

THE CARIBBEAN COURT OF JUSTICE AS A REGIONAL COURT

Presented by

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The Caribbean Court of Justice (which in English uses the same acronym CCJ as *La Corte Centroamericana de Justicia*) was inaugurated in April 2005. It is an important adjunct to the CARICOM Single Market, which was initially implemented on January 1, 2006 with six members and on July 3, 2006 added six more member countries.

These two institutions owe their existence to the movement for Caribbean economic integration. Caribbean integration is a process which began in response to fundamental changes in the world economy i.e. globalization of production and finance and liberalization of international trade in goods and services. Mega trade blocs have emerged such as the EU and NAFTA. Regional or sub-regional groups have come together. Examples of these are: the Central American Common Market, the Andean Group, the Association of South-East Asian Nations (ASEAN), the Economic Community of West African States (ECOWAS), MERCOSUR (Argentina, Brazil, Paraguay and Uruguay), COMESA (the Common Market for Eastern and Southern Africa) and of course CARICOM.

Background

On July 4, 1973 some of the former Caribbean colonies of Great Britain signed the Treaty of Chaguaramas. The aim was to achieve closer co-operation, economic

integration and co-ordination of foreign and external trade policies. The 1973 Treaty established the Caribbean Community and Common Market (CARICOM), which was itself the end product of a Caribbean free trade area known as CARIFTA.

By 2001 CARICOM included three continental countries: Guyana and Suriname in South America and Belize in Central America. Suriname (a member since 1995) is Dutch-speaking and has a civil law legal system. Guyana, which also at one time had a Dutch colonial past, still applies Roman-Dutch law in the law of real property. Haiti, which became a member of CARICOM in 2002, is French-speaking and has a civil law legal system.

In July 2001 in Nassau, Bahamas, the Treaty of Chaguaramas was amended by nine protocols (hereinafter referred to as “the Revised Treaty”) to give effect to CARICOM’s move to economic union in the form of a single market and economy. This is referred to as the CARICOM Single Market and Economy or CSME.

The Caribbean Court of Justice

By article 188 of the Revised Treaty disputes concerning the interpretation and application of the Revised Treaty may be settled voluntarily in any of the following ways: good offices, mediation, consultations, conciliation, arbitration. The sixth method of disputes settlement is the Caribbean Court of Justice. Although there is one overarching method of disputes settlement i.e. the Conference of Heads of Government in article 12(8), such settlement would have no legal or precedential effect on third parties.

The Caribbean Court of Justice (“the Court”) was established by an Agreement signed on February 14, 2001. The Court was established as a regional court by sovereign independent states with a dual function: an appellate jurisdiction and an original jurisdiction. In its appellate function - the Court is the final court of appeal in respect of all civil, criminal and constitutional matters for all Caricom countries which cater for this in their domestic law. For the former colonies of Great Britain, this involves amending their constitutions so as to substitute the Court for the Judicial Committee of the Privy Council in London as their final court of appeal. Only two countries (Barbados and Guyana) have so far made the necessary constitutional changes.

In its original jurisdiction the Court is a regional court applying rules of international law in the interpretation and application of the Revised Treaty. In its original jurisdiction the court performs three functions:

- (1) The Court has responsibility for determining how the provisions of the Revised Treaty are to be interpreted and applied. It is the interpreter of the rules of the CSME.

- (2) The Court alone provides the means by which the rights and freedoms conferred and the corresponding obligations imposed by the Revised Treaty will be vindicated and enforced.

- (3) The court alone provides a compulsory method of resolving with finality disputes between participants in the CSME.

The Court also has exclusive jurisdiction to deliver advisory opinions concerning the interpretation and application of the Revised Treaty, but only at the instance of a Contracting Party or the Community.

National courts are obligated to refer to the Court any question concerning the interpretation and application of the Revised Treaty, if the resolution of that question is necessary to enable the municipal judge to deliver judgment: Article 214 of the Revised Treaty and Article XIV of the Agreement. The main purpose of this provision is to ensure consistency and uniformity in the interpretation and application of the Revised Treaty.

Finally the court has a limited jurisdiction to review a sanction imposed by the Competition Commission for anti-competitive conduct, to review a negative clearance ruling obtained from the Competition Commission by fraud or improper means and to enforce a peremptory order of the Competition Commission where the time for compliance has expired.

Access by individuals and private entities

Treaties are agreements between sovereign states in international law. Therefore normally only member states have *locus standi* in respect of matters arising under a treaty. However, by Article XXIV of the Agreement nationals of a Contracting Party may seek special leave to pursue a claim in the Court where they can establish:

- (1) that the Revised Treaty intended that a right conferred on a Contracting Party should enure to the benefit of the individual directly and the individual or entity has suffered prejudice in respect of the enjoyment of that benefit.
- (2) that the relevant Contracting Party has omitted or declined to espouse the claim or has consented to a private party action.
- (3) that it is in the interests of justice for the private party to pursue or espouse the claim.

This provision leaves ample scope for judicial interpretation. Indeed it is significant that in the European Economic Community two of the most important decisions of the ECJ were handed down in matters in which the plaintiffs were individuals: see *Van Gend en Loos* [1963] ECR 1 and *Costa v. ENEL* [1964] ECR 585

The CCJ as a regional court

As a regional court designed to promote economic integration, the Court is a supranational court. On the other hand, it has been asserted time and time again that CARICOM is an association of independent sovereign states. There is no equivalent of the European Commission, which can make decisions on behalf of member states. The CARICOM Secretariat has no power to implement CARICOM decisions or to bind member states. However, at a recent meeting in July, 2007 the Heads of Government of CARICOM approved a proposal for the creation of a CARICOM Commission “*with Executive Authority in the implementation of decisions in certain defined areas*”.

Notwithstanding this recent development the history of the ECJ suggests that a supranational court in the context of economic integration has an important role to play in welding together the disparate sovereignties in an economic union. Much of the cohesion of the European Union today has been attributed to the judicial decisions in *Case 26/62 Van Gend En Loos [1963] ECR I* and *Case 6/64 Costa v. ENEL [1964] ECR 585* which established (1) that the EC Treaty had created “*a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals*” (the doctrine of direct effect); and (2) the precedence of Community law if in conflict with domestic law . It is interesting to note that the municipal legislation in the Caricom Member States has incorporated the Revised Treaty and appears to have given it precedence over other laws: see e.g sections 3 and 8 of the Caribbean Community Act

2005 of Trinidad and Tobago.

The Court will have a role to play in protecting the guarantee given to the Contracting Parties and their nationals that the CARICOM Single Market will accord them free movement of goods, services, capital and the right of establishment of businesses. For example, article 46 of the Revised Treaty grants a right to seek employment to certain categories of skilled Community nationals. Much remains to be done, however, with regard to rights contingent on free movement, such as access to education, health services and other social services. It is expected that many such issues of access to economic and social benefits will come before the Court.

Independence of the Court

Much effort has been expended in ensuring the independence of the Court.

By article V of the Agreement the Judges of the Court are appointed by the Regional Judicial and Legal Services Commission (RJLSC). No member of that body is a politician. By paragraph 12 of Article V members of the Commission must “*neither seek nor receive instructions from any body or person external to the Commission.*”

The President of the Court is appointed by the CARICOM Heads of Government, but they may only appoint someone recommended for appointment by the RJLSC (the Regional Judicial and Legal Services Commission).

The President and the Judges enjoy security of tenure and cannot be removed from office before they reach the retirement age of 72 unless a tribunal comprising three persons, who have held high judicial office, advise that they ought to be removed because of inability to perform their functions or for misbehaviour.

The funding of the Court is also innovative. A Trust Fund was created to provide funding for the Court in perpetuity. Rather than have the Court dependent for its financing on annual subventions from the participating countries, a loan of **US\$100,000,000** was raised by the Caribbean Development Bank on the international market, on terms that the money to repay the loan with interest would be provided in agreed proportions by the participating countries. The capital sum of US\$100,000,000 was then placed on trust in the hands of an independent Board of Trustees who have the responsibility of investing the Fund and providing the Court from time to time with the money needed for its biennial budget. This arrangement, which as far as I am aware, has never been adopted for any other court or tribunal in the world, serves to ensure the administrative autonomy of the Court and hopefully, its longevity.

Regional trade agreements and non-trade issues

Regional groupings should be sensitive to the economic, social and environmental consequences of the exercise of the rights and freedoms which are granted to members.

Take the freedom of movement of persons. Regional courts must pool their experiences in an effort to prevent individuals who have moved within the regional sub-grouping from being treated unfavourably in relation to health, housing and other contingent social and economic rights.

Another non-trade issue that should engage the attention of regional courts is the applicability of human rights in trade courts. The Revised Treaty in its preamble merely recalls that the Charter of Civil Society adopted by the CARICOM Conference of Heads of Government in February 1997 reaffirmed the human rights of the peoples of the region. The Charter was a non-binding declaration of the Heads. It is now proposed that legal status be granted to the CARICOM Charter of Civil Society.

While this approach of listing human rights in a formal document has been criticized as not necessarily leading to clarity, a list such as that contained in the European Charter of Fundamental Rights serves to remind one that the scope of fundamental rights has expanded. For example in the European Charter the right to human dignity includes a prohibition on cloning or eugenics.

CONCLUSION

1. The Caribbean Court of Justice is an unique court of dual jurisdiction. It is innovative in the way it has made the appointment of judges and the President of the Court free from political influence. The financing of the Court also provides a model for other regional courts.

2. The Court serves countries with both civil law and common law traditions. In this regard one expects to see a measure of cross-fertilization in the solutions arrived at by the Court.

3. There is room for judicial interpretation in areas such as the *locus standi* of private citizens before the Court and contingent social and economic rights and human rights. In this regard the jurisprudence of other regional courts would be of great assistance. Accordingly, regional courts should begin to exchange jurisprudential material. Exchange visits will also enhance the flow of knowledge and experience between regional courts.

4. Regional courts will also be anxious to ensure that within the single economic space of a regional grouping the economic social and human rights of individuals and private entities are not impaired. Adherence to such principles would ensure that regional courts apply the rule of law equitably and fairly.