The Caribbean Court of Justice and the CARICOM Single Market and Economy

The Honourable Mr Justice Rolston Nelson,
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29 July 2005

The CARICOM Single Market and Economy seeks to implement provisions for the removal of trade and professional restrictions. These provisions facilitate the right to establishment businesses, to provide regional services, the free movement of capital and the coordination of economic policies. In the ensuing years, some Caribbean economies, under the auspices of multilateral lending institutions, implemented structural adjustment programmes having at their core, programmes of economic, financial and trade liberalisation that far exceeded their commitments as expressed in the Treaty of Chaguaramas.

Presentation

By

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In preparation for speaking on the Caribbean every speaker should start by consulting that book of wisdom, *"Time for Action - the Report of the West Indian Commission."* (1992).

The West Indian Commission had this vision of the Caribbean Court of Justice ("CCJ") at page 500:

> *"But there is now another reason for establishing a court of high authority in the Region, and that is the process of integration itself, Integration in its broadest economic sense - involving a Single CARICOM Market, monetary union, the movement of capital and labour and goods, and functional cooperation in a multiplicity of fields - must have the underpinning of Community law. Integration rests on rights and duties; it requires the support of the rule of law applied regionally and uniformly. A CARICOM Supreme Court interpreting the* Treaty of Chaguaramas, *resolving disputes arising under it, including disputes between Governments parties to the Treaty, declaring and enforcing Community law, interpreting the Charter of Civil Society - all by way of the exercise of an original jurisdiction - is absolutely*

essential to the integration process. It represents in our recommendations one of the pillars of the CARICOM structures of unity.

Essentially, our recommendation is that the Court should have an original jurisdiction in matters arising under the Treaty of Chaguaramas (as revised) and that any CARICOM citizen (individual or corporate) and any Government of a member State of the Community or the CARICOM Commission itself, should have the competence to apply for a ruling of the Court in a matter arising under the Treaty. This will include, perhaps prominently so, matters in dispute between Member States in relation to obligations under the Treaty, particularly under the Single Market régime; but it will also provide for the clarification of Community law as it develops pursuant to decisions taken within the CARICOM process. As already indicated, we envisage that that original jurisdiction should also be exercisable to a limited degree in the context of the CARICOM Charter of Civil Society which we have separately recommended."

Background

The Treaty of Chaguaramas established the Caribbean Community and Common Market and was signed by the Contracting States on July 4, 1973.

On February 14, 2001 in Barbados the Contracting States signed an agreement establishing the Caribbean Court of Justice ("the Agreement") defining its jurisdiction in terms of an original

jurisdiction to interpret the 1973 Treaty and an appellate jurisdiction as a final court of appeal in replacement of the Privy Council.

On July 5, 2001 in Nassau, Bahamas the 1973 Treaty of Chaguaramas was amended by nine protocols and is hereinafter referred to as "the Revised Treaty". The Revised Treaty defines "court" as the Caribbean Court of Justice ("CCJ"), as the Agreement had earlier anticipated. Disputes resolution was therefore allocated to the Caribbean Court of Justice in its original jurisdiction.

The object of the Revised Treaty is economic integration, but economic integration comes in different shapes and sizes. There are at least five types of economic integration formulae. These are (a) a free trade area; (b) a customs union (c) a common market (d) an economic union and (e) political union.

The Revised Treaty clearly does not envisage political union; and it is well known that political union is anathema to several of the participating countries.

Some of the provisions of the Revised Treaty suggest that there is a project of an economic union. The Council for Technical and Economic Development (COTED) and the Council for Finance and Planning (COFAP) are charged with adopting appropriate measures for the abolition of exchange control in the Community, and free convertibility of the currencies of the Member States - (Article 44 (c)); the establishment of an integrated capital market in the Community - (Article 44 (d)); convergence of macro-economic performance and policies through the co-ordination and harmonization of monetary and fiscal policies, including, in particular, policies relating to interest rates, exchange rates, tax structures and national budgetary deficits.

Article 226 paragraph 3 of the Revised Treaty states that : *"The Community Council shall take appropriate measures to co-ordinate applicable legislation, regulations and administrative practices established in accordance with Article 44."*

The Revised Treaty contemplates a progression towards economic union; at the moment it certainly has not achieved anything close to economic union. The goal is the attainment of what one might call an "internal market".

The Caricom Single Market and Economy ("CSME") is a common market aspiring to be a single market.

CARICOM and the CSME at this stage would be appropriately described in the words of the European Court of Justice ("ECJ") Case No. 15 of 1981 ***Gaston Schul*** [1982] ECR 1409:

> *"The concept of the common market involves the elimination of all obstacles to intra community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market."*

The CSME is more than a free trade area, which Carifta was, and it is more than a customs union which was what the Treaty of Chaguaramas in its unrevised state aimed at.

The CSME is in my view an internal market which aims at customs union, which attempts to introduce economic integration in a negative way by means of market integration through

deregulation of national laws, and positive integration in terms of voluntary harmonization of certain laws, and by removing obstacles to the free movement of goods, i.e., the physical barriers, the technical barriers and the fiscal barriers, the free movement of persons and of capital, the free movement of services and freedom of establishment. The role of the CCJ is to ensure smooth sailing into the haven of the single internal market and economy. The CCJ will provide the underpinning of Community law to the economic integration process that is the CSME.

Foundations of the CCJ

There are two constituent documents of the CCJ: The Agreement establishing the Caribbean Court of Justice dated February 14, 2001 and the Revised Treaty of Chaguaramas dated July 5, 2001.

Minor adjustments need to be effected to the superstructure so as to strengthen it. The nuts and bolts need to be tightened. I illustrate this point by three examples.

In Article 1 of the Revised Treaty "Commission" is defined as "the Competition Commission established by Article 167". The reference should be to Article 171.

In Article 1 of the Revised Treaty "dispute" is defined as "a dispute within the meaning of Article 183". The reference should be to Article 187.

In Article XVIII paragraph 2 the meaning of "convention to which Member States and persons other than those concerned in the case are parties" is not clear.

Dissonance between the Revised Treaty and the Agreement

Both Article 216 of the Revised Treaty and Article XVI of the Agreement prescribe that the Member States or Contracting Parties agree that they recognize the original jurisdiction of the CCJ as *"compulsory, ipso facto and without special agreement"*. The proposition here seems to be that the original jurisdiction of the Court is immediately binding in international law without reference to any requirement of municipal law.

If the latter statement is correct, there should have been no need for a second instrument to give effect to the establishment of the CCJ in international law or to repeat the provisions of the principal constituent document, the Revised Treaty.

The parent document is the Revised Treaty which merely amends the Treaty of Chaguaramas of July 4, 1973. Articles 211 to 222 of the Revised Treaty set out the jurisdiction of the Court with no further introduction than a definition of "Court" in Article I as *"the Caribbean Court of Justice established by the Agreement"*.

The actual creation of the Court is achieved by Article III of the Agreement. By Article XII of the Agreement the jurisdiction of the Court in contentious proceedings is set out in terms nearly identical to Article 216 of the Revised Treaty. The Agreement then refers to the non-contentious jurisdiction of the Court in relation to advisory opinions and referrals from national courts and tribunals.

However, owing to an oversight the Agreement says nothing about three elements of the Court's jurisdiction:

(a) to review a penalty or remedy imposed by the Competition Commission for anti-competitive conduct pursuant to Article 175 para. 12 (b) to make an order compelling a defendant to remove the effects of anti-competitive conduct where the defendant has failed to comply with an order of the Competition Commission and has not sought an extension of time within which to comply pursuant to Article 175 para.11[1].

(c) to review a decision of the Competition Commission declaring certain business conduct as lawful where that decision was obtained by deceit or improper means: Article 180 para. 3

On the other hand the Revised Treaty does not deal with the important question of how its orders are to be enforced; whereas Article XXVI of the Agreement treats with enforcement of judgments.

A hydra-headed jurisdiction

The jurisdiction of the CCJ is embodied in the Agreement and the Revised Treaty, as indicated above. The Agreement, however, was designed to add a new jurisdiction, an appellate jurisdiction, to the CCJ. The Revised Treaty makes no mention of a domestic appellate jurisdiction.

Before describing the original jurisdiction of the CCJ it is important to state that adjudication by the CCJ is only one of six modes of disputes settlement. The other five methods provided for are: good offices, mediation, consultations, conciliation and arbitration.

[1] By Article 174 para. 6 Member State must pass legislation to ensure the enforcement of orders of the Competition Comission. Quaere whether Article 175 para. 11 was necessary.

The original jurisdiction of the CCJ is set out in part in Article 211 of the Revised Treaty and Article XII of the Agreement. Article 211 provides as follows:

"ARTCLE 211 Jurisdiction of the Court in Contentious Proceedings

1. Subject to this Treaty, the Court shall have compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Treaty, including:

(a) disputes between the Member States parties to the Agreement;

(b) disputes between the Member States parties to the Agreement and the Community;

(c) referrals from national courts of the Member States parties to the Agreement;

(d) applications by persons in accordance with Article 222, concerning the interpretation and application of this Treaty.

2. For the purpose of this Chapter, "national courts" includes the Eastern Caribbean Supreme Court."

In the Revised Treaty the Court's jurisdiction is restricted by the double reference to *"interpretation and application"* but extends to disputes of the type illustrated by (a) to (d).

Article XII of the Agreement contains only one reference to "interpretation and application" but is confined on its face only to disputes of types (a) to (d) "concerning the interpretation and application of the Treaty". It seems that the wording of the Revised Treaty may give a much wider

jurisdiction to the CCJ than the Agreement. That is a question the CCJ must resolve, but it is possible that paragraph (c) of the Agreement which extends to referrals from national courts or tribunals may be regarded as equating jurisdiction under the Agreement with jurisdiction under the Revised Treaty. Indeed Article 214 of the Revised Treaty (referral to the Court), if read with Article 211 para. 1 (c) (referral from national courts) might be considered as covering referrals from national courts and tribunals. A There are three other areas of jurisdiction.

(1) the paper jurisdiction relating to advisory opinions: Article 212 and Article XIII of the Agreement.

(2) the referrals from national courts on any matter concerning the interpretation and application of the Revised Treaty, if the resolution of that matter is necessary to enable the municipal judge to deliver judgment:
Article 214 and Article XIV of the Agreement.

(3) the limited Competition Commission jurisdiction described above: Article 175 paras. 11 and 12; Article 180 para. 3.

Some preliminary problems

(1) <u>The applicable law</u>

Given that Suriname, a civil law country, is a Contracting Party one of the fundamental questions for the CCJ is what law should it apply. Article 217 of the Revised Treaty and Article XVII of the Agreement say that *"such rules of international law as may be applicable"* would govern the original jurisdiction.

These provisions also prohibit the CCJ from making an inconclusive finding of non liquet, but permit the Court to decide a case ex aequo et bono if the parties agree.

It is true that the Revised Treaty is a treaty between sovereign states, but it is thought that relations between member states under the treaty will be governed by regional norms applied by the CCJ, which can more properly be described as Community law. In any event neither the Treaty nor the Agreement indicates what law of evidence, or what procedural rules apply or whether the CCJ would develop its own law and procedure. These issues are particularly important because Suriname is the sole civil law country among the Contracting Parties.

(2) Precedent

Another important question arises out of Article 221 of the Revised Treaty and Article XXII of the Agreement (judgment of the court to constitute stare decisis).

Both provisions read as follows:

"Judgments of the Court shall constitute [be] legally binding precedents for parties in proceedings before the Court unless such judgments have been revised in accordance with Article 219 [XX]".

If the intention was to refer to the common law system of precedent, then the focus on the binding effect of judicial decisions on parties is misconceived. The emphasis should have been on the treatment of judicial decisions as binding on other judges or panels of judges.

In the normal case it is the principles of law extracted from the judgment that constitute binding precedent. Since binding precedent has the force of law litigants and non-litigants within the jurisdiction will respect it.

Again, precedent usually operates in a hierarchical court system, higher courts binding lower courts. The CCJ in its original jurisdiction stands alone.

Even if Article 221 means that panels of judges with co-ordinate jurisdiction must follow earlier decisions, the question arises as to whether they can depart from such earlier decisions if on a considered view they were wrong or decided per incuriam. However, the Revised Treaty and the Agreement provide no such escape route.

(3) Locus standi of private entities

The Revised Treaty is an agreement between sovereign states in international law. Therefore, normally one would expect only member states would enjoy locus standi before the Court. However, by Article 222 of the Revised Treaty natural or juridicial *"persons"* of a Contracting Party and by Article XXIV of the Agreement *"nationals"* of a Contracting party may seek special leave to appear before the CCJ where they can establish:

(a) that the Revised Treaty intended to confer on a Community national a direct right or benefit and the person has been prejudiced in his or her enjoyment of that right or benefit and

(b) the relevant Member State has omitted or declined to espouse the claim or has consented to the private party action and

(c) the Court finds that it is in the interests of justice for the private party to espouse the claim.

If the proposed defendant is entitled to appear and be heard at the stage of the application for special leave there could well be considerable argument on the issues of direct right or benefit and of factual prejudice.

It is hoped that the conditions for obtaining special leave will not discourage private entities from approaching the Court. In fact one of the key roles of the CCJ is to provide judicial protection against Member States and the Community. The subjects of the new regional order are not only Member States but their nationals and the Community. Therefore, one would expect that the Court would lean in favour of locus standi for private entities[2].

Another issue to be resolved is whether private entities entitled to apply for special leave must be *"persons, natural or juridical of a Contracting Party"* (a formula that would include residents) as the Revised Treaty stipulates, or *"nationals of a Contracting Party"* as the Agreement prescribes.

[2] Article 175 para. 12 gives locus to an aggrieved party to a determination of the Competition Commission. That party would usually be an enterprise or private entity. Does the special leave procedure apply?

On the other hand, it would seem possible to bypass the special leave procedure by filing an action in the municipal courts, which will be obliged to refer the issue to the CCJ: Article 214 (referral to the Court).

Article XVIII of the Agreement entitled *"a person"* with a substantial interest *"of a legal nature"* to intervene in existing proceedings thus giving private entities locus standi as defendants upon less stringent conditions than apply to those seeking locus standi as applicants.

Appeals in the original jurisdiction

Article XI para. 5 of the Agreement provides as follows:

"The decision of a sole judge exercising jurisdiction under paragraph 4 may, on application of a party aggrieved, be reviewed by a panel comprising not more than five judges".

No right of appeal is granted save in the case of a decision of a single judge.

In most cases the CCJ will sit in panels of five judges in the early years. Appeals from such panels are rare. Even if the panels comprise three judges it must be remembered that in most cases other method of disputes settlement are available within the framework of the Revised Treaty. The issues coming to the CCJ would have been thoroughly debated in the CCJ and elsewhere. In providing finality to a dispute the Court would be sharing a characteristic common to trade adjudications: finality and expedition.

If new facts and circumstances come to light litigants are entitled to seek a revision of judgment pursuant to Article 219 of the Revised Treaty and Article XX of the Agreement.

For the reasons outlined I see no need for an appellate division in the original jurisdiction in order to enhance the credibility of the CCJ in its original jurisdiction or otherwise.

Caribbean Community law

In the early stages the development of the jurisprudence of the CCJ will depend on its definition of the relationship between the new regional legal order and the existing municipal law. In exploring this relationship the Court might consider the doctrine of direct effect, a European Community concept, and its applicability in the Caribbean.

In Europe direct effect refers to the principle that relevant treaty law conferring rights on private entities of member States can take effect within national courts even without any municipal implementing legislation.

The normal rule of international law in dualist countries is that international agreements do not of themselves give rise to rights or interests which citizens can make and enforce in national courts, but bind only states at an intergovernmental level. The doctrine of direct effect is an exception to the normal rule.

Unlike the position in Europe, the direct effect of the Revised Treaty in conferring rights on Community nationals does not result in Community rights being invoked or enforced in national courts. This is because the CCJ has compulsory and exclusive jurisdiction to hear and determine matters concerning the interpretation and application of the Revised Treaty: see article 211. National courts have no jurisdiction.

The Revised Treaty does confer rights on Community nationals but not in municipal courts. Those rights are rights in international law. Thus, the CCJ will not have to treat the rights granted by the Revised Treaty as rights which have been granted in municipal law.

Direct effect of Caribbean Community law means that the Revised Treaty has created rights for the enjoyment of Community nationals. Those rights can be vindicated in the CCJ alone.

Direct effect does not in the Caribbean context mean direct effect within the national legal order, but within the *"new legal order of international law"*.

Another way in which private individuals may be said to acquire rights under the Revised Treaty is by compelling a Member State to implement measures which are prescribed in the Revised Treaty. This proposition is by way of analogy to what obtains in the European Community, where a directive requires certain implementing measures, which a Member State fails to put in place.

In case 148/78 ***Ratti*** *[1979] ECR 1629* the Court said at para. 22:

"Consequently a Member State which has not adopted the implementing measures required by the directive in the prescribed periods may not rely as against individuals, on its own failure to perform the obligations which the directive entails".

Direct effect may apply against a Member State but it is not clear whether a private entity or a Member State may sue *"an emanation of the State".*

Included in the category of emanations of the State are whollyowned state-owned companies, such as the National Gas Company, Petrotrin or the Water and Sewerage Authority.

In *Foster v. British Gas [1990] ECR 1 – 3313*, the plaintiffs alleged gender discrimination against British Gas, a nationalized industry with a monopoly. The plaintiffs sought to rely on a 1976 Equal Treatment Directive.

The House of Lords referred to the ECJ the question whether the directive could be invoked against British Gas.

The ECJ held that *"a body whatever, its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals, is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied on".*

It seems that the Revised Treaty did not anticipate the question whether only Member States can be respondents in an application claiming a breach of Community rights. However, *Foster v. British Gas* suggests that state corporations, public authorities and public utilities may be proper respondents to an action in the original jurisdiction.

Community law in the municipal courts

I have pointed out that the rights conferred in the Revised Treaty are not justiciable in the municipal courts, as they are in the European Community. However, there is likely to be some impact on the municipal law.

It must not be forgotten that the Revised Treaty has been incorporated into the law of a number of Member States. Therefore, municipal judges cannot ignore the provisions of the incorporated law when they are asked to interpret other laws. It would seem that national laws would have to be interpreted so as not to conflict with Community law.

In Case 14/83 *Van Colson [1984] ECR 1891* the ECJ treated national courts as organs of the State with a responsibility for fulfillment of Community obligations. The ECJ went on to state:

"It follows that, in applying the national law and in particular the provisions of a national law specifically introduced to implement [a directive], national courts are required to interpret their national law in the light of the wording and the purpose of the Directive…"

The obligation of harmonious interpretation can also be deduced from Article 9 of the Revised Treaty:

"Member States shall take all appropriate measures, whether general or particular, to ensure the carrying out of obligations arising out of this Treaty…"

The principle of harmonious interpretation by national courts was again applied in Case 106/89 *Marleasing v. La Commercial [1990] ECR – 5 4135* where Advocate General Van Gerven stated as follows:-

"The obligation to interpret a provision of national law in conformity with a directive arises whenever the provision in question is to any extent open to interpretation".

In *Marleasing* the principle was applied in a case between individuals and even where the national law existed before the Community legislation.

The ECJ has indicated that the principle is limited so as not to contravene the principles of legal certainty and non-retroactivity of penal liability:
see Case 880/86 *Kolpinghuis Nijmegen [1987] ECR 3969.*

Therefore even though the national courts in the Caricom Member States do not have jurisdiction over matters concerning the Treaty, local laws will have to be interpreted in conformity with the provisions of the Revised Treaty and not so as to conflict with them.

Remedies for breach of Community law

It is apparent from a study of the Revised Treaty that no remedies are prescribed for breach of Community law. The intention no doubt was not to fetter the discretion of the Court in redressing grievances under the Revised Treaty.

There are no provisions in the Revised Treaty equivalent to Articles 164 to 177 of the EC Treaty spelling out the sanctions to be meted our for breach of the EC Treaty. Nor are there provisions such as Article 215 of the EC Treaty which expressly deal with the contractual and non-contractual liability of the European Community.

In Europe, as in the CSME, there was no cause of action in damages for beach of Community law.

Again, one finds recourse to the jurisprudence of the ECJ very fruitful.

In Case C-6&9/90 *Francovich [1991] ECR-I - 5357* the Italian government had failed to implement a Directive on the protection of employees in the event of insolvency. Two employees were owed wages by their employers but because of the failure of the government to implement

the directive they received no compensation. They claimed the government was liable for the wages unpaid because of its failure to implement the Directive.

Although the directive did not satisfy the conditions for making the State directly liable in case of insolvency, the ECJ upheld the claim on the basis that there was State liability for breach of EC law and that compensation was payable for such breach.

In ***Francovich*** state liability for breach of EC law was based on the following grounds:

(1) The EEC Treaty created its own legal system. The subjects of that legal system were not only Member states but also their nationals. The Treaty gave rise to rights expressly granted but indirectly by virtue of obligations the Treaty imposed on individuals, Member States and Community institutions. In other words, state liability was not in any way dependent on the existence of liability at the municipal level, since the breach occurred within an autonomous legal system.

(2) The principle of effectiveness. The ECJ said: *"- the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain compensation when their rights are infringed by breach of Community law for which a Member State can be held responsible".*

(3) Article 5 of the EEC Treaty, which is similar to Article 9 of the Revised Treaty. By that Article Member States are required to take all appropriate measures to ensure fulfilment

of their obligations under Community law. Those obligations were said to include nullifying the unlawful consequences of a breach of Community law.

The ECJ therefore held that the full effectiveness of Community law required that there should be a right to reparation provided that three conditions were satisfied:

(i) The directive should entail a grant of rights to individuals.

(ii) The directive should identify the content of those rights.

(iii) There should exist a causal link between the breach and the loss.

Francovich dealt with State liability for breach of a directive. Likewise State liability exists for breach of the European Treaty: see *Brasserie du Pêcheur/Factortame III*[1996] ECR I -1029.

In *Brasserie du Pêcheur* the ECJ laid down similar conditions to those elaborated for breach of a directive:

(i) the rule of law (the Treaty provision) must have intended to confer rights on individuals.

(ii) the breach must be sufficiently serious.

(iii) there must be a causal link between the breach and the loss.

It is submitted that if the CCJ follows these cases States might well have to pay compensation for breaches of the Revised Treaty.

Enforcement of CCJ orders

The CCJ has no apparatus of its own for enforcing its orders. By contrast the European Community Treaty gives rise to rights and obligations which can be adjudicated upon before national courts.

Article XXVI of the Agreement, which has no equivalent in the Revised Treaty deals with enforcement of orders of the Court.

Article XXVI states:

"The Contracting Parties agree to take all the necessary steps including the enactment of legislation to ensure that:

> *(a) all authorities of a Contracting Party act in aid of the Court and that any judgment, decree, order or sentence of the Court given in the exercise of its jurisdiction shall be enforced by all courts and authorities in any territory of the Contracting Parties as if it were a judgment, decree, order or sentence of a superior court of that Contracting Party…"*

Paragraph (b) of the same Article gives the Court power to subpoena witnesses and documents, to order discovery and to investigate and punish contempt.

In both the appellate and original jurisdictions the CCJ makes orders and transmits them to the registrar of the municipal court (if the Agreement is locally incorporated) for enforcement according to the municipal law.

Problems may arise where the remedy prescribed by the CCJ in its original jurisdiction is not known to the municipal law. For example, the common law concept of contempt of court is not known in Suriname. In such a situation, the Court may well recall its order and seek to fashion an order that suits the local jurisdiction.

Primacy of Community law

In its formative years the CCJ will have to decide whether it will develop a doctrine of the primacy of Community law over municipal law in matters over which the
Revised Treaty gave it jurisdiction.

The European Community in two seminal decisions in 1963 and 1964 developed such a doctrine.

The first case, *Van Gend en Loos [1963] ECR 1,* was principally a case on direct effect. The ECJ emphasized that the Member States had created a new legal order and a new legal system. The judgment states as follows:

"By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit

within limited fields, and have thus created a body of law which binds both their nationals and themselves.

The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity".

The same notion of a new autonomous legal order was echoed in the second case, *Costa v. ENEL [1964] ECR 585.* *Costa v. ENEL* established the principle of the supremacy of European Community law over municipal law. In *Costa v. ENEL* EEC law prevailed over an Italian law which was later in time.

Like the ECJ, I think that one might also say that the Caribbean states have limited their sovereignty in certain limited fields i.e. in respect of Community rights and so created *"a body of law which binds both their nationals and themselves"*. That body of law is called Community law.

The ECJ saw the creation of the new legal order as a *"permanent limitation of their sovereign rights".* Obligations undertaken by the Member States would be contingent if Community law did not take precedence over municipal law.

In *Internationale Handelsgesellschaft [1987] ECR 3969* the judges of the ECJ held that a Community measure or its effect within a Member State could not be challenged on the ground that it ran counter to fundamental rights enunciated in the Constitution or to the constitutional structure of such Member State.

This new autonomous legal order recognizes certain Community rights in Community nationals. In *Thoburn v. Sunderland City Council [2003] QB 151 (CA)* Laws LJ described the European Communities Act 1972 as a constitutional statute, which was not on that account subject to implied repeal. He compared that Act with Magna Carta and the Bill of Rights 1689.

Similarly it is appropriate to describe the Revised Treaty as a constitutional statute; it is also a new source of law; it orbits in a new legal system.

The rights and obligations under the CSME

As regards the Single Market the Revised Treaty provides for the removal of all restrictions on the free movement of goods[3], services[4], capital[5] and the establishment of businesses. These freedoms are to be complemented by what is now a limited freedom of movement of persons[6].

As regards the Single Economy, the Revised Treaty aims at (1) coordination of sectoral economic policies (2) harmonization of incentives (3) harmonization of legislation including company law, intellectual property, commercial arbitration and taxation (4) harmonization of monetary and fiscal policies. Additionally, there is a special régime designed to protect the interests of the less developed countries, disadvantaged sectors, regions and countries: see Articles 47 - 49 and Articles 142 - 167.

[3] Goods - Article 79
[4] Services - Articles 36 and 37
[5] Capital - Articles 39 and 40
[6] Persons - employees - Articles 45 and 46; self-employed and right of establishment - Articles 33 and 34

By Article 158 of the Revised Treaty the Single Economy contemplates putting in place a Development Fund to provide financial and technical assistance to disadvantaged countries, regions and sectors.

This is a brief description of the Single Market and Economy in which disputes may arise, which later come to the CCJ. I propose to look at the free movement of labour, and then deal more briefly with the free movement of goods, services and capital.

Free movement of persons

Freedom of movement of persons is expressed in Article 45 to be a goal. It is to be attained on a phased basis.

It is ironical that in colonial days before independence - at least in the Englishspeaking Caribbean - people were free to move to any island under British rule to live and work.

Under the Revised Treaty freedom of movement[7] is accorded to (a) those with a right of establishment and (b) to workers or wage-earners. In other words freedom of movement is linked to economic activity.

The right of establishment is an aspect of the freedom of movement of persons. It entails the right of legal or natural persons from one Member State to pursue economic or professional activity on a stable and continuous basis from a fixed base within another host Member State.

[7] Note there is no right to move and reside freely within the territory of Member States

Article 32 grants a right of establishment in another Member State to self-employed persons engaged in commercial industrial, agricultural, professional or artisanal activities. That right of establishment extends to companies, entrepreneurs who create and manage economic enterprises and to agencies, branches or subsidiaries of a business already established in a Member State wishing to set up business in another Member State.

Implied in the right of establishment of these categories of persons is freedom of movement. But in addition there are express contingent rights. These rights and the timetable for putting them in place are to be supervised by COTED. Freedom of movement is granted to managerial, technical and supervisory staff of economic enterprises and to those setting up agencies, branches and subsidiaries as well as to their spouses and dependants. These categories also have nondiscriminatory access to land, buildings and other property[8].

Article 46 speaks of granting a right to seek employment to five categories of skilled Community nationals. They are: university graduates, media workers, sportspersons, artistes and musicians. In the case of these workers nothing is said about rights of settlement for their families or about contingent rights to health care or education. Such gaps may well have to be filled by judicial decision.

In April 1997, however, an Agreement on Transference of Social Security benefits was signed and ratified by twelve Member States. The agreement facilitates the portability of long term benefits from one social security system to another.

[8] See Article 34

The CSME permits Member States upon notice to the Council for Trade and Economic Development (COTED) or the Council for Finance and Planning (COFAP) to apply restrictions to the exercise of such free movement as exists, where such mobility rights create *"serious difficulties in any sector of the economy of a Member State or occasions serious economic hardships in a region of the Community."*

Again, a Member State may apply to the Community Council for a five-year waiver of the rights granted by Article 30, which include the right of establishment, the right to move capital and the right to provide services[9].

Apart from these provisions, the Less Developed Countries have the right to defer removal of restrictions on the rights created by Article 30 by reference to their special needs and circumstances[10].

Although the end result is a fragile freedom of movement for a few, it seems that Community nationals will still be in a position to challenge any direct or indirect interference by a host State with freedom of movement granted by the Revised Treaty: see *Van Duyn v. Home Office (No. 2) [1975] 3 All ER 190.*

Free movement of goods

The CSME trade policy is described in Chapter Five of the Revised Treaty. Its principal objective is the *"full integration of the national markets of all Member States of the Community into a single unified and open market area"*: see Article 78 para. 2 (a).

[9] Article 47 para. 1

[10] Article 48 para. 1

The substance of the requirement of free movement of goods is contained in Article 79.

1. *The Member States shall establish and maintain a régime for the free movement of goods and services within the CSME.*
2. *Each Member State shall refrain from trade policies and practices, the object or effect of which is to distort competition, frustrate free movement of goods and services, or otherwise nullify or impair benefits to which other Member States are entitled under this Treaty.*
3. *The Member States shall not introduce in their territories any new restrictions on imports or exports of Community origin save as otherwise provided in the Treaty."*

Member States undertake to remove both fiscal and non-fiscal barriers to free movement of goods.

The problem in relation to fiscal barriers is that States may appear to eliminate a fiscal barrier but might impose a *"charge having equivalent effect"* to a customs duty. Indeed it would seem, as held by the ECJ, that *"any pecuniary charge imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect…even if it is not imposed for the benefit of the State, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with any domestic product"*[11].

Article 91 seeks to deal with non-fiscal barriers to trade. These are referred to as quantitative restrictions.

[11] See Case 24/68 *Commission v. Italy [1969] ECR 193.* See also Case 87/75 *Bresciani* (charge for compulsory veterinary inspection: defence of payment for a service rejected)

"Quantitative restrictions"[12] are prohibitions and restrictions on imports into or exports from any other Member State, *"whether made effective through quotas, import licences or other measures of equivalent effect, including administrative measures and requirements restricting imports or exports".*

The CCJ may have to adjudicate on national rules regulating the marketing and presentation of goods (their shape, packaging or content) with a view to deciding whether such specifications are inimical to free trade and hinder inter-state trade.

Free movement of services

Freedom to provide services entails the ability of a legal or natural person to carry on economic or professional activity for a temporary period in another Member State or to carry on such activity in the provider's home State in relation to persons from another Member State temporarily in the provider's home State for that purpose.

The free movement of services is important to the Single Market. It has been said in Europe that economic growth is essentially driven by services.

Examples of services are professional services such as engineering or legal advice: business services, health services, retail services, hotel services etc. However, national restrictions exist

[12] See Case 8/74 *Dassonville [1974] ECR 837* (Belgians required government certificate as to right to designation of origin. Scotch whisky from France); Case 120/78 *Cassis de Dijon [1979] ECR 649* (French fruit liqueur banned from Germany - below alcoholic strength for marketing as liqueur); Case 267-8/91 *Keck [1993] ECR I - 6097* (selling arrangements - resale at a loss - not covered)

but if they are discriminatory must be abolished; otherwise they must be removed after consultation with the competent organs of the Community.

A restriction would consist of *"any measure liable to prohibit, impede, render more costly or onerous or otherwise render less advantageous service provision between Member States."* Examples are regulatory action by a Member State; rules and practices of professional bodies; duplicated requirements e.g. for professional indemnity in the host State.

Articles 36 to 38 apply where there is a cross border element. This may arise as follows:

(1) Provider in host State temporarily

(2) Provider remains in his State and receives visitors from another Member State, who seek his services.

(3) Provider and recipient each remain in their state, but services are provided, say, by satellite.

I give a few examples of some of the issues that might confront the court.

(1) When can a provider of services be said to have set up an establishment in a Member State so as to become subject to the host State?

(2) If a provider of services in State A has paid the necessary fees and purchased professional indemnity insurance as required can State B impose similar requirements of its own? Are these restrictions?

(3) Are Community nationals free to go to another State to receive, say, health care services without paying a surcharge for being nonresident or without being denied such services?

(4) Can Community nationals from States which have exchange control be denied foreign exchange for services provided in Trinidad or Jamaica?

For completeness I would add that the CCJ could approve a restriction on the ground of public policy, public security or public health: see Articles 225 and 226.

Free movement of capital

The aim of the freedom of movement of capital is (1) to facilitate a viable regional stock market (2) to encourage the establishment of a regional stock exchange (3) to promote the existence of a regional caArticles 39 and 40 prohibit the imposition of new restrictions on the movement of capital and call for the removal of current restrictions on the movement of capital payments and on current payments including payments for goods and services.

Article 39 prescribes the removal of restrictions on banking, insurance and other financial services. At present there is no co-ordination of regulation in these sectors at the Caricom level.

The objective of the Revised Treaty is (1) to harmonize legal and administrative requirements of partnerships and companies (2) abolition of exchange controls (3) free convertibility of currencies (4) harmonization of monetary and fiscal policies.

Dr. Trevor Farrell has concluded in a study[13] on Caribbean economic integration that there has been progress in four main areas:

(1) intra-regional direct investment

(2) growth in intra-regional portfolio investment

(3) development of a regional capital market with crosslisting on the three major stock exchanges

(4) use of offshore centres in the Eastern Caribbean for incorporation and investment so as to minimize tax.

These developments have taken place despite the disparate régimes of financial regulation that now exist. Therefore, it is not anticipated that there will be need for settlement of disputes by the CCJ where the movement of capital is concerned. Nonetheless, if disputes arose before the CCJ there is little doubt that a purposive construction of the Revised Treaty will be applied with a view to achieving a harmonized single financial market.

CONCLUSION

The principal role of the CCJ will be to bring legal certainty and uniformity to the interpretation and application of the Revised Treaty. In carrying out its mission, the Court in its original

[13] Caribbean Economic Integration – What is happening now; What needs to be done.

jurisdiction, as a supranational institution, must be conscious of the goal of economic integration of the CSME.

The present structure of the Community is very tentative. This is borne out by the limited degree of freedom of movement available to date. However, within the framework of the rights actually recognized by Member States there is considerable scope for judicial innovation.

The amplitude of the jurisdiction of the CCJ is still far from defined.

It extends over the whole area of the Revised Treaty. Yet the scope of the Revised Treaty is to be still further delineated by the inclusion of rights contingent to freedom of establishment, freedom of movement and of the provision of services. The social dimension of economic integration is yet to be confronted. The role of the Charter of Civil Society is not clear. The Charter is a non-binding declaration of common commitment to fundamental rights such as the rights of the disabled, the rights of indigenous peoples, the rights of the child, the rights of the family and environmental rights. The values recognized in the Charter may well influence the interpretation and application of the Revised Treaty.

In closing I adopt the words of Lord Denning M.R. in *Shields v. E. Coomes (Holdings) Ltd [1978] 1 WLR 1408, 1417:*

"...The flowing tide of Community law is coming in fast. It has not stopped at high-water mark. It has broken the dykes and the banks. It has submerged the surrounding land. So much so that we have to learn to become amphibious if we wish to keep our heads above water."