



Implementation of Competition Law and Policy

The Honourable Mr Justice Winston
Anderson, Judge of the Caribbean Court
of Justice

**Session 1 at the Sixth Conference of the United Nations to Review
All Aspects of the Set of Multilaterally Agreed Principles and Rules**

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REMARKS

By

The Honourable Mr Justice Winston Anderson, Judge of the Caribbean Court of Justice,

on the occasion of

**The Sixth Conference of the United Nations to Review All Aspects of the Set of
Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive
Business Practices**

8 November 2010

Session I: Implementation of Competition Law and Policy*¹

The Caribbean Court of Justice and the Caribbean Community

In order to appreciate the role of the Caribbean Court of Justice (“CCJ” or “the Court”) in the implementation of competition law and policy it is necessary to say a few words about the CCJ and its responsibility for the orderly development of the Caribbean Community (“CARICOM”) including the CARICOM Single Market and Economy (“CSME”).

The Agreement Establishing the Caribbean Court of Justice (“CCJ Agreement”) was concluded in February 2001 and entered into force in July 2002.² The Court became fully operational in April 2005.

¹ The views expressed in this paper are personal to the author and do not necessarily reflect the views or opinions of the Caribbean Court of Justice. Moreover, these views are provisional in that they have not benefitted from the forensic argument of counsel.

² More specifically, the CCJ Agreement was adopted 14 February 2001, and entered into force 23 July 2002. It is *reprinted in* 2255 UNTS 319.

The CCJ Agreement recognizes the power of the CCJ to review competition law and policy in two main categories: (1) cases falling within the original jurisdiction, and (2) those falling within the appellate jurisdiction.

The Original Jurisdiction

In its original jurisdiction the Court has “compulsory and exclusive jurisdiction” to hear and determine disputes concerning the interpretation and application of the Revised Treaty of Chaguaramas. This is the Treaty which establishes the Caribbean Community including the CARICOM Single Market and Economy (“the Revised Treaty”).³ The member states of CARICOM are *ipso facto* parties to and must accept (and have accepted) the original jurisdiction of the Court. In this way, the CCJ adjudicates over a community that is co-extensive with the territory of its fifteen members which together constitute a landmass of approximately 180,000 square miles and a population of some sixteen million people.

Adjudication in the original jurisdiction may arise from four categories of disputes: between member states; between member states and the Community; on referrals from national tribunals; and by applications by individuals.

³ The Revised Treaty was adopted by Heads of Government of the Caribbean Community on July 5, 2001 and entered into force on January 1, 2006. It is *reprinted in* 2259 UNTS 293.

Already, the Court has delivered seven judgments in its original jurisdiction in respect of cases which were all brought on the application by private individuals.⁴ These cases have provided opportunities for the Court to comment upon its jurisdiction *vis-à-vis* member states and the Community. For example, the Court has made it clear that it has plenary jurisdiction to review the decisions made by organs of the Caribbean Community, such as the Council for Trade and Economic Development (“COTED”).

The Appellate Jurisdiction

The appellate jurisdiction locates the CCJ as the final court of appeal for domestic adjudication for those member states accepting that jurisdiction. Thus far three member states have established the Court as their highest domestic tribunal: Guyana (2005); Barbados (2005); and Belize (2010). The other member states of CARICOM are also expected to do so by effecting the necessary amendments to their constitutions.

Competition Matters

Chapter VIII of the Revised Treaty contains the rules on competition policy. The overriding objective of these rules is to ensure that the benefits expected from the establishment of the CARICOM Single Market and Economy are not frustrated by anti-competitive business conduct.⁵

⁴ See *Trinidad Cement Ltd. and TCL Guyana Inc. v Guyana* [2009] CCJ 1 (OJ); *Trinidad Cement Ltd. and TCL Guyana Inc. v Guyana* [2009] CCJ OJ); *Trinidad Cement Ltd. and TCL Guyana Inc. v Guyana* [2009] CCJ 5 (OJ); *Trinidad Cement Ltd. v The Caribbean Community* [2009] CCJ 4 (OJ); *Doreen Johnson v Caribbean Centre for Development Administration* [2009] CCJ 3 (OJ); *Trinidad Cement Ltd. v The Caribbean Community* [2009] CCJ 2 (OJ); and *Trinidad Cement Ltd. and TCL Guyana Inc. v Guyana* [2008] CCJ 1 (OJ).

⁵ Article 169, Revised Treaty.

To this end, the Revised Treaty establishes a Competition Commission (“the Commission”) with very broad functions and powers in the field of competition law.

Caribbean Court of Justice and the Sixth United Nations Conference to Review Competition Law

Competition issues can come up for review before the CCJ through either of its two jurisdictions. In the *appellate jurisdiction*, the Court is obliged to apply the domestic law of the country from which the appeal emanates but must, at the same time, be sensitive to the regional competition law obligations of that member state. At present there are unlikely to be many cases that arise for judicial review from national competition authorities. The decision in the *Jamaica Stock Exchange* case (2001) in Jamaica was to the effect that it was contrary to the rules of natural justice and due process for a national competition commission to conduct investigative and prosecutorial, as well as adjudicative functions. Since then, the focus of the national authorities has been on their investigative rather than adjudicative responsibilities.

The competence of the CCJ in competition matters is more easily seen in relation to its *original jurisdiction*. In one of the Court’s original jurisdiction cases decided in 2009,⁶ a member state sought to defend claims that it had breached its Revised Treaty obligations by suggesting that the claimants themselves had engaged in predatory pricing and abused their dominant position in the regional cement market. The CCJ observed that the allegation of predatory pricing was a new submission, meaning that it was an allegation made for the first time in the member state’s

⁶ *Trinidad Cement Ltd. and Guyana Inc. v Guyana* [2009] CCJ 5 (OJ).

submissions in reply. More significantly however, the Court noted that, “such issues would be more appropriately and effectively investigated by a national Fair Trading Board or the regional Competition Commission”.⁷ The Court also decided that the allegations as to the claimant’s abuse of its dominant position were irrelevant to the issues in the case as, “even if proved, they were incapable of excusing a breach of the obligation” undertaken by the member state under the Revised Treaty or of relieving the member state of any liability it may have incurred as a result of such a breach.⁸

Review Powers in Competition Law

In the exercise of its original jurisdiction, the CCJ has very broad powers to ensure compliance with competition law and policy. As the supreme judicial tribunal for CARICOM the Court may be expected to enforce the important obligations that the Revised Treaty places on the Community, member states, and the regional Competition Commission to take action in relation to competition law and policy.

For example, the Community must establish appropriate norms and institutional arrangements to prohibit and penalize anti-competitive business conduct; and it must also establish and maintain appropriate information systems to enable enterprises and consumers to be kept informed about the operation of markets in the Community.⁹ Member states are obliged to take the necessary

⁷ *Ibid.*, at paragraph 17.

⁸ *Ibid.*

⁹ Article 170 (1) (a), Revised Treaty.

legislative measures to ensure consistency and compliance with the rules of competition and provide penalties for anti-competitive business conduct. Also, they must establish and maintain a national competition authority for the purpose of facilitating implementation of the rules of competition.¹⁰ The regional Competition Commission “shall” apply the rules of competition in respect of anti-competitive cross-border business conduct, and in discharging its functions the Commission must have regard to a mandatory list of considerations set out in the Revised Treaty.¹¹

The Court has inherent jurisdiction to review the decisions made by the organs of the Community in order to ensure their consistency with the requirements of the Revised Treaty. This power has been asserted in relation to COTED¹² and applies, by extension, to the decisions of the regional Competition Commission.

Specific powers of review are given to the CCJ in respect of certain decisions of the Commission. Where a party is aggrieved by any determination made by the Commission to impose orders or directions or fines in relation to anti-competitive business conduct, that party may apply to the Court for a review of the determination.¹³ Also, where the Commission makes a decision that certain business conduct is not uncompetitive, the Commission may nonetheless ask the Court to review that decision on the ground that it was induced by deceit or improper means.¹⁴

¹⁰ *Ibid.*, Article 170 (1) (b), (2).

¹¹ *Ibid.*, Article 173.

¹² *Supra.*

¹³ Article 175 (12), Revised Treaty.

¹⁴ *Ibid.*, Article 180.

Remedies, Penalties, Orders

Where the CCJ makes a decision in its appellate jurisdiction in a competition case, it may make any order available to the national courts from which the appeal emanates. In relation to the original jurisdiction, neither the CCJ Agreement nor the Revised Treaty makes extensive provisions for remedies consequent upon a successful action in the Court's original jurisdiction. The filling of this *lacuna* is likely to be influenced by European Union precedent and the CCJ's own Rules of Procedure in the Original Jurisdiction.

Caribbean Court of Justice and the Sixth United Nations Conference to Review Competition Law

In the *Trinidad Cement Limited* cases,¹⁵ the CCJ made important observations on the award of remedies in respect of breaches of Community law by Member States and by extension the Community. The Court affirmed the possibility of ordering interim measures, making a declaration, prescribing coercive remedies, and awarding damages. Drawing upon European Community jurisprudence, the CCJ has based the competence to award remedies on the necessity to enforce the rule of law and render the Revised Treaty effective.¹⁶

¹⁵ *Supra*.

¹⁶ *Trinidad Cement Ltd. v The Caribbean Community* [2009] CCJ 4 (OJ), at paras. 42 and 43.

Enforcement

All judgments of the Court are binding in international law and one may presume that they will be obeyed. This presumption is based, in the first place, on the acceptance by all CARICOM member states of the general undertaking to carry out the obligations arising out of the Revised Treaty, and to facilitate the objectives of the Community.¹⁷ Article XV of the CCJ Agreement¹⁸ contains specific requirements for compliance with judgments of the Court: “The Member States, Organs and Bodies of the Community, entities or persons to whom a judgment of the Court applies *shall comply with that judgment promptly*”.¹⁹

Where the judgment is addressed to entities that do not enjoy immunity, enforcement arrangements rely upon the enforcement machinery of national courts and similar authorities. The CCJ Agreement contains specific provisions requiring contracting parties to take all the necessary steps, including the enactment of legislation to ensure that all authorities of a contracting party act in the aid of the Court. Any judgment, decree, order, or sentence of the Court shall be enforced by all courts and authorities in any territory of the contracting parties as it were a judgment, decree, order, or sentence of a superior court of that contracting party.²⁰

¹⁷ Article 9, Revised Treaty.

¹⁸ *Ibid.*, Article 215.

¹⁹ Emphasis added.

²⁰ Article XXVI, CCJ Agreement.

Qualification and Competence in Competition Law

The CCJ Agreement provides for a total composition of ten judges (the President and nine other judges)²¹ and requires that judges must have general qualifications and experience in law in that they must either have been a Judge in another Court for at least five years or a legal practitioner or teacher of the law for at least fifteen years. The latter criterion permits academic lawyers to be appointed to the bench. All CCJ judges must possess the moral, social, and intellectual and analytical capacity to be sound adjudicators.

The CCJ Agreement makes a special stipulation that at least three of the ten must possess expertise in international law, including international trade law. No specific mention is made of competition law and policy but a competence in these areas may be implied in the further requirement in Article XI which says that in the exercise of its original jurisdiction the Court must have at least three judges and these judges, “shall possess the expertise necessary for the Court to adjudicate the matter”. As we have seen, matters specifically placed within the purview of the Court includes review of certain decisions of the Competition Commission.

The intention of the framers was clearly to ensure that in matters related to original jurisdiction, which includes matters in competition law and policy, the judges of the CCJ possess the necessary qualifications and competence to adjudicate on CSME disputes. As regards competition law and policy, the Court has been pleased to participate in three training seminars organized by the regional Competition Commission in 2010 (February, *Trinidad and Tobago*; May, *St. Lucia*; and

²¹ At present there are seven justices: the President and six other judges.

August, *Trinidad and Tobago*). In this way the judges have benefitted from perspectives on competition law presented by the experts in the Latin-American, American and European systems. The President of the Court, the Honourable Mr. Justice Michael de la Bastide, has made clear that this participation is without prejudice to the judicial function of the CCJ in relation to the Commission and other organs of the Caribbean Community.

As a Judge of the CCJ I am pleased to have been invited by the United Nations Conference on Trade and Development to participate in this, the Sixth UN Conference to Review all Aspects of the Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business practices. I am confident that I will find this Conference useful and I warmly congratulate the wonderful and efficient organizers and distinguished conference participants.