears to be no fixed price at which persons in Trinidad and Tobago obtain natural gas. Price variability is related to several factors, many historical. In particular, prices vary depending on the history of exploitation of the particular well-head, the time when the concession was granted, and the purpose and pattern of consumption by potential consumers. Secondly, price variability may be interwoven with product variability. In this regard, there are two basic markets for natural gas in Trinidad and Tobago. There is:

a) A market for natural gas for the production of energy and/or feedstock for industry including electricity generation and NNG; and

b) The production of LNG which commodifies the natural gas and makes it more internationally tradable.
46. Market (a) appears, as presently advised, to be a monopoly in which the Government of Trinidad and Tobago and/or an agent of the Government of Trinidad and Tobago perform the function of transporter and merchant. Foreign private investors (British Gas, British Petroleum, etc.) undertake exploration and production under concessions. Government policy, it would seem, critically influences the pricing of natural gas in this market.

47. Market (b) is a managed arrangement between the small group of natural gas producers and the one natural gas processor. The Government of Trinidad and Tobago appears to receive revenue based upon the net back price of the natural gas but plays no role in the pricing of the LNG.

48. The market organization that currently exists in Trinidad and Tobago appears to be one in which LNG is not sold on the Trinidad and Tobago market. As Jamaica proposes to purchase LNG, the crucial question arises as to whether the same product is in issue. On virtually any view of modern competition policy, price discrimination is permissible in respect of different products and different markets.

49. Admittedly, the term ‘price discrimination’ is, in some ways, an unfortunate and tendentious one: the very language suggests that differences in the price at which goods are offered are themselves ‘bad’; a proposition that is disputed by some economists.³ Be that as it may, the fact of the matter is that Community law has placed considerable importance on creation of a single market and is generally hostile to market behaviour that entails divisions along national lines. In the context of European law it has been said:

“To that end, striking down arrangements in which arbitrary national barriers are prescribed is a goal of the community institutions. But that is very different from charging different prices in geographically separated markets, simply because the markets happen to be in different countries.” ⁴

NON-DISCRIMINATION ON GROUNDS OF NATIONALITY

50. Article 7 of the Revised Treaty is the basis of claim both to ‘national treatment’ and ‘non-discrimination’. The Article reads:

“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 such discrimination.”

51. The Community Council has not yet made any rules pursuant to paragraph 2. However it is doubtful whether the absence of such rules prevents the current application of the non-discrimination principle. It is submitted that the principle is extant and applies without more; at

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³ It is however, not self-evident that price discrimination is in fact ‘bad’ in economic terms for economists have identified several factors that could be argued in mitigation Paul Craig and Grainne De Burca, EU Law: Text, Cases, and Materials (Third Edition, 2003) at p. 1017.
⁴ Ibid
least in respect of identifiable rights enjoyed under the Treaty. The latter is a proposition supported by Caribbean jurisprudence.\textsuperscript{5}

\textbf{Is Non-Discrimination synonymous with National Treatment?}

52. The question posed to the Secretary-General could be read as inviting a discussion of “national treatment” separate and distinct from “non-discrimination”. Admittedly, Article 7 appears to permit discrimination provided there are bases for differential treatment beyond grounds of nationality. But discrimination on the basis of “nationality plus” is not necessarily a nullification of the national treatment principle; in fact the formulation could be construed as describing circumstances in which discrimination is, apart from nationality considerations, justifiable; a situation well known to GATT/WTO and European Community jurisprudence.\textsuperscript{6}

53. Admittedly, too, there may be some historical basis for ascribing special meaning to “national treatment”. Traditionally, the national treatment standard was one of the main general standards used in general international law to secure a certain level of treatment for foreign nationals in host countries. In this context, national treatment is contingent upon and relative to the treatment given to the nationals of the host country. This relativity makes a determination of its content dependent on the treatment offered by the host country to nationals and not on some \textit{a priori} absolute principles of treatment. The other standard was the minimum international standard by which treatment of foreigners was referred to international, largely western standards. The tension between the two standards was frequently exhibited in sharp relief in the field of state responsibility for expropriation (see e.g., \textit{Aminoil} case 21 ILM 976 (1982). What is significant is that neither standard specified particular rights \textit{per se}, each was concerned with the definition of a certain principle by reference to which treatment of non-nationals was to be measured.

54. In treaty practice, national treatment has its origin in trade agreements. The first treaties to apply a concept of non-differentiation between foreign and local traders can be traced as far back as to the practices of the Hanseatic League in the Twelfth and Thirteenth centuries. In trade matters, national treatment of imported products with respect to internal measures is one of the basic principles of the multilateral trading system created by the General Agreement on Tariffs and Trade (GATT). At least as originally negotiated in 1947, the primary focus of the GATT was on the control and liberalization of border measures restricting international trade in goods. A fundamental principle in this respect is that, as a general rule, any border measure designed to give a competitive advantage to domestic products should take the form of customs tariffs imposed at the border, and that the level of such customs tariffs should be a matter for negotiation and binding national schedules.

55. Accordingly, in the context of the WTO, it appears that Article III of GATT is concerned with national treatment on internal taxation and regulation, particularly as it relates to the avoidance of protectionism.\textsuperscript{7} The WTO Appellate Body in the \textit{Japan – Alcoholic Beverages II} dispute, making reference to prior Panel Reports,\textsuperscript{8} determined as follows:

\textsuperscript{5} \textit{R v Minister of National Security exp Grange} (1976) 24 WIR 513 (Constitutional provisions sufficient to invoke declaration of state of emergency without need for the passage of Regulations contemplated by the Constitution).


\textsuperscript{7} In part Article III provides as follows:
“The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III is to ensure that internal measures ‘not be applied to imported or domestic products so as to afford protection to domestic production’. Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products. ‘[T]he intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given’."

56. This finding was supported by the Appellate Body in Korea – Taxes on Alcoholic Beverages (1999) and Canada – Certain Measures Concerning Periodicals (1997) and amplified in Argentina – Hides and Leather, wherein the Panel stated that Article III: 2 is concerned with the economic impact of taxes and charges on the competitive opportunities of imported and like domestic products.

57. The precise bundle of rights covered by any particular regime of “national treatment” varies as between different treaty regimes. For example, in relation to foreign direct investment (FDI), national treatment requires that foreign and domestic investors should be subject to the same competitive conditions in the host country market and therefore no government measure should unduly favour domestic investors. Thus in relation to FDI, national treatment standards may be pertinent to all phases of an investment, i.e., treatment of the foreign investment after, as well as to actual entry. The border is generally irrelevant in respect of national treatment of foreign direct investment. Similarly, the actual content of “national treatment” also differs significantly in Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPS, Article 3).

58. Finally, the articulation of the principle in Article 7 of the Revised Treaty may on a linguistic analysis suggest differences. The phrase “national treatment” does not appear as such rather the long hand expression is that of prohibiting “any discrimination on grounds of nationality only”. Moreover, the phrase “national treatment” does appear as such in at least three other sections of the text (Articles 31, 148 and 149).

III:1 The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

III:4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use…

8 Inter alia to the US - Section 337 of the Tariff Act of 1930 (Panel report adopted November 1989) and the Italian Discrimination Against Imported Agricultural Machinery (Panel report adopted October 1958) disputes.

9 ILA Issue Paper Series, pp. 7-8

10 “1. Each Member shall accord to the nationals of other Members treatment no less favourable than it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits…”
59. The difficulty with this view is that if “national treatment” meant something different from non-discrimination on grounds of nationality, it would be difficult to assign any meaning to the latter, which is, after all, the formulation of the general principle found in Article 7. It is instructive to recall that the phrase “non-discrimination” is equally to be found in several other Articles of the Revised Treaty without further reference to Article 7 (see Articles 41, 43, 47). But it could hardly be said that as used in this way the phrase refers to a standard different from that set out in Article 7.

60. Some support for the view that both concepts refer to the same principle may be garnered from the fact that Article 7 is virtually identical to Article 6 of the European Community Treaty and that the latter is routinely discussed as referring to “the principle of national treatment.”

61. It seems reasonable to suggest, therefore, that in treating with “national treatment” and “non-discrimination” we are not speaking of separate notions but rather the same principle. Article 7 is intended to state the principle at the most commodious level of generality and provisions in relation to specific issues repeat the principle in short hand. In every instance, the Revised Treaty declares that a Member State is obliged to grant no less favourable treatment to other community nationals than it does to its own nationals.

62. Thus understood, “national treatment” or “non-discrimination” is seen to foundational to the CSME. For example, the concern regarding the application of internal tax and regulatory measures in “non-protectionist” manner is contained in Article 90 (1) of the Revised Treaty. The Article makes provision for the application of internal taxes and other fiscal charges, defining fiscal charges as ‘internal taxes and other internal charges with equivalent effect on goods’. In plain words, Member States shall not:

(a) apply directly or indirectly to imported goods of Community origin any fiscal charges in excess of those applied directly or indirectly to like domestic goods, or otherwise apply such charges also as to protect like domestic goods; or
(b) apply any fiscal charges to imported goods of Community origin of a kind which they do not produce in substantial quantities, in such a way as to protect the domestic production of substitutes which enter into direct competition with them and which do not bear, directly or indirectly, in the country of importation, fiscal charges of equivalent incidence."

63. There are two general contexts in which the concept of “national treatment” appears in the Revised Treaty. First, in relation to monopolies, the Treaty allows Member States to determine that the public interest requires the exclusion or restriction of the right of establishment in industry or in a particular sector of an industry (Article 31 (1)). However, where such a determination results in the continuation or establishment of a private sector monopoly, the Member State “shall, subject to the provisions of this Treaty, adopt appropriate measures to ensure that national treatment is accorded to nationals of other Member States in terms of participating in its operations” (Article 31 (2) (b)). In this context, the Treaty could clearly be construed as requiring the abolition of regulations, etc., that would inhibit other community nationals from participating in ownership, management and operation of such monopolies.

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11 Now, after amendment, Article 12 of the EC Treaty.
12 (See .g., Case 8/77 Sagula, Brenac, and Bakhouche [1977] ECR 1495). Certainly, the jurisprudence of the WTO is to the effect that completely different drafting techniques used in the same instrument may result in exactly the same meaning (Bananas case, (1997)).
64. Second, the Treaty contains reference to national treatment in the context of relieving disadvantaged Member States of the obligation to accord nationals of other Member States equal treatment in relation to specific obligations. Thus, the Treaty makes general provisions for establishment of a programme for the removal of restrictions on the right of establishment (Article 33). In establishing the programme, the COTED is required to determine in relation to disadvantaged countries, “a list of economic activities in respect of which national treatment may not be accorded to persons exercising the right of establishment for a specified period of time” (Article 149 (2) (a)). Similarly, in relation to establishing the programme for the removal of restrictions on the provision of services by community nationals, the COTED may make derogations in respect of “a list of services in respect of which national treatment may not be applied for a specified period of time.” In this context, the Treaty could clearly be construed as permitting the creation or retention for a specific period of time, of government regulations etc., which discriminate against other community nationals, with regard to establishment and provision of services.

65. **Does Non-Discrimination apply to Pricing?**

65. Member States have the obligation to refrain from discrimination on the grounds of nationality alone in relation to all matters undertaken by them under the Revised Treaty. This is a general obligation, akin to those requiring the accord of the MFN treatment (Article 8), and the general undertaking to take all appropriate measures for the implementation of the Revised Treaty (Article 9).

66. Article 7 has the effect of providing that unlawful discrimination “is hereby prohibited”, much the same as Article 99 prohibits the grant or maintenance of subsidies by Member States. In circumstances where a Member State imposes a charge or tax on a product such that the product is more expensive in the another Member State, a breach of the non-discrimination principle is potentially engaged (*Greece v Turkey*, a transportation case decided by the ECJ).

67. The GATT Council and Secretariat and the Committee on Trade and Development considered the issue of price discrimination, in particular as regards the application of measures pursuant to Article XIX (Emergency Action on Imports of Particular Products). In discussions in these bodies on a Canadian Article XIX action on leather footwear which exempted footwear above a certain value, certain contracting parties opined that this kind of discrimination between suppliers either geographically or on the basis of price infringed GATT rules. It was also stated that devices such as Canada’s application of price breaks in that context ‘could produce such a narrow and selective definition of source that the action could no longer be said to be truly non-discriminatory…[and] would conflict with the fundamental principles of the General Agreement.’

68. Nor is it critical that the discrimination is covert and indirect. Where government practice contributes to such discrimination, the practice is controlled by the principle. In the case of the MFN the point is derived from GATT/WTO jurisprudence articulated, for example in the *Bananas* case (1997) and the *Gasoline* case (1996). In the case of the General Agreement on Trade in Services (GATS) the point is spelt out in the actual Treaty regime. Article 17 paragraph 3 provides:
“Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared with like services or service suppliers of any other Member.”

**Discrimination and Product Differentiation**

69. It is worth bearing in mind that discriminatory treatment arises where there is a difference in treatment between two people who appear to be similarly placed. Where persons are not similarly situated, because, for example, they are concerned with the purchase of different products, a point of potential relevance in relation to the market organization for natural gas as opposed to the LNG or the natural gas that goes into LNG, then logically, no issue of discrimination arises.

70. While the GATT does not define “like product”, GATT and WTO panels have considered a range of possible justifications for differentiated treatment of apparently similar products. In the dispute *United States – Denial of MFN treatment as to Non-rubber Footwear from Brazil* (DS 18/R adopted 19 June 1992) the Panel noted that Article I would in principle permit a contracting party to have different countervailing laws and procedures for different categories of products or even to exempt one category of products from countervailing duties altogether. The Panel stated that the mere fact that one category of products is treated one way and another category is treated another is not in principle inconsistent with the MFN obligation. The provision clearly prohibits a contracting party from according an advantage to a product originating in one country while denying the same advantage to a like product originating in another contracting party.

71. In determining what may constitute ‘like products’, GATT panels have examined such factors as the number of products and tariff items carrying different duty rates and tariff bindings, the varying contents and different natural and synthetic origins of products (1978 *Report on EEC Measures on Animal Feed Proteins*); organoleptic differences, the various forms in which the products are sold and their end-use (1981 *Panel Report Spain - Tariff Treatment of Unroasted Coffee*).

**Government Involvement in Pricing**

72. The critical question then turns on whether the Government of Trinidad and Tobago is involved in the setting the ‘price’ or establishing the ‘pricing policy’ for natural gas. As presently advised, Government policy, it would seem, critically influences the pricing of natural gas in the market for natural gas for the production of energy and/or feedstock for industry including electricity generation and NNG within Trinidad and Tobago. In respect of this product, therefore, Trinidad and Tobago has the obligation to ensure access by other Community nationals on the basis of non-discriminatory pricing.

73. The degree, if any, to which the Trinidad and Tobago Government is involved in setting the ‘price’ or establishing the ‘pricing policy’ for LNG or the gas that goes into LNG, is a matter of fact on which further representation is required before any definitive ruling can be made, whether by the Secretary-General, or we presume to add, other Tribunal. Suffice it to say that if the Government of Trinidad and Tobago were engaged in these activities, whether directly or indirectly, the non-discrimination obligation under Article 7 would be engaged. The relevant principle is that where government determines prices or pricing policy, that determination must
be governed by the non-discrimination principle. We would add that such governmental involvement is not easily reconcilable with the philosophy of a market-led model for economic development adopted by the Revised Treaty.

**Pricing by Private Sector Actors**

74. Where prices are set by Private Sector entities, the question arises as to whether this activity is controlled by the non-discrimination provision of the Treaty. It is submitted that in accordance with basic principles, where pricing policy is determined by private sector actors, the principle of non-discrimination would does not apply directly; rather resolution of any dispute as to pricing is a matter turning largely upon fidelity to rules in the Revised Treaty governing competition.

75. Under the general international law, States are the parties to international agreements. As such States are the entities that enjoy international rights and assume international obligations. Where a national is injured in consequence of a breach of Treaty obligations, the traditional view has been that the injury is in law done to the state of that person’s nationality (Mavrommatis 1924 PCIJ). In the common law system of jurisprudence, individuals may only derive rights or obligations from Treaties when such agreements have been transformed into local law by legislation (International Tin Council case (1989); Anderson, “Treaty Implementation in Caribbean Law and Practice” (1998) Vol. 8 Caribbean Law Review 185).

76. Exceptionally, treaties do impose obligations and confer rights on private individuals but this is normally done by clear and express language, although there appears to be a growing exception to this rule in the field of human rights protection law. For example, outside the context of civil law jurisprudence adopting the doctrine of direct effect, the Revised Treaty, in a quite revolutionary development, gives individuals the right to appear with the special leave of the Court, as parties in proceedings before the CCJ, albeit in very restricted circumstances. The restrictions include the condition that the Contracting Party entitled to espouse the claim in proceedings before the Court has either omitted or declined to do so, or has expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party so entitled (Article 222). This then is a rather narrow exception to the general schema of the Agreement in setting up an inter-state dispute resolution mechanism.

77. It follows that, as a general rule, the obligations enshrined in the Revised Treaty are imposed upon Member States rather than, and as distinct from, private sector actors. Accordingly, obligations in relation to CSME do not fall directly to the private sector but on the State; as such private entities cannot in general be defendants in relation to breaches of the Treaty obligations. Thus, for example, where the Revised Treaty speaks to the prohibition of discrimination on grounds of nationality only, that is an obligation binding on the Member States and not on any private individuals within the jurisdiction of the State.

78. This is not to suggest that measures taken by private action may not affect the single market in undesirable ways. Private parties may take action that partitions the market along national lines and hence impede the realization of the CSME. This can occur, for example, when private parties use industrial property rights to divide the Community on the basis of national boundaries. Community rules must obviously address this issue in order to prevent private action from recreating barriers to trade analogous in their effect to duties or quotas or other discriminatory practices.
79. However, as presently advised, the Community addresses these matters in the rules governing Trade Policy and more particularly, Competition Policy. The objectives of the Competition Policy include the enhancement of efficiency in the sense of maximizing consumer welfare and achieving the optimal allocation of resources; and protection of consumers and small businesses from large aggregations of economic power; whether in the form of monopolistic dominance of a single firm, or agreements whereby rival firms co-ordinate their activity so as to act as one unit. Another central objective is to facilitate the creation of a single market, and to prevent this aspiration from being frustrated by the activities of private undertakings. Community law prohibits tariffs, quotas, and the like which can impede the attainment of this goal. The effectiveness of such community norms would, however, be undermined if private undertakings could themselves partition the single market along national lines.

80. In a seminal case decided by the European Court of Justice (Case 27/76, United Brands Company and United Brands Continental BV v Commission [1978] ECR 207), the European Commission alleged that the United Brands sold the bananas at different prices in different member States, and that it did so without objective justification. There were, for example, no real differences in unloading costs. The essence of the applicant’s response was that the price differentials reflected market forces, viz. the average anticipated market price in each state; that the community had not established a single banana market; and that therefore, it was not possible to avoid differences in the individual supply/demand situations in different countries.

81. The ECJ held against the applicant. Although the responsibility for establishing a single banana market did not lie with the applicant, it could only endeavour to take ‘what the market can bear’ provided it complied with the rules for the regulation and coordination of the market laid down by the Treaty:

"Once it can be grasped that differences in transport costs, taxation, customs duties, the wages of the labour force, the conditions of marketing, the differences in the parity of currencies, the density of competition may eventually culminate in different retail selling price levels according the Member States, then it follows that those differences are factors which [the applicant] only has to take into account to a limited extent since it sells a product which is always the same and at the same place to [persons] who – alone – bear the risks of the consumers’ market."13

82. It should also be added that the Treaty sanctions action in the nature of a governmental function, even if carried out by ‘private’ entities. Thus the prohibition on quantitative restrictions has been held to be applicable against the State even though private parties have taken the main role in restricting the free movement of goods. This was exemplified in Commission v France (Case C-265/95, [1997] ECR 1-6959). The Commission brought an action against the French Government for breach of the provision on the ground that the government had taken insufficient measures to prevent French farmers from disrupting imports of agricultural produce from other EC countries. The ECJ held that it was incumbent on a government to take all necessary and appropriate measures to ensure that free movement was respected in its territory, even where private parties created the obstacles.

13 Ibid.
**Distinguishing between State and Private Entities**

83. Given that the non-discrimination obligation applies to measures taken by the State, as opposed to those taken by private parties, the issue of what is a state entity must necessarily be engaged. A state will not easily be permitted to distort the single market by the expedient of acting through private entities. In a comparable context the ECJ has had occasion to make this point on a number of occasions. Thus in the famous *Buy Irish* case (case 249/81, Commission v. Ireland 1982 [ECR 4005]) the ECJ rejected the argument that the Irish Goods Council was a private body and therefore immune from application of the EC Treaty that “Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.” The Irish Government’s involvement with the funding of the Organization and the appointment of its members was sufficient to render it public for these purposes.

84. It is also clear that institutions such as those concerned with trade regulation may come within the definition of the State for these purposes even if they are nominally private, provided they receive a measure of state support or ‘underpinning’ (*R v. The Pharmaceutical Society, ex parte APP*, Case 266/87, [1989] ECR 1295).

85. The Secretary-General, not having been seized of the relevant facts, is not in a position to advise upon whether the entities responsible for the production and sale of LNG or the natural gas that goes into the making of LNG are public or private enterprises. For the reasons explained earlier, any such determination would be outside of the remit of the request from the Conference.

**THE MOST FAVOURED NATION RULE**

86. As is the case in GATT/WTO, the MFN rule is pivotal to the architecture of the Revised Treaty. Article I of GATT 1994 and applies with respect to customs duties and charges of any kind connected with importation or exportation, the application of internal taxes or charges and the rules governing the application of these duties, charges and taxes.

87. Article I provides that with respect to the foregoing, any advantage, favour, privilege or immunity granted by any WTO member to products originating in or destined for any country shall be accorded immediately and unconditionally to like products of all WTO members. In essence, Article I seeks to ensure that WTO members are not discriminated against whether in law or in fact. (*Canada – Certain Measures Affecting the Automotive Industry* June 2000)

88. In the Revised Treaty, there is a general obligation on Member States to grant most favoured nation treatment to other Member States. Specifically, Article 8 provides that subject to the provisions of the Revised 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.”

89. MFN treatment must therefore be accorded to Member States exercising *any rights* covered by the Treaty. The Appellate Body in the *Canada – Autos* dispute drew attention to this all-encompassing nature of the MFN rule in the WTO context, by declaring that the very existence in the GATT 1994 of several ‘MFN-type’ clauses dealing with varies matters (see e.g. Art III:7; Art. IV(b); Art. V:2,5,6; Art IX:1; Art. XIII:1; Art XX(j); Art. XVIII:20) demonstrates the pervasive character of the MFN principle of non-discrimination.
90. The question of whether Trinidad and Tobago is breaching its MFN obligation to Jamaica by permitting operation of differentiated pricing in relation to natural gas cannot be resolved without the offer of further evidence of the relevant facts. As we have suggested, there is no evidentiary basis on which the Secretary-General can come a conclusion that the Government of Trinidad and Tobago is or is not involved in the pricing or pricing policy of LNG or the natural gas that goes into LNG. Where entities from third states are favoured by differential pricing as the result of action taken by private entities in Member States the appropriate remedies appear to lie in the realm of Competition Law.

91. As explained earlier, the notification of the Revised Treaty under Article 24 of GATT permits derogation from the GATT regime by Member States parties to the CSME. In carrying out its Treaty obligations in respect the prohibition of discrimination, Trinidad and Tobago is therefore under no threat of imposition of countervailing measures from Members of GATT/WTO.

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