

CHALLENGES TO CARIBBEAN ECONOMIC SOVEREIGNTY IN A GLOBALIZING WORLD

*Karen E. Bravo**

INTRODUCTION	33
I. WHAT IS ECONOMIC SOVEREIGNTY?	34
II. ILLUSTRATIVE CHALLENGES TO CARIBBEAN ECONOMIC SOVEREIGNTY	36
A. OECD Anti-Tax Haven Initiative	37
B. OECD/FATF: Anti-Money Laundering Initiative	39
C. WTO: United States-European Union Banana Dispute	41
D. WTO: European Union Sugar Subsidies Dispute	43
E. WTO: Antigua-United States Gambling Dispute	44
F. EU-CARIFORUM Economic Partnership Agreement	47
III. IMPLICATIONS FOR CARIBBEAN ECONOMIC SOVEREIGNTY	49
A. Sovereignty and Membership	51
B. Sovereignty and Illicit Trade	52
C. Sovereignty and Legitimacy	54
D. Sovereignty, Size, and Power Imbalances: More about Legitimacy.....	54
CONCLUSIONS.....	55

INTRODUCTION

This Essay encapsulates and expands on my comments at the February 2011 Symposium “*Sovereignty in Today’s World*” organized by the Michigan State International Law Review.

As explored by my fellow speakers, economic globalization is challenging for the large economies of the world. It is even more challenging for the smaller economies of the world, such as those in the Caribbean. I will discuss some illustrative challenges to economic sovereignty, how the Caribbean has responded to these challenges—what have been the effects—and offer some analysis of the implications to the economic sovereignty of Caribbean states and territories.

* Professor of Law, Indiana University School of Law—Indianapolis. The Author is grateful to the editors of the International Law Review of the Michigan State University College of Law for the opportunity to participate in its 2011 symposium, *Sovereignty in Today’s World*. Research work by Steve Jorgenson, JD expected 2012, Indiana University School of Law—Indianapolis (expected 2011) provided valuable contributions to this project. Ruth Lilly Law Library Research Librarian Debra Denslaw and the reference staff of the Ruth Lilly Law Library were an invaluable resource.

My remarks will explore the following subjects:

1. The meaning of sovereignty in the context of small and micro states in the current iteration of globalization
2. Economic globalization presents strong challenges to the economic sovereignty of Caribbean states and territories.
3. The challenges, and their impact on the Caribbean, offer a narrative perspective and an analytical path that is relevant to larger states and economies.

My remarks are organized as follow: Part I offers a working definition of economic sovereignty; Part II consists of an illustrative list of challenges to Caribbean economic sovereignty, and descriptions of Caribbean states' and territories' responses to those challenges; Part III provides an analysis of implications for Caribbean economic sovereignty and contemporary economic sovereignty of states in general; and my concluding statements are in Part IV.

I. WHAT IS ECONOMIC SOVEREIGNTY?

As so well articulated by Professor Dunoff earlier in the symposium, there is a great deal of discussion and debate regarding the definition and implications of sovereignty, and I am not going to create a *new* definition: The working definition that I have used for my remarks is: The power of an individual state to act independently—to choose and craft economic tools to serve the best interests of the state's domestic economy (as such interests are perceived by and/or pursuant to the vision and judgment of the people and government of that state).

I also thought that it would be meaningful to specify what I mean when I refer to “the Caribbean.” Some potential for ambiguity is present since the Caribbean Sea is bordered by several countries located in mainland North, South, and Central America, including Mexico, Venezuela, and the United States. In my remarks I am referring to islands that are both independent states and overseas dependent territories in the Caribbean Basin.¹ The nation states include Jamaica, Barbados, Trinidad, and the Dominican Republic. The overseas dependent territories include entities affiliated with the United Kingdom (for example, the British Virgin Islands, Anguilla, the Turks and Caicos Islands, and the Cayman Islands); France (Martinique, Guadeloupe, and St. Barthelemy); The Netherlands (St. Eustatius and Saba); and the United States (Puerto Rico and the U.S. Virgin Islands).

1. See, e.g., Peter Clegg, *Governing the UK Caribbean Overseas Territories: A Two-Way Perspective*, in GOVERNANCE IN THE NON-INDEPENDENT CARIBBEAN: CHALLENGES AND OPPORTUNITIES IN THE TWENTY-FIRST CENTURY (Peter Clegg & Emilio Pantojas-Garcia eds., 2009).

Like other island chains colonized by European powers (the island chains of the Pacific offer another such example), the Caribbean provides a wonderful experimental and experiential laboratory of the different types or models of sovereignty and quasi-sovereignty extant in the contemporary world. Looking at a map of the Caribbean, one might see a depiction of the history of the New World as it was discovered and colonized by European powers. It is due to that history that, today, the Caribbean has these varied languages. For example, the United Kingdom has the British Virgin Islands, Montserrat, and Anguilla.² You also see French *departements*: That is, when you step on the shores of Martinique and Guadalupe, you are in France. The same is true in St. Barts because, according to the French conception of France, the *departements* are essential parts of France—they're all French. In another example, St. Maarten recently attained the status of an independent country within the Kingdom of The Netherlands; and Anguilla, the Turks and Caicos Islands, and the British Virgin Islands are overseas dependent territories of the United Kingdom, with particular levels of independence and autonomy. Then we have the Dutch Islands: St. Maartens, St. Eustasius, Curacao, Aruba. You will think of some Caribbean states and territories as vacation spots, great for Spring break which is coming up within the next month. And, of course, the United States also is present with Puerto Rico and the U.S. Virgin Islands.

As there are several varieties of sovereignty and different stages of self-determination in the overseas dependent territories, states, *departements*, in the Caribbean, no individual territory finds its situation replicated in another. Each has its own deal with its former colonizer—that is, former mother country. In addition, however, we have islands, such as Jamaica, such as Trinidad, such as Barbados, and so on, that are independent states and are attempting to make their way in this new era of globalization, of 193 countries, or 192 until Southern Sudan becomes independent. So, in the Caribbean, you will see that there are states, nation states—members of the UN—such as Jamaica, Barbados, Trinidad, Antigua, as well as other entities, overseas dependent territories.

What does it mean: "Overseas dependent territories?" In the context of the Caribbean, the descriptor includes the islands which are not sovereign states, as they have not secured independence from their colonizers. As

2. And I have an illustrative story with respect to Anguilla. That is, in the 1970s or 80s, the British wanted to get rid of Anguilla, so they put forward the proposition that Anguilla should be governed from St. Kitts and Nevis. Now, the Anguillans—and if you've been to Anguilla, it's a sandbar basically, beautiful colored beaches and all that—they revolted and asked to be put back under the jurisdiction of the United Kingdom. So they continued to be an overseas dependent territory of the United Kingdom, instead of joining St. Kitts and Nevis, a twin island nation state.

such, they “have surrendered aspects of their political, economic and cultural identities to external centres of power.”³

Now, these jurisdictions, to the extent that they are independent, are members of the World Trade Organization. In addition, there is a primarily Anglophone community, a regional grouping called CARICOM: the community of Caribbean states. This was supposed to be a regional pooling of sovereignty to create a counterbalance to economic pressures coming from outside the region.⁴

I would like to take this opportunity to acknowledge the potential limits of my perspective and to admit that I am an Anglophone in the context of the Caribbean because, as you may know, in the Caribbean you will speak of the Anglophone, Francophone, Spanish and Dutch speaking islands and territories. My interests and analysis have focused mostly on the Anglophone Caribbean, with some references to the Francophone and Spanish speaking entities.

Within these definitional and affinity constraints, I will now address some particular examples of challenges to Caribbean economic sovereignty and my analysis of their broader implications.

II. ILLUSTRATIVE CHALLENGES TO CARIBBEAN ECONOMIC SOVEREIGNTY

My remarks will focus on the recent illustrative challenges listed below:

- A. The Organization for Economic Cooperation and Development (OECD) anti-tax haven initiative;
- B. The OECD-Financial Action Task Force (FATF) anti-money laundering initiative;
- C. The United States-European Union (EU) World Trade Organization (WTO) banana dispute;
- D. The termination of European Union sugar subsidies pursuant to WTO rules;
- E. The Antigua-United States WTO internet gambling dispute; and
- F. The EU-CARIFORUM Economic Partnership Agreement

3. Peter Clegg and Emilio Pantojas-Garcia, *Preface, in* GOVERNANCE IN THE NON-INDEPENDENT CARIBBEAN: CHALLENGES AND OPPORTUNITIES IN THE TWENTY-FIRST CENTURY *supra* note 3, at xvii. The authors describe the territories’ dissatisfaction with the *status quo*, despite, or perhaps because, independence does not appear to be a viable option for these small islands and island chains. *Id.*

4. See Karen E. Bravo, *CARICOM, the Myth of Sovereignty, and Aspirational Economic Integration*, 31 N.C. J. INT’L. L. & COM. REG. 145, 155-60 (2005) [hereinafter Bravo, *CARICOM*].

A. OECD Anti-Tax Haven Initiative

Beginning in 2001, the OECD initiated negotiations with countries it considered to be tax havens, meaning that the tax regulations and structures of those economies were unfair and illegal according to the criteria introduced by the OECD.⁵ The organization also began an initiative to list and target states, which it claimed, or which, according to its standards, were tax havens. The OECD used leverage and threats to try to get countries to make significant tax reforms and essentially bullied countries into making such changes.⁶ The designation of a jurisdiction as a “tax haven” depended on the OECD’s determination that the favorable tax treatment offered by the jurisdiction in question was luring money and taxpayers from other, “more honest” jurisdictions. It is noteworthy that the “other, more honest” jurisdictions that suffered the allegedly negative effects were Western-oriented, wealthier countries. That is, more favorable tax treatment was given to taxpayers leaving the United States, the European Union, and other jurisdictions to invest their money in the alleged tax havens.

In this regard, we must now scrutinize the OECD. Now what is the OECD? It is the Organization for Economic Cooperation and Development. Who are the member states of that organization? They are the states with the largest economies in the world.

The organization is an exclusive club, composed of the 34 states with the world’s largest economies.⁷ The membership is almost exclusively Western

5. The OECD considers countries that, in their opinion, offer tax rates that are low enough to be considered nominal to be tax havens, which allow taxpayers to evade their domestic tax authorities. OECD, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 32 (1998). In fact, the OECD labels a country a tax haven if: (1) it imposes no or only nominal taxes; (2) it offers a lack of transparency about the application of tax laws and about underlying documentation; (3) it has laws or administrative practices that prevent the effective exchange of information for tax purposes with other governments about taxpayers who benefit from zero or nominal taxation; (4) the absence of a requirement that the taxpayer’s activity within the country’s jurisdiction be substantial. Samantha H. Scavron, Note, *In Pursuit of Offshore Tax Evaders: The Increased Importance of International Cooperation in Tax Treaty Negotiations after United States v. UBS AG*, 9 CARDOZO PUB. L. POL’Y & ETHICS J. 157, 165-66 (2010).

6. Taylor Morgan Hoffman, Development, *The Future of Offshore Tax Havens*, 2 CHI. J. INT’L L. 511, 512 (2001). The actions taken by the OECD have been characterized as “economic imperialism” whereby large, powerful states exert their will over small offshore jurisdictions that threaten the financial dominance of the world powers. Richard K. Gordon, *On the Use and Abuse of Standards for Law: Global Governance and Offshore Financial Centers*, 88 N.C. L. REV. 501, 534-35 (2010). Gordon contends that there has been a shift from state actors directly implementing their global governance agendas to international bodies controlled by the world powers essentially serving as a proxy to direct and implement the agendas and restrict the growth of developing economies. *Id.* at 506-08.

7. For a complete list of the OECD’s membership, see OECD, *List of OECD Member Countries-Ratification of the Convention on the OECD*, http://www.oecd.org/document/58/0,3746,en_2649_201185_1889402_1_1_1_1,00.html (last visited October 31, 2011).

and European, with the exception of Chile, Japan, Korea, Turkey, Mexico, and Israel. No African, Pacific, or Caribbean states are represented. The organization excludes the voices of the world's other 160 states. The composition and authority of the OECD is not representative. That is, it is not a universal membership body; instead, its membership is limited to economies of a certain size. There was no democratic participation in standard-setting by the territories and countries listed as tax havens.⁸ The OECD listed a number of Caribbean entities in its offshore tax haven report.⁹ Among the Caribbean states and territories included in the list were: Antigua, Barbados, The Bahamas, The Cayman Islands, The Turks and Caicos Islands, and the twin island nation of St. Kitts and Nevis. The list included overseas dependent territories as well as nation states. Each of these entities had begun the process of successfully diversifying their economies from agriculture into financial and other service sectors.

There was great uproar. The response in the Caribbean was to characterize the listing and resulting economic pressures as discriminatory economic blackmail.¹⁰ The effect of the blacklist was severe.¹¹ Immediate results were that multinationals—banking and financial entities—

8. One author critiques the OECD for trying to impose its will on states that are not even OECD members and for encroaching on the sovereignty of nations. See Alexander Townsend Jr., *The Global Schoolyard Bully: The Organization for Economic Cooperation and Development's Coercive Efforts to Control Tax Competition*, 25 *FORDHAM INT'L L.J.* 215, 215 (2001). Townsend asserts that telling states how they must form and implement their tax policies is a serious threat to the sovereignty of nations. *Id.* at 220-21. He also notes that the OECD is telling these sovereign nations how they need to decide their fiscal needs, and how they are to decide their fiscal needs. *Id.* at 219-20.

9. See OECD, TOWARDS GLOBAL TAX CO-OPERATION: PROGRESS IN IDENTIFYING AND ELIMINATING HARMFUL TAX PRACTICE 17 (2000), available at <http://www.oecd.org/dataoecd/9/61/2090192.pdf>.

10. See OECD Tax List Called "Economic Blackmail," ALLBUSINESS.COM, (Aug. 1, 2000), <http://www.allbusiness.com/finance/581057-1.html> [hereinafter *Economic Blackmail*].

11. The OECD has clearly impacted the financial sectors of Caribbean nations and territories. Diane Ring, *Who is Making International Tax Policy?: International Organizations as Power Players in a High Stakes World*, 22 *FORDHAM INT'L L.J.* 649, 710-11 (2010). In addition, the United States has unilaterally set its sights on Caribbean nations with growing financial sectors as well. The United States has strayed from the OECD's model for addressing such issues and employed a number of tactics to discourage the use of Caribbean banks, including subjecting people and organizations to audits for simply transacting with offshore Caribbean financial institutions. Bruce Zagaris, *The Procedural Aspects of U.S. Tax Policy Towards Developing Countries: Too Many Sticks and No Carrots?*, 35 *GEO. WASH. INT'L L. REV.* 331, 336 (2003). As the United States continues to see greater deficits in the budget, it is increasingly likely that it will put even more pressures on anyone that uses Caribbean banking facilities. *Id.* at 390. The events of September 11, 2001 is used as a justification for the necessity of preventing countries from having preferential taxing and banking practices. See Bruce Zagaris, *Revisiting Novel Approaches to Combating the Financing of Crime*, 50 *VILL. L. REV.* 509, 511 (2005). See generally Elwood Sanders Jr. & George Sanders, *The Effect of the USA Patriot Act on the Money Laundering and Currency Transaction Laws*, 4 *RICH. J. GLOBAL L. & BUS.* 47 (2004).

announced that they would exit these countries and territories and the targeted states and territories feared negative reputational effects would take place. In addition, there was uncertainty regarding the enforcement action that the member states of the OECD might take if their multinational corporations (MNC's) did not exit the Caribbean states.

So, as I said, that initiative began in 2000, and by 2009 most or actually all countries and territories were off the blacklist.¹² We still have now a gray list.¹³ The gray list is a group of countries that said "yes, we will accede to your demands." But, the OECD says: "Well, you're not carrying it out in as quick a fashion, you're not implementing these commitments as we would like." So now several Caribbean countries are on the gray list of potential tax havens.¹⁴

B. OECD/FATF: Anti-Money Laundering Initiative

In 2003, the Organization for Economic Cooperation and Development's (OECD) Financial Action Task Force (FATF) issued a new revision of its Forty Recommendations, which had been first issued in 1990 and which form the baseline standards for the international prevention of and fight against money laundering by banking and financial systems and institutions. That same year, the FATF issued a list of Non-Cooperating Territories and Countries (the NCCT list), naming countries whose banking and financial laws and regulations did not meet the standards set forth in the updated Forty Recommendations.

The purpose of the Financial Action Tax Force is anti-money laundering activities: that is, the perception that monies were being transferred around the world in a *sub rosa* fashion by drug traffickers, corrupt governments, and corrupt private parties, and were being facilitated by the banking system in particular countries.¹⁵ Prior to the issuance of the NCCT list in 2003, in

12. At the G-7 meeting in July of 2007, the world powers' Finance Ministers agreed that sanctions they called "defensive measures" would be placed upon uncooperative tax havens. Hoffman, *supra* note 5, at 512. The Caribbean countries were originally encouraged by the British in the 1960s to diversify their economies by creating financial sectors; the sectors have since grown to the point that they made up as much as a quarter of some countries' economies. *Id.* at 512-13. The United States' stance is that the offshore accounts were accounting for \$70 billion a year in lost tax revenue. *Id.* at 513.

13. See Ulrich Eder, *The Caribbean, The OECD and The Empty Black List*, 31 CARIBBEAN PROPERTY MAGAZINE (Aug. 2009), http://www.caribpro.com/Caribbean_Property_Magazine/index.php?pageid=717.

14. These include Anguilla, Antigua and Barbuda, and the Cayman Islands, among others. *Id.*

15. For a thorough discussion of the initiative, see Karen E. Bravo, *Follow the Money? Does the International Fight Against Money Laundering Provide A Model for International Anti-Human Trafficking Efforts?*, 6 ST. THOMAS L.J. 138, 160-66, 173-79 (2008). Those considered to be countries that support or allow money laundering are often depicted as countries run by greedy, selfish bureaucrats who simply want money and do not care whether they are giving terrorist organizations and criminals a place to carry out their

February 2000, the FATF had published the Report on Non-Cooperative Countries and Territories (the Initial 2000 NCCT Report) and, in three subsequent reports, identified countries and territories that it would investigate and review in order to determine NCCT designation. The list included 15 countries and territories. Similarly to the anti-tax haven initiative, several Caribbean states and territories were included on the list. By late 2007, when the FATF issued the 2006/2007 list of Non-Cooperating Territories and Countries, no jurisdictions remained on the list—all the formerly non-compliant states and territories are now compliant or their compliance was in the process of being confirmed. That is, within eight years, all the territories identified as an NCCT, or potential NCCT, had taken steps comply with the standards of the Forty Recommendations, had been investigated and/or monitored, and were de-listed.¹⁶

The non-cooperative countries and territories (NCCTs) initiative was created to ensure that *all* countries adopt anti-money laundering measures.¹⁷ Once again, the non-representative nature of the membership of the international organization that is the source of the rule making, monitoring, and sanctioning is striking. The FATF is an independent inter-governmental organization created by the G-7/OECD in 1989. As with the tax haven initiative, the standards were formulated by a non-representative body—that is, no input from the countries that would be subject to those standards. The project was intended to force non-member states and jurisdictions with deficient anti-money laundering systems to create new legislation by adopting a “name-and-shame” device—in the form of the published list of non-compliant jurisdictions—and by encouraging FATF members to take actions to convince NCCTs of the importance of adopting such legislation.

The criteria for identifying NCCTs consist of a range of detrimental rules and practices in and by a country or territory that obstruct international cooperation against money laundering. These detrimental rules can be found in a NCCT’s financial and other regulatory requirements (especially those related to identification), their rules regarding international administrative and judicial cooperation, and the resources the country has made available

illegal activities on an international scale. See William F. Wechsler, *Follow the Money*, 80 FOREIGN AFF. 41, 41-43 (2001). Countries that choose to respect the privacy of their investors are seen as safe havens for those wishing to conduct illegal money laundering activities, despite the reality that such privacy is likely to be just as appreciated by those that do not have any illegal intentions. *Id.* at 42. The inherent assumption that the alleged money laundering havens merely intend to service criminals fails to take into account that many of the states with laws favorable to investors are created to give them some sort of a general competitive advantage in the financial sector that they would not otherwise have with uniform laws. Shawn Turner, *U.S. Anti-Money Laundering Regulations: An Economic Approach to Cyberlaundering*, 54 CASE W. RES. L. REV. 1389, 1399-1400 (2004).

16. See Bravo, *supra* note 15, at 160-66.

17. Jared Wessel, *The Financial Action Task Force: A Study in Balancing Sovereignty with Equality in Global Administrative Law*, 13 WIDENER L. REV. 169, 174 (2006).

for preventing, detecting, and repressing money laundering.¹⁸ There is no specific criterion that can serve as a litmus test; rather, a jurisdiction should be judged based on the entirety of its efforts to combat money laundering.

Also noteworthy is the intrusive and very effective nature of the monitoring imposed, under threat of sanctions, on non-FATF and non-OECD states.¹⁹ For the most part, Caribbean countries have complied with the regulations established regarding money laundering, but they have had to do so because if they did not, economic disaster would result—their economies simply are not strong enough to survive for long while under siege from the world powers.²⁰ What does it mean? Sovereign states are subject to intrusive monitoring by the FATF and have changed their internal regulations in order to comply with the standards issued from above, without their participation, that is, from the OECD.²¹

C. WTO: United States-European Union Banana Dispute

Let us address now challenges with respect to the trade in goods. None of the Caribbean states or territories are members of the OECD or of the FATF. This non-membership contrasts with their status in the World Trade Organization. The Caribbean states *are* members of the WTO; in fact, they are founding members because they had been members of the GATT.²²

18. *Id.*

19. For example, the Caribbean Financial Action Task Force (CFATF) was established in 1996 and received a great deal of criticism from both sides of the issue. PETER REUTER & EDWIN M. TRUMAN, CHASING DIRTY MONEY: THE FIGHT AGAINST MONEY LAUNDERING 84 (2004). One of the primary problems with the CFATF is that it exercises peer review of members and does some global supervision, but has little to no power to require compliance with sanctions. *Id.* at 85. After 9/11, the United States has tried to correct these flaws in implementation. *Id.*

20. G. Scott Dowling, Comment, *Fatal Broadside: The Demise of Caribbean Offshore Financial Confidentiality Post USA PATRIOT Act*, 17 TRANSNAT'L L. 259, 292 (2004). The broad wording of the PATRIOT Act gives the U.S. a number of weapons in its arsenal to change the financial practices of Caribbean countries indefinitely. *Id.* at 292-93. The Bahamas and the Cayman Islands have been two of the more "cooperative" Caribbean jurisdictions, and foreign states often make requests for information regarding certain clients; more often than not, the requests are honored. Evan Metaxatos, *Thunder in Paradise: The Interplay of Broadening United States Anti-Money Laundering Legislation and Jurisprudence with the Caribbean Law Governing Offshore Asset Preservation Trusts*, 40 U. MIAMI INTER-AM. L. REV. 169, 188-89 (2008).

21. Critics have argued that the FATF's actions are a form of interference and an impingement on the sovereignty of the nations targeted by the FATF, and that sanctions, if imposed, would be a violation of the UN Charter because such measures are supposed to be addressed by the UN Security Council. Todd Doyle, Note, *Cleaning up Anti-Money Laundering Strategies: Current FATF Tactics Needlessly Violate International Law*, 24 HOUS. J. INT'L L. 279, 300-301 (2001-2002).

22. See WTO, *Understanding the WTO: Members and Observers*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Oct. 31, 2011).

The long-running banana dispute between the United States and the European Union resulted in the loss of preferential access that the European Union had extended to banana exports from African, Caribbean, and Pacific countries that are former colonies of EU member states. Brought by the United States, and making claims with respect to bananas produced in South America, the dispute is one of the longest-running (spanning 1993 to 2010)²³ and most seemingly intractable in the history of the World Trade Organization.

The question was whether the preferential access given by EU member states to their former colonies violated the EU member states' GATT obligations. And I guess I should give some background: These English-speaking, Spanish-speaking, and French-speaking territories and countries were colonies of EU member states. Once they were given independence, part of the deal was: "we will continue to subsidize you, some might even argue compensate you or make reparations to you, by giving your agricultural products preferential access to our markets."

The preferential arrangement between EU member states and their former colonies, between the European Union and those decolonized states, was found to be illegal. With respect to compliance, the European Union dragged its feet for a considerable period of time and, in May 2010, finally consented to comply with the panel report and the compliance panel.

Some interesting facts with respect to the dispute include: (i) Bananas are a major agricultural crop in the Caribbean;²⁴ (ii) the United States does not produce bananas; instead, the United States' position represented the interests of large MNCs (i.e., Dole and Chiquita) who had interests in banana-producing South American countries (i.e., today's banana republics); (iii) pursuant to WTO procedural rules and as a result of the procedural posture of the dispute, the African, Caribbean, and Pacific states and territories, whose market access and economic futures would be determined by the dispute, were limited to the role of third party observers.

The case was brought by the United States against the European Union, not because the United States grows bananas, but because it was representing the interests of the multinational corporations—Dole and Chiquita for instance—which *do* have banana growing enterprises in Latin American countries. The problem, according to their point of view, was "our bananas are being disadvantaged in the European markets, they're getting discriminatory treatment because the Caribbean, Pacific and African bananas are getting in at a lower rate and so are more attractive to consumers."

23. Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997).

24. According to then-Prime Minister of Jamaica Percival J. Patterson, "Bananas are to us what cars are to Detroit." WARREN J. KEEGAN & MARK C. GREEN, *GLOBAL MARKETING* 125 (2d ed. 2000).

As I have stated, the Caribbean states are members of the WTO. However, with respect to this decision which has enormous impact on a substantial part of their economy, these Caribbean states were reduced to the role of third party observers. That is, they were able to submit documents and relevant information, but they were not parties, they were not participants, they were not there as primary actors with respect to their economic future. Fifty-six of the seventy-eight nations in the ACP that were to be impacted by the banana settlement are members of the WTO, but were given no ability to make an impact on the WTO proceedings.²⁵ The WTO dispute settlement procedures appear to present a threat to the sovereignty of member states—their ability to take necessary government actions on behalf of citizens.²⁶ The WTO system as it stands leaves developing countries in a position where their participation is marginalized and they are not often a part of proceedings.²⁷

D. WTO: European Union Sugar Subsidies Dispute

In 2003, Australia, Brazil, and Thailand requested the establishment of a WTO panel to examine the legality of subsidies applied to European Communities' (EC) sugar.²⁸ As had occurred, with respect to bananas, the European Union's sugar subsidies, challenged by Australia, Brazil, and Thailand, were found to be illegal. The Dispute Settlement Body's 2004 report, which found that the European Union's sugar regime breached the European Union's WTO obligations, had a detrimental impact on another major cash crop of African, Caribbean, and Pacific states and territories.²⁹

As I stated earlier, the agricultural background of the islands means that sugar and bananas were crucial to their agricultural economy. I should also add, however, that the Caribbean sugar industry is extremely inefficient and

25. *Id.*

26. Benjamin L. Brimeyer, *Bananas, Beef, and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations*, 10 MINN. J. GLOBAL TRADE 133, 167 (2001).

27. HAIDER A. KHAN & YIBEI LIU, GLOBALIZATION AND THE WTO DISPUTE SETTLEMENT MECHANISM: MAKING A RULES-BASED TRADING REGIME WORK, 23-24 (2008), <http://mpira.ub.uni-muenchen.de/7613/1/WTO.PDF>. The dispute was supposed to be just limited to bananas, but the European Union has insisted on expanding the package to encompass other concessions included in the Doha Round. GIOVANNI ANANIA, HOW WOULD THE WTO AGREEMENT ON BANANAS AFFECT EXPORTING AND IMPORTING COUNTRIES? 5 (International Centre for Trade and Sustainable Development Programme on Agricultural Trade and Sustainable Development June 2009), available at http://ictsd.org/downloads/2009/07/web_bananas.pdf.

28. Appellate Body Report, *European Communities—Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R (Apr. 28, 2005), available at http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/283ABR.doc.

29. In those countries, sugar and bananas are huge agricultural products and in fact a substantial part of their economy.

unproductive and later in this Essay I will address issues of comparative advantage as well. The fact that Caribbean states and territories would no longer get access to this market had a huge impact on the day-to-day life and domestic economies of those countries and on their economic sovereignty. The changes to the EU sugar regime have been described as drastic changes that will affect developing and least developed countries that depend on the preferential treatment received from the European Union.³⁰

The new agreement for tariff-free sugar imports into the EU market did not fully come into effect until 2009, and the European Union seems to suggest that it will be beneficial for LDCs and the European Union alike.³¹ The new sugar regime stands to leave ACP countries as losers in the new market system if they are unable to compete with the comparative advantages other countries enjoy.³² The new regime changes the positions of those that are the winners and those that are the losers and threatens the already fragile economies of the losers.³³ Although the new sugar regime has an impact on all ACP countries, the Caribbean countries stand out as greater losers in the newly competitive sugar market than other countries.³⁴

E. WTO: Antigua-United States Gambling Dispute

The internet gambling dispute between the United States and Antigua is historic in scope. It began with Antigua's³⁵ March 21, 2003 request for consultation under the WTO Dispute Settlement Understanding about United States barriers to the provision of transborder gambling services.³⁶

30. Piero Conforti & George Rapsomanikis, *The Impact of the European Union Sugar Policy Reform on Developing and Least Developed Countries*, in FOOD AND AGRICULTURE ORGANIZATION OF THE UN, COMMODITY MARKET REVIEW 89, 90-93 (2005), available at <http://www.fao.org/docrep/008/a0334e/a0334e0f.htm>. The author found through his research that it is not likely that the quantity of sugar exported from the Caribbean should decrease all that much but, rather, the revenues would be significantly different. The Caribbean has in fact decreased in both production and revenue from sugar. *Id.* at 103.

31. LEENA KERKELA & ELLEN HUAN-NIEMI, TRADE PREFERENCES IN THE EU SUGAR SECTOR: WINNERS AND LOSERS 8 (Purdue Univ. Seminar on Agric. 2005), available at <http://www.etsg.org/ETSG2005/papers/kerkela.pdf>.

32. ELLEN HUAN-NIEMI & LEENA KERKELA, REFORM IN THE EU SUGAR REGIME: IMPACT ON THE GLOBAL SUGAR MARKETS, 4-6 (2005), available at <http://ageconsearch.umn.edu/bitstream/24733/1/cp05hu02.pdf>.

33. *Id.* at 14.

34. Michael Bruntup, Discussion Paper, *Everything But Arms (EBA) and the EU-Sugar Market Reform—Development Gift or Trojan Horse?* 7 (German Development Institute Oct. 2006), available at <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=27650>.

35. And I challenge you to find Antigua on your map—Antigua, it's on the right hand side, it's a very tiny twin-island state—Antigua and Barbuda . . .

36. See Request for Consultations by Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services—Request for Consultations by Antigua and Barbuda*, WT/DS285/1 (Mar. 27, 2003), available at

In light of the disparity in power in the WTO,³⁷ I was very, very surprised in 2003 to learn that Antigua had challenged the United States about its internet gambling laws. That is, the United States had forbidden internet gambling, but Antigua had become a huge offshore internet gambling center—a huge business, with lots of companies going there to invest and locate their internet gambling sites in that country.

In view of the conflict, Antigua challenged the United States, claiming that the prohibition violated the United States' WTO obligations under the General Agreement on Trade in Services (GATS) because it was possible to gamble in the United States in person via casinos, race tracks, and various other state and private entity sponsored gambling.

The dispute resulted in partial wins for Antigua under both the November 10, 2004 Panel Report and the April 7, 2005 Appellate Body report.³⁸ However, the United States' refusal to comply with the findings resulted in further proceedings to ensure compliance.³⁹ Although the WTO can impose "special and different treatment" provisions to protect the

http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDocuments/t/S/L/110.doc

37. Kristin Bohl, *Problems of Developing Country Access to WTO Dispute Settlement*, 9 CHI. KENT J. INT'L & COMP. L. 130, 131 (2009). The reasons smaller states, like those in the Caribbean, have trouble with access to the system often include a lack of resources, small trade volumes, a lack of institutional capacity or a lack of political will. *Id.* at 132.

38. Report of the Panel, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004), available at http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS285%FCR%2A+and+not+RW%2A%29&language=1; Report of the Appellate Body, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005), available at http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS285%FCAB%FCR%2A+and+not+RW%2A%29&language=1. The Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) was passed as a result of the United States losing in its WTO dispute against Antigua and Barbuda. Peter Shaker, *America's Bad Bet: How the Unlawful Internet Gambling Enforcement Act of 2006 Will Hurt the House*, 12 FORDHAM J. CORP. & FIN. L. 1183, 1198 (2007).

39. Recourse to Article 21.5 of the DSU by Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WT/DS285/RW (Mar. 30, 2007), available at http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/285RW-00.doc. The initial reaction by Antigua to the favorable ruling was that the win was a great victory, especially for such a little country. Daniel Pruzin, *Antigua-Barbuda Wins WTO Interim Ruling Against U.S. Internet Gambling Restrictions*, 21 Int'l. Trade Rep. (BNA) 13, 14 (Mar. 25, 2004). However, some scholars still feel that the victory was hollow because the case "highlights the ineffectiveness of the provisions intended to ensure that developing countries are able to use and prevail during the WTO dispute settlement process." *Id.* at 28. The fact of the matter is that the Antigua has very little it can do to impose sanctions against the United States Daniel B. Pimlott, *WTO Rules Against U.S. in Internet Gambling Case*, FIN. TIMES (London), Jan. 26, 2007, available at <http://www.ft.com/intl/cms/s/0/317e9e48-ad61-11db-8709-0000779e2340.html#axzz1dBYdeTQQ>.

interests of developing countries from developed countries, the measures have been critiqued for rarely being implemented and even more rarely being to the benefit of developing countries.⁴⁰ Even when measures are taken, the WTO does not have any teeth to make the United States adhere to rulings against developing countries: even after two adverse WTO rulings, the United States still refused to change its position on Antigua and internet gambling and continued to try to make internet gambling illegal.⁴¹

As a result of the compliance proceedings, on December 23, 2007 the WTO arbitrator authorized Antigua to assert \$21 million nullification of benefits against U.S. intellectual property that was protected pursuant to the TRIPS Agreement.⁴² That is, Antigua was given permission to violate the TRIPs with respect to U.S. intellectual property up to the amount of \$21 million without violating its obligations under the WTO Agreement.⁴³ The United States' response was to announce that it was withdrawing from its GATS obligations as they pertained to internet gambling.⁴⁴

40. Amin Alavi, *On the (Non)-Effectiveness of the World Trade Organization's Special and Different Treatments in the Dispute Settlement Process*, 41 J. WORLD TRADE 319, 320 (Apr. 2007).

41. See Andrea Ewart, *Small Developing States in the WTO: A Procedural Approach to Special and Differential Treatment through Reforms to Dispute Settlement*, 35 SYRACUSE J. INT'L L. & COM. 27, 55 (2007).

42. The WTO ruling was a potentially significant move by the WTO in favor of small countries because Antigua was permitted to suspend \$21 million annually in IP rights held by firms from the United States. See Isaac Wohl, *The Antigua-United States Online Gambling Dispute*, 4 J. INT'L COMM. & ECON. 1, 2-3 (2009). This remedy was chosen by the WTO because a remedy allowing suspension of obligations to the US would have almost no effect in a developed country such as the United States. Clint Bodien, *Cross-Retaliation in the WTO: Antigua and Barbuda's Proposed Remedy against the United States in an Online Gambling*, 14 L. & BUS. REV. AM. 847, 853 (2008). The ruling gives small countries the potential to create leverage in future disputes. Wohl, *supra*, at 16. The decision was especially notable because it was an instance where the 15th smallest country in the world went head to head with the world's economic superpower and left the WTO with a sound victory. Ewart, *supra* note 41, at 27.

43. The suspension of IP rights of U.S. firms was notable because the WTO DSB recognized that traditional remedies would not likely be enforceable because of the disparity in size of the countries. Bodien, *supra* note 42, at 855. However, Antigua could also lose its MFN status with the United States via the Caribbean Basin Initiative (CBI) because the CBI includes a requirement of recognition and enforcement of U.S. IP rights as one of the requirements for the MFN status. *Id.* at 855. The bottom line is that the DSB's decision could have ended up being more detrimental than beneficial for Antigua. *Id.*

44. Yevgeniya Roysen, *Taking Chances: The United States' Policy on Internet Gambling and Its International Implications*, 26 CARDOZO ARTS & ENT. L.J. 873, 875 (2008-2009). On April 15th, 2011, the FBI indicted 11 of the founders from the three largest online poker websites and shut down the websites. Michael McCarthy, *FBI Busts Three Biggest Online Poker Hhouses*, USA TODAY, (Apr. 16, 2011), available at <http://content.usatoday.com/communities/gameon/post/2011/04/fbi-cracks-down-on-3-biggest-online-poker-houses-poker-stars-full-tilt-poker-absolute-poker/1>. The inditees were charged with bank fraud, money laundering, and illegal gambling offenses. *Id.* The prosecutors cited the UIGEA as the grounds for the indictments. *Id.* Until the very recent indictments, the WTO decision had left the operators of the online gambling websites unsure

I would ask you to think about the effect or the benefit of this \$21 million of IP nullification to Antigua. That is, I am able to violate your intellectual property rights up to the amount of \$21 million versus having an economy or an industry that actually functions and employs Antiguan citizens and brings in tax revenue to the state. Furthermore, the fact that a small nation won against an economic superpower, yet ultimately still lost, only emphasizes the flaws in the WTO system: Developed countries essentially do what they like, regardless of their commitments to the WTO.⁴⁵

F. EU-CARIFORUM Economic Partnership Agreement

The Caribbean Community (CARICOM) is the premier Caribbean regional integration organization.⁴⁶ Founded in 1973, the organization first consisted of Anglophone former colonies of the United Kingdom. Membership has expanded to include Haiti. CARIFORUM is a broader organization that includes the Dominican Republic.

Following the WTO proceedings in the banana wars, in view of the need to re-arrange the economic and trade relationship between the EU member states and their former ACP colonies, the European Union entered into economic partnership agreements with different regional groupings of African, Caribbean, and Pacific former colonies. Broadly, pursuant to the terms of the CARIFORUM Economic Partnership Agreement (EPA), access to the EU markets is no longer unconditional: Products of the CARIFORUM states will receive duty-free and quota-free access to the markets of EU member states. In return, products from EU member states will face decreasing barriers to the markets of the Dominican Republic and CARICOM member states. CARIFORUM states have agreed to liberalize 80 percent of imports over 15 years and will liberalize the remaining 20 percent over 20 to 25 years.⁴⁷

of the legality of their activities. Tom Newnham, Note, *WTO Case Study: United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 7 *ASPER REV. INT'L BUS. & TRADE L.* 77, 81 (2007). The constitutionality of UIGEA was challenged in 2008 by a non-profit advocacy group, but the case was dismissed in an unpublished opinion. Kristina L. Perry, Note, *Current State of the Unlawful Internet Gambling Enforcement Act and Recently Adopted Prohibition on Funding of Unlawful Internet Gambling*, 8 *RICH. J. GLOBAL L. & BUS.* 29, 31 (2008-2009). The court did not state whether the dismissal was based on a lack of standing or for failure to state a claim. *Id.*

45. Michael Grunfeld, Note, *Don't Bet on the United States's Internet Gambling Laws: The Tension between Internet Gambling Legislation and World Trade Organization Commitments*, 2007 *COLUM. BUS. L. REV.* 439, 501-03 (2007).

46. For a thorough discussion of CARICOM, see Bravo, *CARICOM*, *supra* note 4, at 167-89.

47. See Anthony Gomes, *Phasing of Tariff Liberalization on European Union Goods*, *JAMAICA OBSERVER*, Jan. 26, 2011, available at http://www.jamaicaobserver.com/columns/Phasing-of-tariff-liberalisation-on-European-Union-goods_8315707#ixzz1DrRgSCn3.

What does it mean? What are the terms of the deal? Access to the EU markets is no longer unconditional. So, the good deal that the former colonies had was that their preferential access to EU markets was not reciprocal. That is, the Caribbean states and territories got preferential access but could still keep their tariffs and get revenue from the European Union's products coming in. Now it's no longer unconditional, so the products of the CARIFORUM states will get duty free and quota free access to the EU markets but, in return, tariffs must be removed with respect to 80 percent of imports over 15 years and the remaining 20 percent over a 20 to 25 year period.

Arrived at following four years of negotiation, the treaty is controversial⁴⁸ and has stimulated much debate in the region regarding whether the economic effects will be beneficial for the Caribbean. For example, the loss of tariff revenues will be substantial: Based on data for the 2005/06 fiscal period, at the end of the liberalization period Jamaica is estimated to lose approximately \$1.34 billion in both tariff and non-tariff revenues, or 96 percent of tariff revenues previously collected from EU imports.⁴⁹

So, having finally acceded to the banana dispute resolution, the European Union negotiates with its former colonies to come into compliance with its WTO obligations. Through the CARIFORUM Economic Partnership Agreement, the European Union is attempting to rearrange its relationship with those colonies so that it comes into compliance. However, freed finally by its decision to comply with the banana decision, the European Union's negotiations are no longer premised on the idea of giving unconditional aid to its colonies. Now we can bargain hard because we have been told that this preferential access violates our WTO obligations, right?

Despite the agreement, the Caribbean continues to resist implementation. There's the promising and then the complying.⁵⁰ So, the agreement was

48. I can't tell you how many editorials were published in the papers in the Caribbean Islands in which dire predictions have been made regarding what will be the effect of this agreement, or whether the CARICOM and Dominican Republic should have held out for a better deal or some other kind of deal with the European Union because this, they said, would be the end of the region. See, e.g., Rickey Singh, 'EPA Nightmare,' JAMAICA OBSERVER, Sept. 8, 2008, http://www.jamaicaobserver.com/news/139937_-EPA-nightmare-.

49. See Gomes, *supra* note 47.

50. In response to the lack of implementation of the EPA by Caribbean countries, CARIFORUM has agreed that it will establish an "EPA Implementation Unit" by July of 2011. Dixie-Ann Dickson, *EPA Implementation Unit Coming in July Says Cadiz*, TRINIDAD GUARDIAN (Trinidad & Tobago), Apr. 4, 2011, <http://guardian.co.tt/business/2011/04/04/epa-implementation-unit-coming-july-says-cadiz>. It seems like one of the biggest obstacles to implementing this for Caribbean countries has been getting local business to be comfortable with the changes. *Id.* Cariforum is using information seminars aimed at local business owners and the European Union's offer of aid for trade and the promise to offer technologies as an incentive for local businesses that are reluctant to get on board with the EPA. *Id.* The stresses from the outside to adjust their economies have caused stresses within. Although the countries within the region have many similarities, there are rivalries and social differences

signed at the end of 2008 and was supposed to come in effect on January 1, of this year—2011. As of late February 2011, only Guyana⁵¹ had implemented the agreement. Further, it took two years before the regional body, CARICOM, set up an implementation body to ensure member state compliance with the treaty.

III. IMPLICATIONS FOR CARIBBEAN ECONOMIC SOVEREIGNTY

What do these series of events reveal about the economic sovereignty of the states and territories of the Caribbean? Individually and collectively, they demonstrate that Caribbean states and territories lack economic sovereignty and are thus unable to chart their own economic destiny. I would say that their situation is very similar to the situation of other small and micro states that do not have economic heft. Their market is not that attractive, they do not have enough population or economic activity to bring in investors and investments from abroad, so they are left to react rather than to create their own initiatives. The effects of these challenges will be adverse impacts on their major agricultural industries, which as I noted before, are quite inefficient. As a result of the OECD's anti-tax haven and anti-money laundering initiatives, their provision of financial and recreational services has now been adversely impacted as well.

It is not hyperbole to state that the economic sovereignty challenges call into question the viability of fundamental tenets of international trade law. The challenges that I have described have adversely impacted the region's major agricultural industries. The region's rather successful turn toward the provision of financial and recreational services was negatively impacted by the OECD's anti-tax haven and anti-money laundering efforts. The provision of the more "innocuous" recreational services (gambling) by some states and territories has been stymied. The region must now continue its search for the next comparative advantage. But will that comparative advantage be deemed acceptable by the international community's regulatory organizations?

which make integrating further more difficult. David Jessop, Op-Ed., *Caricom's Problems Create Doubts for Partners*, DOMINICAN TODAY (Dominican Republic), Apr. 8, 2011, <http://www.dominicantoday.com/dr/opinion/2011/4/8/39188/Caricom-problems-create-doubts-for-partners>. The rivalries between islands may not be overcome quickly enough to implement effective coalitions for economic growth.

51. And I also meant to say I apologize because my map does not show Guyana. Guyana is actually on the South American continent but is considered to be in the Caribbean by Anglophones in the Caribbean based on historical ties. Caribbean countries are well behind in implementing their EPA obligations on tariff dismantlement; the deadline was the beginning of the year, and thus far only Guyana and St. Kitts Nevis have met their obligations. *Id.* The lack of uniformity and agreement between Caribbean countries seems likely to lead to greater questions being raised about the purpose of such regional organizations. *Id.*

In the context of evaluating the impact of these challenges, let's think about comparative advantage now. What is "comparative advantage?" Pursuant to the theory of comparative advantage, a state should produce and trade in the products and services in which it has a comparative advantage in comparison to the other products and services that it could produce. That is, you should do what you're best at, right? And trade what you're best at producing.

Comparative advantage is impermanent. Each trading partner must be endlessly flexible and must continuously engage in formulating and exploring new sources or formats of its comparative advantage. The Caribbean region's transition from the provision of agricultural products to the provision of varied services—tourism, financial, recreational (i.e., gambling)—demonstrates the impermanence of comparative advantage. At one point, they were the best, or at least good, at banana and sugar production; now they are very good at tourism services, right?⁵² But also several are very good at financial services and banking. Think of transitioning from the purely agricultural model to the financial services and banking model and even to the more or less innocuous internet gambling model.

The transition to their next comparative advantage would be facilitated by their exercise of economic sovereignty by creating a regulatory regime attractive to those who want to park their money here, escape taxes there, or play and gamble on the internet. However, this process of transition has been foreclosed or substantially restricted by the top-down imposition of regulations by a non-representative—I would claim a non-representative—international body—the OECD. That is, the region's search for a new comparative advantage has been undermined to a great extent so that the movement away from agriculture to another kind of paradigm—searching for the services industry that these countries would be very suited for—has not been completed at this point, or is being stultified.

According to the theory of comparative advantage, the WTO trading partners or parties need to be very flexible in finding what their comparative advantage is going to be. The Caribbean may also demonstrate that sovereignty itself—the power to create regulatory regimes within a territory or state—may be a source of comparative advantage. They seem to have found a comparative advantage that consists of using sovereignty itself to create regulatory regimes that would facilitate economic activity and economic access for their citizens.

Yet sovereignty itself is an uncertain source of comparative advantage since it is constricted and shrinking in scope due to multilateral treaties, geopolitical realities, and other commitments.

What is the impact of large-country policies, which may stem from anti-competitive intent and have anti-competitive impact, in undermining the

52. Thus, the Caribbean as a favored destination for Spring Break.

search for comparative advantage by the less powerful? Will comparative advantage of weaker states only be explored at the discretion of and pursuant to the terms agreed to by larger economies?

Yet that reality—a top-down imposition of rules of indeterminate legitimacy—is detrimental to both the United States and the Caribbean. For example, the decrease in banana production in the region has led to an increase in production of marijuana and an increased role in provision of illicit transborder services. Drug trafficking is now the most viable and productive economic activity for the dislocated banana or sugar farmer and for others dependent on the banana industry.

What might be the region's comparative advantage—proximity to the United States or the possession of Anglophone populations in a world where English is predominant? Anything else? Do these small countries and territories actually have anything to offer in a globalized world? Anything other than white or golden powdery beaches, tropical climates, and endless sunshine?

Further analysis of the meaning of these challenges to Caribbean sovereignty can be organized under several banners: (1) the interaction of sovereignty and membership; (2) sovereignty and legitimacy; (3) sovereignty and illicit trade; and (4) sovereignty, size, and power imbalances.

A. Sovereignty and Membership

Does membership in multilateral organizations confer sovereignty enhancing benefits? The circumstances of the affected Caribbean states and territories starkly demonstrate an inability to effectively participate in situations of both membership and non-membership: Contrast the challenges presented by the OECD anti-tax haven and anti-money laundering initiatives with the challenges arising from the results of the sugar, banana, and gambling disputes under the auspices of the WTO. That is, Caribbean state membership in the WTO does not appear to have conferred any significant benefit to the Caribbean states with respect to resolution of these disputes. The states and territories were subjected to the OECD anti-tax haven and anti-money laundering initiatives despite non-membership in either the OECD or the FATF. Yet, as members of the WTO, in the sugar and banana disputes, they were limited to 3rd party observer status despite the fundamental importance of the outcomes of both of those disputes to their economic health and futures. With respect to the gambling dispute, the small size and lack of economic and political power of Antigua was not overcome by its membership in the WTO. Instead, the United States was able to ignore and/or refuse compliance with the panel and Appellate Body reports, with no adverse economic or other effects on the United States. In contrast, the Antigua offshore gambling industry was virtually destroyed.

The result is the same. As a member with a voice in the WTO, a Caribbean state or territory is foreclosed with respect to the dispute central to its economy just as they were foreclosed from participation due to the membership requirements with respect to the OECD. Once the more powerful economies have identified a threat to their own regulatory regime—that is, here are our own tax dollars fleeing elsewhere or here are potential havens for money laundering—they determine that reform is needed. Their influence means that they are able to force these targeted countries to change their internal domestic regulations. So there was no difference. Whether there was membership or not, the outcome was the same: loss of market, loss of control, and demonstration of powerlessness against larger economic powers.

However, note that with respect to Caribbean states' membership in CARICOM, those states have manifested great skittishness with respect to their membership obligations, and a general reluctance to pool membership, leading to a largely ineffective organization.⁵³ Note, as well, other manifestation of sovereign prerogative: lack of implementation with respect to the CARIFORUM-EU Partnership Agreement.⁵⁴

My question is, if there is no value, or little value, to sovereignty, what is the point of participation, of voice, of access, of whether you are a member or a nonmember in these international institutions? Contrasting the impact of the OECD anti-tax haven and anti-money laundering regime and the effects of the WTO bananas, sugar, and internet gambling dispute, it seems to me that having membership in those international organizations was virtually meaningless for these countries. What will sovereignty become for these little places, these micro places? These places, these micro states, may seem to be inconsequential, to be far away, or great for a Spring Break vacation, but we are globalized and interlinked; there is a deep interrelationship. Accessing drugs or accessing the drug market in the United States coming through the Caribbean is much more possible now when legitimate economic activity is foreclosed for the individual citizens in Jamaica.

B. Sovereignty and Illicit Trade

I also want to think about the larger, detrimental impact when the search for comparative advantage is undermined in this way. I have thought a great deal about the comparative advantage of Caribbean countries; that is, the movement away from agriculture to tourism. I think it is clear that tourism is going to employ a certain number of people but not everyone or even a majority of the population. So, self-sustaining agriculture would seem to be

53. See generally, Bravo, *CARICOM*, *supra* note 4.

54. See discussion *supra*, Part II.6.

a good project. But now, bananas are no longer profitable; it makes no sense to grow bananas. It makes no sense to grow sugar.

Does anyone know what the number one cash crop is now in the Caribbean? Marijuana. That is, if I can't grow bananas and find a market for it, and I can't get a job at the resort, and I can't be involved in a licit economic industry, I may then explore the relationship between the legitimate trade links and the illicit or illegitimate trade links. The choice to that banana farmer is to find the next comparative advantage. Proximity to the United States is a source of comparative advantage, and the felicity of being English-speaking in a world where English is the dominant world language of business and economics is also another source of comparative advantage. The reality of being shut out from legitimate international markets—sugar, bananas—has resulted in a huge spike in the production of marijuana, and provision of illicit services—the transborder shipment is drugs—services that are not covered under the General Agreement on Trade in Services or other WTO agreements or instruments.

What is the effect of that move to illicit business on the sovereignty of these states? The last time that Jamaica actually hit the news in the United States in a big way was the embarrassing scenario last year where a certain drug don called Dudus faced an extradition request from the United States. Curiously enough, the drug don lived in the constituency of the Prime Minister of Jamaica. Curiously enough, someone in the government of Jamaica contacted a high flying and high priced law firm in Washington, D.C. to fight the extradition on the basis of sovereignty—the sovereignty of the Jamaican state, the nation state. When this news broke in Jamaica, there was outrage that Jamaican laws were being used to defend the alleged drug king pin, but there was also great denial on the part of the government: denial of involvement. The governmental systems appeared to be corrupted, with some participation of the Prime Minister, Bruce Golding.⁵⁵ In fact, as we meet and speak here in Lansing, Michigan, the Manatt Commission of Inquiry is underway in Kingston, Jamaica, attempting to identify the existence and source of corruption in the system and the reasons why Jamaica first refused to extradite Mr. Christopher Coke (or Dudus), the infamous drug lord.⁵⁶

55. See Paul Henry, *Golding Maintains that Manatt Did not work for Government*, JAMAICA OBSERVER, Mar. 2, 2011, <http://www.jamaicaobserver.com/news/Golding-maintains-that-Manatt-did-not-work-for-Gov-t>; Marc Lacey, *U.S. Extradition Effort Strains Relationship with Jamaica*, N.Y. TIMES, Apr. 25, 2010, <http://www.nytimes.com/2010/04/26/world/americas/26jamaica.html?ref=christophercoke>.

56. See Tanesha Mundle, *Nelson Denies Saying Coke Extradition Could Topple Government*, JAMAICA OBSERVER, Feb. 18, 2011, http://www.jamaicaobserver.com/news/I-never-uttered-such-words_8388676. Joseph Goldstein, *Jamaican Kingpin Pleads Guilty in New York*, N.Y. TIMES, Aug. 31, 2011, http://www.nytimes.com/2011/09/01/nyregion/christopher-coke-pleads-guilty-in-new-york.html?_r=1&ref=christophercoke.

Sovereignty then was being used as a banner, as a protective shield, for an accused drug trafficker. That was the argument, we're not going to extradite because it violates our sovereignty that the United States wants us to extradite this person, used as a shield for illicit activities, right? So, Jamaica experienced an island-wide manhunt for this individual⁵⁷ at the same time that the government was trying to fight his extradition based on notions of the sovereignty of the Jamaican state.

C. Sovereignty and Legitimacy

I also want to think about sovereignty and legitimacy, to question the legitimacy of the top-down creation and implementation of standards by the OECD. The United Nations is like sausage making: everyone goes in and speaks, and no one can come to a decision. With the FATF, in contrast, you have a single purpose, exclusive membership organization. You can actually create rules. But to what extent are these rules then being used to facilitate the economic development of one set of countries versus the domination of smaller, less powerful states?

What is the source, if any, of the legitimacy of the anti-money laundering and anti-tax haven initiatives of the OECD and the FATF, both of which are limited—even exclusive—membership and limited-purpose economic institutions? That is, what is the source of the standards deployed? What is the nature of the participation of the “subjects” of these rules? Did the subjects—“sovereign states”—participate in crafting them? Despite the doubts regarding legitimacy of the power exercised by the organizations, there is no doubt regarding the effectiveness of their strategies supported, as they are, by the power of the largest trading economies.

D. Sovereignty, Size, and Power Imbalances: More about Legitimacy

Caribbean states and territories are small in size and lack resources. As a result, their ability to participate effectively in multilateral organizations is negatively impacted.⁵⁸

In addition, the Caribbean states' and territories' responses to the economic challenges manifest an inability to withstand reputational pressures. Despite protestations about the legitimacy—both with respect to the source of the standards and the discriminatory application—and purposes of the OECD anti-tax haven and OECD/FATF anti-money laundering initiatives, all the Caribbean states and territories capitulated to

57. Kareem Fahim, *Gang Leader Still Eludes Police as Death Rate Rises*, N.Y. TIMES, May 27, 2010, <http://www.nytimes.com/2010/05/28/world/americas/28jamaica.html?ref=christophercoke>.

58. Note, however, that members of CARICOM have devised an institutional mechanism for pooling negotiation strategies—the CARICOM Regional Negotiation Machinery.

the pressures, as did all other targets of the FATF. Their capitulation must be contrasted to the reactions of the United States and the European Union to the outcomes of the beef hormones and gambling disputes.⁵⁹ Economic and other sources of power allowed both of these players to avoid effective implementation of ostensibly neutral rules.

And then there is the question of sovereignty and size. Should we have small states? Does it make sense? What does sovereignty entail if there will be an inability to actually carve a path in the increasingly interdependent world? What function does sovereignty provide for these entities? It is nice to have the flag and the athletes at the Olympic Games and various cultural things, but does it really provide for the economic benefit, the political benefit of the citizens of that territory or geographic space?

CONCLUSIONS

The recent challenges to Caribbean economic sovereignty give rise to a number of questions. These are: Does membership in multilateral organizations confer benefits to small states? Or does the membership of such states help to facilitate paralysis in decision-making? For example, the WTO's Doha Round paralysis stems from the attempt to give voice to "too many" points of view, while at the same time illustrating the limits of participatory democracy. Does the contrast between the "effectiveness" of the FATF's standard-setting and implementation with the WTO's decision-making and standard-setting challenges demonstrate the need for the raw exercise of political power in international relations and law?

Secondly, the challenges demonstrate the effects of power disparities—both with respect to geographic and population size as well as to economic size and influence.

Thirdly, this examination of those challenges calls into question the legitimacy and impact of limited member international organizations. Do they merely manifest the existing power disparities such that they are tools and exemplars of the disparities in power? And what is the impact when power disparities and the exercise of power by the powerful shut out the smaller states from legitimate trade? Jamaica, and the Caribbean in general, appears to illustrate the assumption of the reins of state power by illicit transborder networks.

In those cases, the fiction of the juridical equality of states becomes, itself, a source of comparative advantage for the pursuit of illicit and illegal activities. That is, as the illegal and illicit take over the economy, the state's sovereign status becomes a shield against scrutiny and the implementation of an internationally-based rule of law.

59. Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

A further question arises whether the pooling of sovereignty continues to be a good choice. Membership of multilateral organizations may hold out the benefits of access to previously negotiated bargains and voice within an organization, even if the strength and influence of that voice is hindered by the reality of limited resources. However, decentralization and a refusal to join and to pool sovereignty may facilitate heterogeneity—that is, by serving to limit the spread and implementation of economic theories and projects that enjoy core/fundamental support in the West, but which may not serve the interests of smaller, weaker, more peripheral regions and economies.