**Explanatory Memorandum**

The Member States of the Caribbean Community (CARICOM) have maintained that any change to the participation of the European Union Observer (EU Observer) in the work of the United Nations (UN) shall be consistent with the UN Charter and the established practices and rules of procedure of the General Assembly.

Notwithstanding CARICOM’s stated preference for open transparent negotiations of the whole, the CARICOM have engaged in good faith with the European Union (EU) through open ended consultations as well as bilateral consultations to develop a common understanding on the areas of concern on the various iterations of the proposed draft resolution including the most recently tabled A/65/L.64, with a view to arriving at a consensus text.

Accordingly, the CARICOM formally presented its initial proposed amendments on 9 March 2011. Subsequently, and following the publication of L.64, it presented further amendments on 7 April 2011. On 11 April 2011, following an extensive consultation with the EU Rotating Presidency and Acting Head of the European Union and based on a preliminary understanding, it presented a final set of amendments. The abovementioned amendments are appended hereto as Annexes I, II and III respectively.

**I. The initial proposal – 9 March, 2011 (See APPENDIX I)**

In its initial proposal, the CARICOM proposed amendments to the EU resolution which was circulated by Belgium on 9 December 2010. Upon its submission of those amendments, CARICOM requested the start of open transparent and inclusive intergovernmental negotiations.

The CARICOM proposals to the preamble focused on establishing, in a factual manner, the premise for the General Assembly decision to confer special privileges to a non state Observer.

The proposals to the operative part and the Annex had as the main focus the preservation of the intergovernmental nature of the United Nations as set forth in the Charter and the rules of procedure of the General Assembly. At the same time, the CARICOM attempted to reconcile the core interest of the European Union for speaking privileges with the established practice for the conferral of such privileges to Observers, using the resolutions on the Holy See and Palestine as the benchmarks for same.

The new operative paragraph 1 reaffirms the intergovernmental nature of the United Nations. By the amendments to the Annex, specifically the new sub paragraphs (a) and (b), the EU Observer is granted special speaking privileges comparable to speaking privileges conferred to the Holy See and Palestine - privileges that are not currently enjoyed by the EU Observer or any other non-State Observer.

CARICOM also proposed the deletion of parts (d) (e) and (f) in the Annex to the EU text on the following bases:

**A. Making proposals and amendments**

Allowing a non-state observer the unfettered right to make proposals and submit amendments would be a novel and unworkable legal and procedural concept. Non-states simply do not have such rights in the General Assembly, and the EU has 27 Member States that already possess the ability to exercise these rights either individually, or on behalf of their fellow member states.

Allowing a non state observer to independently make proposals and amendments would also create awkward procedural issues. Rules 78 [120] and 81 [123] cannot be interpreted in the non-state context. Further, the submission of proposals and amendments may result in voting or other procedural actions, including the suspension of meetings. It would be offensive to the intergovernmental character of the General Assembly for non-state Observers to be allowed so much control over the actions of a plenary of states.

B. **Points of Order**

There is no precedent for allowing a non state observer entity to enjoy the Member States’ right to raise points of order. The United Nations currently has two established categories of points of order:

1. The “unfettered” right to raise points of order, as contemplated by Rule 71 [113] of the Rules of Procedure of the General Assembly. This right is extended to all Member States of the General Assembly;
2. The “circumscribed” right to raise points of order in particular narrowly defined proceedings. This right has been extended, by resolution, to observer States at the United Nations: Palestine (A/RES/58/314) and The Holy See (A/RES/52/250).

The EU proposal would effectively confer a **third category** of points of order: that is, an “unfettered” right to raise points of order extended to a *non-state* observer which observer is a regional organization, comprised of UN Member States *that already independently enjoy that unfettered right*.

For the first time in the history of the United Nations,the EU proposal would raise the specter of a *non-state* using procedural rules to silence[[1]](#footnote-1) or otherwise challenge a Member State of the UN.

C. **Right of reply**

Similarly, extending the right of reply to a non state observer also raises the specter of a non state challenging a Member State of the UN. In particular:

1. It would, for the first time, grant a non-state the right to “have the last word” in a debate with a State.
2. It would provide an additional voice for the 27 existing members of the European Union who already posses the right of reply, and are all capable of exercising the right.
3. The concept of the EU Observer making only prepared and agreed statements on behalf of its membership is incompatible with the exercise of the right of reply, which is typically exercised extemporaneously and often delivered without ability to consult with its membership.

Although it is true that non-members (Palestine and the Holy See) enjoy the right of reply, those cases are distinct from that of the EU Observer for a host of reasons, including, *inter alia*, (i) The EU Observer is not a state; (ii) the Holy See and Palestine resolutions envisage speaking on a narrow range of issues, so the possibilities for their exercise of the right of reply are similarly limited; (iii) neither the Holy See nor Palestine have subsidiary members that can exercise the right of reply on their behalf.

Second, the EU representatives have advanced a conceptual framework that is incompatible with the right of reply. The EU has explained that they are simply transferring “spokespersonship” from the rotating EU chair to the EU Observer. They have claimed that all statements made by the EU observer are first discussed and agreed upon by all 27 members of the EU. As such, the EU is speaking not as an Observer, but as a representative of 27 member states of the UN.

This conceptual framework cannot withstand the reality of the circumstances in which the right of reply is exercised. It would be improbable for the EU representative to have the time to consult with 27 member states, draft a statement, and receive consent in sufficient time to exercise the right of reply in many debates. Allowing the unfettered right of reply would therefore exceed the framework within which the EU Observer claims to operate. Indeed, it would allow for “unscripted” and “unapproved” comments by a non-state in response to comments by a UN Member State.

**D. EU Response**

While the EU indicated a willingness to consider some of the proposed amendments to the preamble and operative part of the resolution, it rejected the proposed amendments to the Annex.

II. **L.64 and CARICOM Proposed Amendments of 7 April ( See APPENDIX II)**

Following the publication of draft resolution A/65/L.64 (L.64), the CARICOM proposed a further set of amendments, which was circulated to Member States on 7 April 2011.

While recognizing that the preamble and operative parts of the resolution, as presented in L.64, had been amended to address a principal concern for the preservation of the intergovernmental nature of the United Nations, the Annex contained conflicting and contradictory elements therewith.

The CARICOM thus proposed a possible compromise between the EU Observer request for speaking privileges similar to those of major negotiating groups and the CARICOM’s interest in ensuring that any special privileges granted to a non-state observer entity would not significantly erode the intergovernmental nature of the UN or promote the proliferation of observer entities with special rights and privileges.

The main compromises between the two positions would have been as follows:

**A. Speaking Order in the General Debate and at Plenary**

The proposed compromise amendment in the Annex (replacing paragraphs (a) and (b) with a new paragraph (a)) would seek to achieve the following goals:

1. Maintain the priority of Member States and the intergovernmental nature of the United Nations by establishing the EU Observer’s speaking privileges as limited to “after the last Member State inscribed on the list”;
2. Allow for the possibility of the EU Observer moving up the list of speakers, providing (i) an EU Member State is otherwise inscribed on the list; and (ii) that EU Member State is willing to “swap” places with the EU Observer (*i.e. the EU Member State that swaps will now speak last*)

In practice, every list of speakers would initially place the EU Observer after all UN Member States. The EU Observer could only “move up” by swapping places with an EU Member State that is placed higher on the list. The EU Observer would then speak in the spot vacated by the EU Member State, and that EU Member State would move to “last” place on the list of speakers.

Such a mechanism would not tread so heavily on international law and the Charter, in that the EU is still slotted by law as speaking after Member States. It instead constitutes a revision of procedure and protocol, in that normally, only equal levels can swap (president for president, prime minister for prime minister).

That revision would be limited to a trade off between an EU Member State and the EU Observer for a change in speaking slot. Consequently, only the speaking order of EU Member States’ would be adversely affected by the introduction of the EU Observer, as opposed to asking the entire UN membership to accommodate the “intrusion” of an observer entity.

 The Lisbon Treaty mandates deference of EU Member States to the new EU entity, but the wider UN membership is not similarly obligated.

**B. Making proposals and submitting amendments**

For the reasons already stated, CARICOM considered that amendments and proposals should continue to be submitted by the individual Member States of the EU in accordance with rules of procedure of the General Assembly.

The EU Representatives have claimed that they are merely seeking the right to make “oral and/or informal proposals and amendments.” However, the privilege they seek in draft resolution L.64 goes well beyond that; the resolution simply says “permitted to make proposals and submit amendments.” According to the Rules of Procedure [Rule 78 [129]], “Proposals and amendments shall normally be submitted *IN WRITING* to the Secretary-General. . .” As such, without further qualification, the privilege sought in the resolution is the privilege to submit oral amendments and proposals, and thus spur voting thereon. Non-state observers who themselves lack the right to vote should not be able to cause Member States to vote.

**C. Points of Order**

CARICOM maintained its position on the point of order and continued to call for its deletion.

**D. The Right of Reply**

In addition to the arguments put forward under the initial proposal, CARICOM considered that advancing a right of reply would be legally and procedurally inconsistent with the EU’s own resolution, as drafted.

First, Operative Paragraph 1 of the current draft resolution “*Reaffirms* that the General Assembly is an intergovernmental body **whose membership is limited to States which are members of the United Nations**.” (emphasis added).

The current draft resolution then goes on to say, in the “chapeau” of the Annex, that the rights sought by the EU Observer are “in accordance with this resolution.”

Thus, in reaffirming that the Membership of the UN is limited to states, the non state EU Observer cannot simultaneously claim the right of reply. Such a position would be in obvious conflict with the Rules of Procedure of the General Assembly, which states:

*Closing of list of speakers, right of reply*

**Rule 73 [115]**

During the course of a debate, the President may announce the list of speakers and, with the consent of the General Assembly, declare the list closed. He may, however, accord the right of reply to any ***member*** if a speech delivered after he has declared the list closed makes this desirable. (emphasis added).

Since the Rules of Procedure limit the right of reply to members, and the EU wishes their resolution to be considered in accordance with the principle that members have to be “States which are members of the United Nations,” then the EU Observer cannot claim the right of reply.

**III. CARICOM Proposed Amendments of 11 April 2011 – ( See APPENDIX III)**

After an extensive discussion with the EU held on 11 April 2011, CARICOM and the EU discussed a possible package that would allow for the EU Observer to presents positions of the EU and its Member States as agreed by them. Its inscription would be among the Member States of the major groups for purposes of the work of the General Assembly and other meetings convened under the auspices of the United Nations. In the case of the General Debate, its inscription would be consistent with the practice of participating observers (Palestine and Holy See), having regard for level of representation and the priority of Member States.

These concessions would be balanced by limitations on the manner in which the EU Observer would be able to engage with Member States in the context of the negotiating process so as to preserve the principles of the Charter relating to the sovereign equality of Member States and the intergovernmental nature of the General Assembly. The proposed limitations thus submitted are informed by the foregoing arguments on the privileges relating to proposals and amendments, points of order, and the right of reply. In this regard, the EU Observer would be limited to making oral presentations of proposals and amendments, and would be proscribed from making motions as to procedures. The EU Observer would not be granted the privilege to make points of order. The EU Observer would be limited to rights of reply on EU positions, the exercise of which would also be constrained in terms of the length of time the EU Observer would be able to speak in response to a matter. The EU Observer would not be able to exercise the right of reply in the General Debate or any high level meeting or summit convened under the auspices of the United Nations. Finally the EU Observer would not be able to co sponsor resolutions or decisions.

On 13 April, the CARICOM proposals were rejected.

**APPENDIX I (9 March, 2011)**

*The General Assembly*

*Bearing in mind* the role and authority of the General Assembly as a principal organ of the United Nations and the importance of its effectiveness and efficiency in fulfilling its functions under the Charter,

*Recognizing* that the current interdependent international environment requires the strengthening of the multilateral system in accordance with the purposes and principles of the United Nations and the principles of international law,

*Recognizing* further the importance of cooperation between the United Nations and regional organizations, **as well as the benefits to the United Nations of such cooperation,** [CARICOM proposed amendment]

*Acknowledging* that it is for each regional organization to define the modalities of its external representation,

***Recalling* its resolution 3208 (XXIX) of 11 October 1974, by which it granted observer status to the European Economic Community, and in this regard acknowledging its historical cooperation with the United Nations,** [CARICOM proposed amendment]

***Recalling* that, by virtue of the Treaty of Lisbon, the European Union has replaced the European Community,** [CARICOM proposed amendment]

***Acknowledging* that consistent with the relevant legal provisions, the European Union has succeeded the European Community as a party to many instruments concluded under the auspices of the United Nations, and is an observer or participant in several specialized agencies and United Nations bodies,** [CARICOM proposed amendment]

***Noting* that the Member States of the European Union have agreed by the Treaty of Lisbon that the institutional representatives of the European Union, namely** the President of the European Council, the High Representative of the European Union for Foreign Affairs and Security Policy, the European Commission and European Union delegations, **shall exercise certain competencies on their behalf**, [CARICOM proposed amendment]

***Acknowledging* thus that the Member States of the European Union now desire to confer the functions of spokespersonship, previously performed by the European Union rotating presidency in the United Nations, to the representatives of the European Union Observer, in order to enable those representatives to speak on behalf of the Member States of the European Union,** [CARICOM proposed amendment]

***Noting* that the Member States of the European Union** reaffirm *inter alia* **their** commitment to the purposes and the principles of the Charter of the United Nations and to the promotion of multilateral solutions to common problems, in particular in the framework of the United Nations, [CARICOM proposed amendment]

1. **Reaffirms the intergovernmental nature of the United Nations.** [CARICOM proposed amendment]
2. Decides to adopt the modalities set out in the Annex **to allow the representatives of the European Union Observer acting on behalf of the Member States of the European Union to participate in the [plenary Meetings of] [in the work of ]** **the General Assembly in order to present the common positions of the Member States of the European Union in accordance with the established practice of the General Assembly in conferring rights and privileges to Observers.** [CARICOM proposed amendment]
3. Recognizes that following a request on behalf of a regional organization which has observer status at the General Assembly and whose Member States have agreed arrangements that allow these representatives to speak on behalf of the organization and its Member States, the General Assembly may adopt modalities, similar to those set out in the present resolution, for the participation of that regional organization’s representatives in the work of the General Assembly. *The CARICOM Member States express their concern for the proliferation of regional organizations which could diminish the role of Member States in intergovernmental negotiations. They would suggest however that since this paragraph acknowledges the authority of the General Assembly to adopt modalities to address the participation of regional organizations, it may be moved to the preamble.*
4. Requests the Secretary-General to inform the General Assembly, within the current session, of the implementation of the modalities set out in the Annex to this resolution.

**Annex**

In accordance with the present resolution, the representatives of the European Union shall be:

1. **invited to participate in the general debate and to speak in the formal Meetings of the General Assembly in order to present the common positions of the European Union and its Member States as agreed by them,** [CARICOM proposed amendment]
2. **Without prejudice to the priority of Member States, the European Union shall have the right of inscription on the list of speakers under agenda items at any plenary Meeting of the General Assembly, after the last Member State inscribed on the list;** [CARICOM proposed amendment]

(c) permitted to have documents circulated; [CARICOM proposed amendment]

The representatives of the European Union shall be afforded seating arrangements among observers which are adequate for the implementation of the above modalities.

**APPENDIX II (7 April, 2011)**

***Participation of the European Union in the work of the United Nations***

*The General Assembly*,

*Bearing in mind* the role and authority of the General Assembly as a principal organ of the United Nations and the importance of its effectiveness and efficiency in fulfilling its functions under the Charter of the United Nations,

*Recognizing* that the current interdependent international environment requires the strengthening of the multilateral system in accordance with the purposes and principles of the United Nations and the principles of international law,

*Recognizing also* the importance of cooperation between the United Nations and regional organizations, as well as the benefits to the United Nations of such cooperation,

*Acknowledging* that it is for each regional organization to define the modalities of its external representation,

*Recalling* its resolution 3208 (XXIX) of 11 October 1974, by which it granted observer status to the European Economic Community,

*Recalling also* that, consistent with the relevant legal provisions, the European Union has replaced the European Community and that the European Union is a party to many instruments concluded under the auspices of the United Nations and is an observer or participant in several specialized agencies and United Nations bodies,

*Noting* that the States members of the European Union have entrusted the external representation of the European Union previously performed by the representatives of the member State holding the rotating Presidency of the Council of the European Union to the following institutional representatives: the President of the European Council, the High Representative of the Union for Foreign Affairs and Security Policy, the European Commission and the European Union delegations, **which is seeking to assume the role of acting on behalf of the European Union at the United Nations**, [CARICOM proposed amendment]

1. *Reaffirms* that the General Assembly is an intergovernmental body whose membership is limited to States which are Members of the United Nations;

2. *Decides* to adopt the modalities set out in the annex to the present resolution for the participation of the representatives of the European Union, in its capacity as observer, in the sessions and work of the General Assembly and its committees and working groups, in international meetings and conferences convened under the auspices of the Assembly and in United Nations conferences;

3. *Recognizes* that, following a request on behalf of a regional organization which has observer status in the General Assembly and whose member States have agreed arrangements that allow that organization’s representatives to speak on behalf of the organization and its member States, the Assembly may adopt modalities for the participation of that regional organization’s representatives in the work of the Assembly, such as those set out in the annex to the present resolution;

4. *Requests* the Secretary-General to inform the General Assembly at its sixty-fifth session about the implementation of the modalities set out in the annex to the present resolution.

**Annex**

**Participation of the European Union in the work of the United Nations**

**In accordance with the present resolution, and in order to present positions of the European Union and its member States as agreed by them:**

**(a) Without prejudice to the priority of Member States, the representatives of the European Union shall be invited to participate in the General Debate of the General Assembly or any plenary meeting of the General Assembly, after the last Member State inscribed on the speaker’s list. The representatives of the European Union may be permitted to exchange assigned slots on the list of speakers with any individual Member State of the European Union otherwise inscribed to speak. [CARICOM proposed amendment]**

**(b) delete** [CARICOM proposed amendment]

(c) Permitted to have its communications relating to the sessions and work of the General Assembly and to the sessions and work of all international meetings and conferences convened under the auspices of the Assembly and of United Nations conferences circulated directly, and without intermediary, as documents of the Assembly, meeting or conference;

(d) Permitted to make proposals and submit amendments **through its Member States**; [CARICOM proposed amendment]

**(e) delete** [CARICOM proposed amendment]

**(f) delete** [CARICOM proposed amendment]

The representatives of the European Union shall be ensured seating among the observers.

The representatives of the European Union shall not have the right to vote nor to put forward candidates.

A precursory explanation or recall of the present resolution will be made only once by the President of the General Assembly at the start of each session.

**APPENDIX III (11 April, 2011)**

**Participation of the European Union in the work of the United Nations**

*The General Assembly*,

*Bearing in mind* the role and authority of the General Assembly as a principal organ of the United Nations and the importance of its effectiveness and efficiency in fulfilling its functions under the Charter of the United Nations,

*Recognizing* that the current interdependent international environment requires the strengthening of the multilateral system in accordance with the purposes and principles of the United Nations and the principles of international law,

*Recognizing also* the importance of cooperation between the United Nations and regional organizations, as well as the benefits to the United Nations of such cooperation,

*Acknowledging* that it is for each regional organization to define the modalities of its external representation,

*Recalling* its resolution 3208 (XXIX) of 11 October 1974, by which it granted observer status to the European Economic Community,

*Recalling also* that, consistent with the relevant legal provisions, the European Union has replaced the European Community and that the European Union is a party to many instruments concluded under the auspices of the United Nations and is an observer or participant in several specialized agencies and United Nations bodies,

*Noting* that the States members of the European Union have entrusted the external representation of the European Union previously performed by the representatives of the member State holding the rotating Presidency of the Council of the European Union to the following institutional representatives: the President of the European Council, the High Representative of the Union for Foreign Affairs and Security Policy, the European Commission and the European Union delegations, which have assumedthe role of acting on behalf of the European Union in the exercise of the competences conferred by its Member States,

1. *Reaffirms* that the General Assembly is an intergovernmental body whose membership is limited to States which are Members of the United Nations;

2. *Decides* to adopt the modalities set out in the annex to the present resolution for the participation of the representatives of the European Union, in its capacity as observer, in the sessions and work of the General Assembly and its committees and working groups, in international meetings and conferences convened under the auspices of the Assembly and in United Nations conferences;

3. *Recognizes* that, following a request on behalf of a regional organization which has observer status in the General Assembly and whose member States have agreed arrangements that allow that organization’s representatives to speak on behalf of the organization and its member States, the Assembly may adopt modalities for the participation of that regional organization’s representatives in the work of the Assembly, such as those set out in the annex to the present resolution;

4. *Requests* the Secretary-General to inform the General Assembly at its sixty-fifth session about the implementation of the modalities set out in the annex to the present resolution.

**Annex**

**Participation of the European Union in the work of the United Nations**

In accordance with the present resolution, the representatives of the European Union, in order to present positions of the European Union and its member States as agreed by them, shall be:

(a) Allowed to be inscribed on the speaker’s list **among**representatives of major groups in order to make interventions;

(b) Invitedto participate in the General Debate of the General Assembly, taking into account **the priority of Member States**, the practice of participating observers, **and the level of representation**; [CARICOM proposed amendment]

(c) Permitted to have its communications relating to the sessions and work of the General Assembly and to the sessions and work of all international meetings and conferences convened under the auspices of the Assembly and of United Nations conferences circulated directly, and without intermediary, as documents of the Assembly, meeting or conference;

(d) Permitted to make proposals and submit amendments **orally. Such proposals and amendments shall be put to a vote only at the request of a Member State. The representatives of the European Union shall not be permitted to make motions as to procedure.** [CARICOM proposed amendment]

**(e) delete**

(f) Allowed to exercise the right of reply **regarding positions of the European Union. Such right of reply shall be restricted to one intervention per item and limited to five minutes, and shall not be exercised in the context of the General Debate of the General Assembly or any other high level conference or summit convened under the auspices of the United Nations.** [CARICOM proposed amendment]

The representatives of the European Union shall be ensured seating among the observers.

The representatives of the European Union shall not have the right to vote nor to put forward candidates **nor to cosponsor resolutions or decisions**.

A precursory explanation or recall of the present resolution will be made only once by the President of the General Assembly at the start of each session.

1. Although Rule 71 [113] of the Rules of Procedure makes a distinction between points of order, which “shall be immediately decided by the President in accordance with the rules of procedure”, and procedural motions (e.g. Adjournment of debate), Annex IV of the Rules of Procedure notes that “in established United Nations practice, a representative intending to submit a procedural motion . . . often rises to ‘a point of order’ as a means of obtaining the floor.” (¶79). The EU resolution is unclear on whether the point of order contemplated would allow a non-state to move the adjournment of an ongoing debate among states, or otherwise raise points of order that will affect the right of member states to speak and otherwise participate in the work of the General Assembly. [↑](#footnote-ref-1)