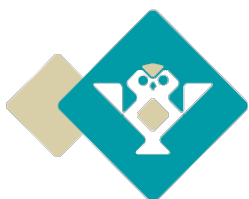


**FACULTY OF LAW**

**Comparative  
European and Caribbean  
Integration Law**

**LL.M.  
(International Law, Regulation &  
Governance)**

***2018-2019***



University of Aruba

Lecturer:  
Jona Israel



## INTRODUCTION

### *Course Contents*

Many of us are familiar with the European Union and its Internal Market. Aruba is linked to the EU as an Overseas Country and Territory, and those with Dutch nationality (or that of another EU Member State) are also European citizens. Most of us are less familiar with the EU's Caribbean counterpart: CARICOM, its Caribbean Single Market and Economy (CSME) and Caribbean Court of Justice. Although Aruba is not a member (but an observer but has also shown interest in becoming an associate Member) of CARICOM, many of its neighbours are. Consequently, knowledge of CARICOM has both practical and academic value.

Our familiarity with the EU gives an excellent basis to study CARICOM from a comparative perspective. How and why were these Communities established and how did they develop? Do they have similar Institutions with similar (legislative) powers? What is the position of the Courts and how did they contribute to the process of integration? Do they share the same fundamental (economic) freedoms (persons, goods, capital and services)? What about competition law and state aids? These are some of the obvious topics that will be addressed. However, participants will have plenty of opportunities to direct the course to focus on topics they find most interesting. All students interested in EU and CARICOM law or in looking beyond Aruba's own borders should consider participating in this course.

### *Tutorials*

In principle the course is taught through tutorial sessions twice a week. However, the number of tutorials, may be adjusted depending on the needs of the participants.

In addition to the introductory session, the course is centred around four main topics. Although the order of topics is largely fixed, not so with the amount of time we can spend on each of those topics. The course will let itself be guided by the interests of its participants.

### *Learning outcomes*

At the end of the course students will have a comparative understanding of the legal frameworks of the European Union (EU), and the Caribbean Community (CARICOM). Students will be familiar with the basic institutional frameworks of (at least) the EU and CARICOM as well as with the most important areas of substantive law.

### *Literature and case-law*

One of the objectives of this course is for students to do research and compile a collective database of texts and legal materials. Therefore, recommended reading is kept to a minimum.

- For Caribbean integration law the obvious and solid starting point will generally be: David S. Berry, *Caribbean Integration Law*, OUP: Oxford 2014, isbn: 9780199670079.
- For EU law it would be Craig, *De Burca, Text, Cases and Materials*, OUP: Oxford 2011, isbn: 978-0-19-957699-9 and/or Barnard, *Peers, European Union Law*, OUP: Oxford, 2014, isbn: 978-0-19-968611-7. All are available in the UA Library.

### *Examination*

Examination is by written exam (default) or a different format agreed by lecturer and students.

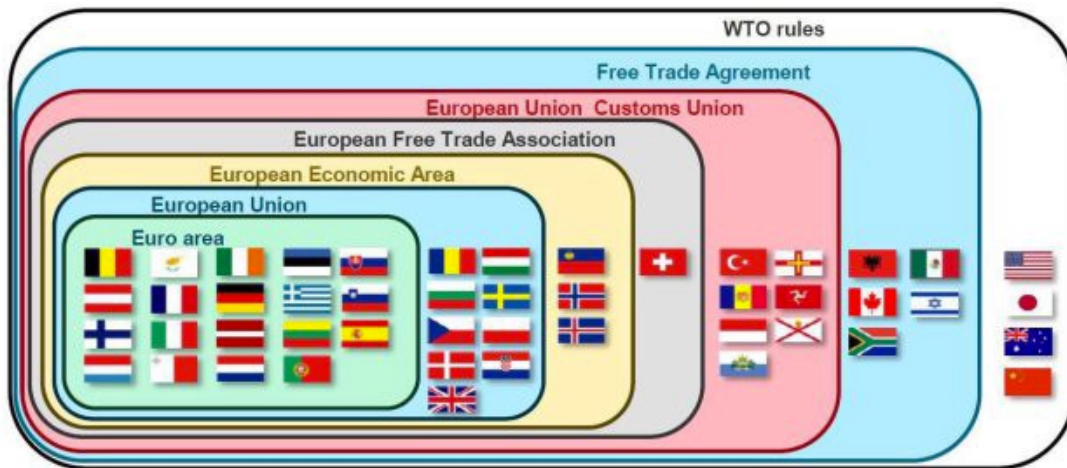
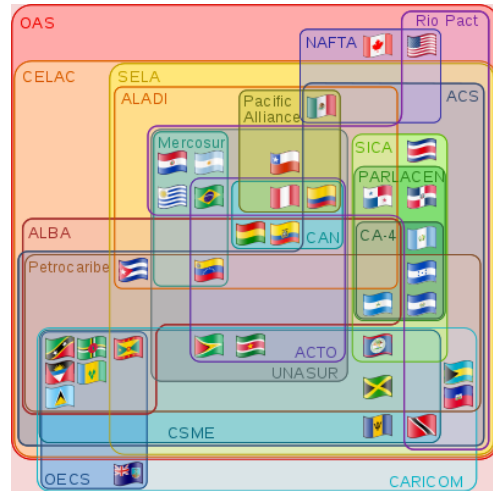
### *Provisional schedule*

Week	Topic	
1	<b>Introduction</b>	RIO's, FTA's, Unions, and Markets CARICOM, CSME, ACS, EEC, EC, EU, ECSC, Euratom, Cariforum, CARIFTA, WIF, OECS
2	<b>Meet in the middle?</b>	Historic background: where do they come from, what were/are they aiming for? The Myth of Sovereignty.
3	<b>Institutional Structures and Balances</b>	What are the characteristic Institutions? What are their (legislative) powers? Is there a balance between the national and the supranational? Is there something as (primary/secondary) Community/Union Law?
4-5	<b>Nature/Enforcement of Community Law/ Role of the Courts</b>	Direct effect and Supremacy? Enforcement of Community law: where and how? State liability?
6	<b>What's in a Common Market?</b>	Substantive policies. Economic freedoms, competition policy, sectoral policies.
7	<b>Relationship CARICOM-EU</b>	Cariforum and EPA

**WEEK 1 INTRODUCTION**

As this course is set up as a comparative course some of us will already be familiar with either the European Union (EU) or with the Caribbean Community (CARICOM) and/or the Organisation of Eastern Caribbean States (OECS). Few will be familiar with all three of them. Consequently, it is convenient to start with some basic information:

- How many Member States do they have?
- Who are the Member States?
- How do the EU, CARICOM OECS compare in general terms of size, population, economies, history?
- What are the founding Treaties, where to find them?



As a general background we should also have a basic understanding about economic integration in particular:

- the different stages/levels/forms of integration, such as Free Trade Area's, Custom Unions, Common Markets, Economic and Political Unions, and
- the theories that try to explain why and how states integrate, such as neo-functionalism, intergovernmental liberalism and multi-level governance.



## WEEK 2 ORIGINS, MOTIVATIONS AND TREATY OBJECTIVES

For this topic we will be looking at the historic context and development of European and Caribbean integration in more detail. Historic context is important for this course as, notwithstanding similarities between European and Caribbean integration law, there are obvious and important differences some of which can (only) be explained from a historic perspective.

### LEVENDE BEGRAVEN.....



Acheson: „.....Zand erover!”

In some ways, the initial impulse for European and Caribbean integration processes may be said to be at opposite ends of a spectrum. For Europe, having just experienced the devastation of two World Wars, integration was a way to reduce the risk of armed conflict between sovereign states by the pooling of resources and of sovereignty itself. The 1951 Treaty establishing the European Coal and Steel Community leaves little doubt in its preamble:

“CONSIDERING that world peace may be safeguarded only by creative efforts equal to the dangers which menace it;  
RESOLVED to substitute for historic rivalries a fusion of their essential interests;  
to establish, by creating an economic community, the foundation of a broad and independent community among peoples long divided by bloody conflicts”.

For the Caribbean states, many of which are former colonies, regional integration has been a means to actually strengthen national sovereignty, for instance by pooling scarce resources and small economies. So much so in fact that Payne and Sutton have argued that

“CARICOM is not an integration movement at all, if the term integration is considered to be a process in which countries have to be prepared that the greater regional good must predominate over national concerns even to the point when, on occasion, their national interests are damaged. For good or ill, this



has never been the case with CARICOM. It has simply not been concerned with integration in that sense; it is a structure created by national governments to make nationalist policies more effective by pursuing them within a regional framework" [Payne, Sutton: *Charting Caribbean Development*, 2001, at 174].

We will examine and compare the origins and development of European and Caribbean integration processes that have, until now, culminated in the EU and CARICOM.

Some questions that you could think about when reading:

- What triggered the desire of the regions to start to integrate?
- Was the development of the EU a foregone conclusion, or did it face challenges at certain points? How were such challenges overcome? Give an example.
- What are the Empty Chair, Luxemburg Accords and Single European Act?
- Why has the European integration been so complex? Has it been easy? Is there a lesson for CARICOM here?
- Identify the main differences between the European and Caribbean integration processes. Do these differences prevent any comparison between the two regional integration experiences? Are there underlying factors or commonalities that allow us to make comparisons? Why do you think it might be useful for us to study the European developments here in the Caribbean? Are there any drawbacks to such a comparative process?

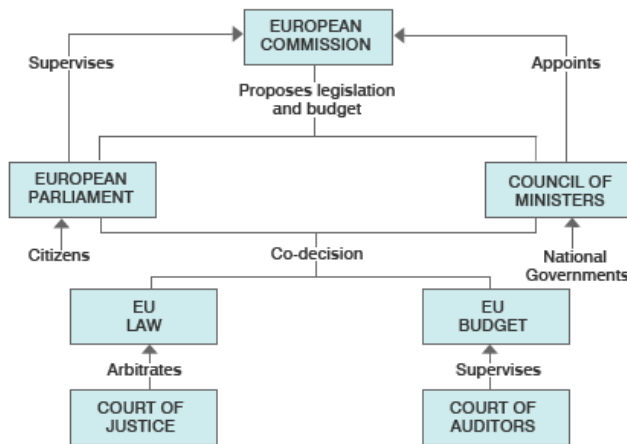
Literature:

- David S Berry, *Caribbean Integration Law* (Oxford: Oxford University Press, 2014), pp 17- 35.
- Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials*, 5th ed. (Oxford: Oxford University Press, 2011), Chapter 1
- Christoph Müllerleile, *CARICOM Integration: Progress and Hurdles—A European View* (Kingston: Kingston Publishers, 1996), pp. 31-75. (EDU)



**WEEK 3 INSTITUTIONAL DESIGN AND BALANCE**

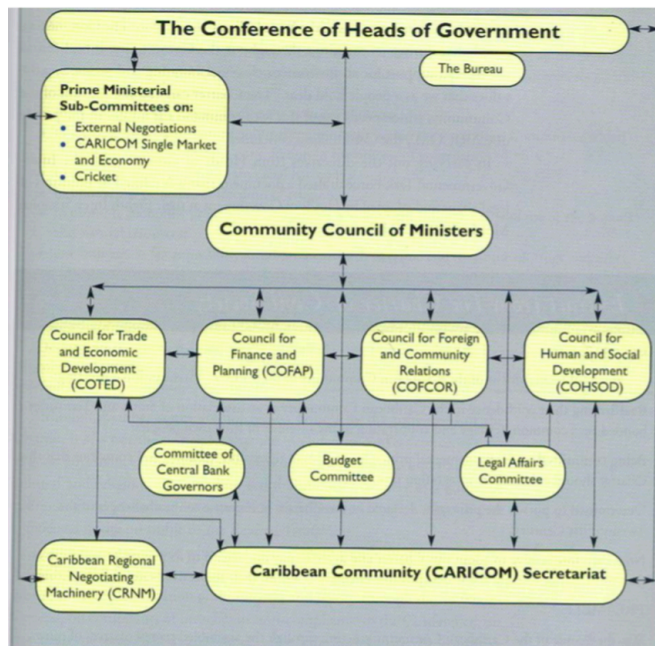
As the third topic of this course we will examine the institutional design of the EU and CARICOM. What Institutions are set up to govern and guide the integration processes? What are their respective tasks and powers? And how do they function?



Of particular interest in examining the institutional structures should be the manner in which and the extent to which these structures are suitable and capable of accommodating and balancing the national interests of the Member States, on the one hand, and the regional/supranational interests on the other. In the light of the previous tutorial

(bound vs enhanced sovereignty through integration) we can expect important differences between the institutional lay-out of the EU and CARICOM. However, it is not only worth knowing why differences may exist in respect of the institutional designs, it is equally important and interesting to theorise on the significance of those differences in terms of integration capacity and day-to-day operations.

Illustrative for this is the absence of an EU Commission like organ within the CARICOM structure (though it is present in the OECS). We may be able to explain this with relative ease but understanding its ramifications for the CARICOM integration process is a different matter. At the same time, however, discussing this difference will also present an opportunity to deepen our understanding of the significance of the Commission in the EU integration process.



We shall also be discussing the existence and scope of Community powers as well as the basic formal and substantive requirements for their lawful exercise. These powers include, but are not limited to,

those by which the Communities may create legal obligations for its Members and/or citizens.

After exploring the various forms in which our Communities may create legal obligations and by means of which instruments, we may then focus on the scope of those powers, more in particular the principle of attributed powers, doctrine of implied powers and necessary powers. In respect of the exercise of the powers we shall further discuss the principles of subsidiarity and proportionality.

Aside from clear similarities, one may also expect to encounter significant differences. One difference in particular deserves our attention as it relates to fundamental differences between the EU Member States and those of CARICOM. Unlike the EU, the latter consists entirely of *developing* states, most of which face substantial economic challenges. Financial aid to the poorer, less developed Member States has been difficult. The manner in which CARICOM accommodates the differences in development is by differentiating between “more developed” and “less developed” states in the Treaty and by including a special regime for the latter allowing exceptions to Community obligations.

- What are the ‘legislative processes’ of CARICOM and the EU? In other words:
  - what kinds of ‘decisions’ (in the broadest sense of the word) can be made,
  - how are they made, and
  - how do they become binding?
- Which CARICOM/EU entities can initiate a legislative process?
- Which of the above types of ‘decisions’ are binding? Which organ(s) can make binding rules? When do decisions become binding?

Literature:

- Europa, “EU Institutions - Bodies” [https://europa.eu/european-union/about-eu/institutions-bodies\\_en](https://europa.eu/european-union/about-eu/institutions-bodies_en)
- David S Berry, *Caribbean Integration Law* (Oxford: Oxford University Press, 2014, Ch. 5-6
- Caribbean Court of Justice, *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ) (merits) [43]-[48]

## WEEK 4-5 NATURE AND ENFORCEMENT OF COMMUNITY/UNION LAW – BUILDING A COMMUNITY: THE TWO COURTS OF JUSTICE

As CARICOM law currently stands ‘direct effect’ in the sense the concept is used in EU law appears to be absent: binding CARICOM law cannot be invoked or relied upon by

individuals before the national courts of the Member States. However, this is not the whole answer, as in the CARICOM framework individuals do have (direct) access to the Caribbean Court of Justice in its original jurisdiction where they may in fact rely on Community law.



The implications of this difference in set up are worth exploring further. What does it mean for the kind of remedies available to individuals? Does it mean that national courts of the CARICOM Member States are not in a position to come to the aid of the Caribbean Court of Justice as guardians of Community law?

Finally, it must be kept in mind that the EU notion of ‘direct effect’ is not laid down in any of the founding treaties. The concept was introduced by the Court of Justice in its case-law as early as the *Van Gend en Loos* decision. The really interesting and challenging issue for us is to try to trace the constituent building blocks of *Van Gend en Loos* and the concept of direct effect and to then try to ask whether these are (albeit latent) also present in CARICOM law. Recent case-law by the Caribbean Court of Justice may very well suggest a positive answer.



As part of this topic we may analyse some or even all of the Caribbean Court of Justice’s (landmark) decisions and their ramifications for the Caribbean legal order against the backdrop of the European experience. Judgments such as in *Trinidad Cement Limited*, *Humming Bird Rice Mills Ltd.* and *Myrie v Barbados* are clearly inspired by judgments delivered by the European Court of Justice in the foundational period of the European integration, like *Van Gend en Loos*, *Costa v ENEL*, *Francovich* and *Brasserie du Pecheur*. Like its European counter-part before it, the Caribbean Court of Justice seems to have taken a more assertive attitude when it comes to transforming CARICOM from a community of sovereign states to a community with an autonomous legal order. However, these judgments are delivered in CARICOM’s own unique context and institutional design; they are similar but not the same.

Comparing these European and Caribbean cases raises many interesting issues of where and how far the Caribbean Court and Community will and can go. It equally makes us re-examine where the European Court of Justice and the EU came from.

Questions:

- Supremacy and direct effect in EU law: where do they come from and what is their significance also in terms of integration process?
- Do these concepts exist in CARICOM? Could they exist?
- What has been the contribution of the European Court of Justice in the process of integration? Does the Caribbean Court fulfil a similar role?
- What is the position of national courts in respect of Community/Union law?

Literature:

- Joseph Weiler, The Transformation of Europe, *The Yale Law Journal*, Vol. 100, No. 8, Symposium: International Law. (Jun., 1991), pp. 2403-2483.
- Salvatore Caserta and Mikael Madsen, Between Community Law and Common Law: The Rise of the Caribbean Court of Justice at the Intersection of Regional Integration and Post-Colonial Legacies, *iCourts Working Paper Series*, No. 10, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2528978](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2528978).

**WEEK 6****WHAT'S IN A COMMON MARKET**

With this topic we shift our focus to substantive European and Caribbean integration law, the common market and other policies.

Both the European Common Market and the CARICOM Single Market and Economy (as well as the OECS Economic Union) recognise the four familiar economic freedoms: free movement of goods, capital, persons (including the right of establishment) and services. EU common market law is highly developed and sophisticated, both in law as well as in doctrine and case-law. The law relating to the CARICOM Single Market and Economy has not attained that level of sophistication yet. This by no means excludes a valuable comparison of the structure of law, the scope of the freedoms and exceptions thereto. Something to keep in mind however, is the fact that the common markets compared are *in fact* very different from each other: the large, near continuous, diversified European market versus the small, fragmented markets of the Caribbean.

Competition law is a vital element of both the European and the Caribbean common markets. In this tutorial we shall compare various aspects European and Caribbean competition law. We shall see that in terms of both objectives and substance the laws of the EU and CARICOM are very similar. That is however far less the case when it comes to enforcement procedures.

As we have seen both the EU and CARICOM are committed to the creation and maintenance of a common market, the functioning of which must not be frustrated by anti-competitive conduct of enterprises or, and that is the subject of this session, the State.

On either side of the Atlantic the State remains an important actor on the market. The form in which the State may act on the market varies. Undertaking may be in public ownership or may be granted certain privileged status in the market-place. Or the state may grant (financial) benefits to specific undertakings or areas of economic activity which may have the consequence of distorting competition within the common market.

With regard to the former, public undertakings, European and Caribbean integration law contain a similar regulatory framework as part of their competition law. As to the latter, however, the two diverge. In the EU the prohibition on state aids forms an important part of competition law as state aids may easily and significantly distort competition on a market. The CARICOM Single Market and Economy does not appear to have taken a similar stance on the issue. A clear general rule prohibiting state aids is absent. What can be found however are rules relating to 'subsidies'. Here CARICOM seems to have been inspired by the WTO Agreement on Subsidies and Countervailing Measures rather than EU law.

Perhaps even more than competition law generally, the law concerning public undertakings and state aids/subsidies raises fundamental issues about the nature of the common market and its function with regard to the broader aims of the European and Caribbean integration process.

**Literature:**

To be decided.

## WEEK 7 THE ECONOMIC PARTNERSHIP AGREEMENT (EPA): WHERE EU AND CARICOM MEET

During our study of European and Caribbean competition law issues we already came across the Economic Partnership Agreement between the EU and CARIFORUM. CARIFORUM includes all the CARICOM Member States, except Monserrat as a British overseas territory, with the Dominican Republic being added.

Broadly speaking, the EPA, concluded in the wake of the WTO Banana dispute, regulates market access from the Caribbean to the EU market and *vive cersa*. The EPA provides for nearly full reciprocal trade liberalisation over a period of 25 years (80% after 15 years), for liberalisation in services and contains many other commitments in areas such as intellectual property, investment, competition policy, public procurement and extends into e-commerce, the environment and social aspects.



Aside from looking into the background of the EPA as part of a developing, complex relationship between Europe and their former Caribbean colonies as well as the WTO background, the EPA raises important issues for Caribbean Integration. It could be argued that the EPA and the obligations it

imposes on the CARICOM Member States pre-empts (normative) choices that would otherwise still have to be made on the way to further integration. Is the EPA a European 'straightjacket' on Caribbean integration?

Literature:

- Norman Girvan, The Effect of the Economic Partnership Agreement on the CSME 'The Fork in the Road.', *Journal of Eastern Caribbean Studies*, 2008, Vol. 33 Issue 2, p. 45-69.