



Is Joining the Appellate Jurisdiction of the CCJ an Option for Suriname?

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

The inauguration of the FHR School of Law of the FHR Institute for Social Studies

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Remarks
of
The Honourable Mr Justice Winston Anderson^{1*}, Judge of the Caribbean Court of Justice,
on the occasion of
The Inauguration ceremony of the FHR School of Law
9 March 2010

Introduction

The Caribbean Court of Justice, (sometimes referred to as the “CCJ”), was formally inaugurated in Port of Spain, Trinidad, on 16th April, 2005. Although the Agreement Establishing the Court had been concluded from as early as 2001, and had entered into force in 2002, the CCJ finally became operational in 2005, and in *both* its original and appellate jurisdictions. In its original jurisdiction the Court has the compulsory and exclusive jurisdiction to determine disputes concerning the interpretation and application of the Revised Treaty of Chaguaramas establishing the Caribbean Community, including the CARICOM Single Market and Economy (CSME). In its appellate jurisdiction the CCJ is the final court of appeal from the decisions of either of the two tiers of the national courts of the state from which the appeal comes.

Each Member State of the Community *must* subscribe to the original jurisdiction, which is contained in both the 2001 CCJ Agreement as well as in the Revised Treaty. The appellate

¹ * Judge, Caribbean Court of Justice; formerly, Professor of International Law, Faculty of Law, University of the West Indies, and General Counsel of the Caribbean Community Secretariat. NOTE: This paper was originally delivered at the Inauguration of the FHR School of Law, FHR Institute for Social Studies, Paramaribo, Suriname on March, 9, 2010. The presentation was revised in January 2011 and, following Justice Anderson’s elevation to the Bench of the CCJ, an abbreviated version was published in the *West Indian Law Journal*.

jurisdiction is only provided for in the CCJ Agreement. Acceptance of the appellate jurisdiction is *optional* and was originally meant, primarily, to allow Commonwealth Caribbean Member States to complete the process of their political independence by terminating appeals to Her Majesty's Privy Council in London and vesting those appeals, instead, in the Caribbean Court of Justice. But it must be emphasized that *any* Contracting Party to the CCJ Agreement may opt to join the appellate jurisdiction. This means that non-Commonwealth Member States of the Community (such as Suriname) may join. Indeed, even a State, not party to the Revised Treaty and the CSME, may nonetheless choose to have the CCJ as its final appellate tribunal.

As His Excellency, President Ronald Venetiaan of Suriname said, in his capacity as Chairman of the Community at the inauguration ceremonies, the vesting of the two jurisdictions, as well as the institutional and financial arrangements made to insulate the court from the possibility of executive interference, make the CCJ a unique judicial institution. In the language used by the President, the Court is '*sui generis*'. And, he continued,²

“The achievement is even more remarkable given the composition of the membership of the Community. There are independent States, there is one Dependent State; there are several Common Law Countries and two Member States with a history and tradition of Civil Law; and there are three distinct languages. This will be a major challenge for the Caribbean Court of Justice and its judges, in setting the example of how to bridge the differences and bring them all together.”

And the President closed his remarks with the following words:

² For the text of the President's speech see: http://www.caribbeancourtjustice.org/papers_addresses1.html accessed on 6th March, 2010.

“Suriname, one of the two CARICOM member states with a Civil Law System, will closely observe the development of the Appellate Jurisdiction of the Court, and will sometime in the future decide whether it wishes to add a third tier to its judicial structure. The Supreme Court of Canada already offers a worthy precedent of a final court that has to deal with both the common law and civil law.”

Precisely six months after the inauguration, in October 2005, the Honorable Chandrikapersad Santokhi, the Minister of Justice and Police of Suriname, told a CARICOM Legal Affairs Meeting held in Barbados, that the Government of Suriname was moving forward with the process of becoming a member of the appellate jurisdiction of the CCJ. Minister Santokhi said:

“In this light, we would reiterate our wish of becoming a member of the Appellate Jurisdiction of the CCJ and hopefully Surinamese representation in the CCJ can be reality in the near future.”³

I should say that I had the personal privilege of serving that meeting of the Legal Affairs Committee as General Counsel of the Caribbean Community Secretariat, and that I still recall the pride and optimism that that statement inspired within the room and the region.

Today, virtually five years after those heady days in 2005, I have been asked to address the question: *“Is joining the Appellate Jurisdiction of the CCJ an Option for Suriname?”*

I believe the answer to this question remains resoundingly in the affirmative: “yes”; and largely so for the reasons given by Minister Santokhi at the LAC meeting in 2005. The Minister linked Suriname’s accession to the Appellate Jurisdiction with Suriname’s already existing commitment to the CARICOM Single Market and Economy and the Original Jurisdiction of the Court to

³ Advocate News, Barbados, 6 October, 2005, at p. 1.

interpret and apply the Revised Treaty which establishes the CSME. He was particularly keen to emphasize that with the free movement of Community nationals throughout the Member States and globalization there was an increasing threat to the Community and to human dignity by transnational crime. This required, in the words of the Minister, “more interdependence and an integral approach to CARICOM to prevent and uphold safety at national and regional levels”.⁴

I should like to adopt these sentiments but to apply them in a more generic sense to the inextricable link, as I see it, between the original jurisdiction (to which Suriname and all other Member States are already legally committed) and the appellate jurisdiction. That link is forged in the idea, not just of the CSME, important as that is, but more profoundly in the idealism of the Caribbean Community. From this perspective, the original and appellate jurisdictions are separate ways of reinforcing and guaranteeing the single concept of an emerging Caribbean distinctiveness. When viewed in this light, the reasons for acceding to the appellate jurisdiction are fundamentally the same, whether the Member State was originally linked to colonial Britain or colonial Holland; whether the Member State now follows the common law tradition or the civil law system, and whichever of the European dialectics may be its official language. In short, the reasons for acceptance of the original and appellate jurisdictions are to found in the still fledgling emergence of a Caribbean identity.

It follows, therefore, that we shall need to look more closely at this notion of the Caribbean Community, to which Suriname was the first non Anglophone State to be admitted. In particular, we shall need to examine the relationship between the Community, created by the Revised Treaty,

⁴ Ibid.

and the national community created by the constitutions of the individual member states in order to ascertain the symbiotic relationship between the two jurisdictions of the Court.

The Caribbean Community

For the purposes of this presentation an essential fact must be grasped at the outset. The Caribbean Community, including the CARICOM Single Market and Economy (CSME), was *not* established outside of its constituent Member States. To the contrary, the Community is the legal *integration* of Caribbean economies through the creation of a single, liberalized regional market. The establishment of the integrated market is premised on the belief that it represents the best model for the economic and social development of the peoples of the Community. In particular, the CSME is considered the best approach for ensuring favourable conditions for sustained market-led production of goods and services on an internationally competitive basis.⁵

The legal coherence and continuity of the Community is secured both by international treaties and national legislative incorporation of these agreements into national law, including the laws of the Republic of Suriname. These factors make it possible to assert the following salient propositions.

First, the Community is established as an international legal entity⁶ that is clearly meant to operate *within* the territorial limits of its Member States.⁷ In spatial terms the Community is co-extensive with the territory of its fifteen members which, together, constitute a landmass of approximately 180,000 square miles⁸ and a population of some sixteen million people. With the establishment of

⁵ Preamble, Article 6, Revised Treaty of Chaguaramas, 2001.

⁶ Article 2, 228, Revised Treaty of Chaguaramas, 2001

⁷ Article 3 lists the Members of the Community as: Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago. It should be noted that Haiti acceded to the Community in 2003, although the details of its participation in the CSME are yet to be agreed.

⁸ About 460,000 km².

the single economy, the expectation is that the Region will operate as a country does in its single territorial space.

Secondly, the Revised Treaty prescribes rules and procedures for the elimination of national barriers to the regional market. Member States are expressly prohibited from introducing in their territories any new restrictions⁹ and they are required to remove existing discriminatory restrictions in respect of community nationals.¹⁰ The Programme for the Removal of Restrictions, approved by the Heads in Conference in 2002 in Belize City, Belize, provided for the abolition of restrictions by 31 December 2005: in this exercise Suriname amended some 13 of its legislative enactments. This was crucial to the ushering in of the CSME and a seamless market on 1st January 2006.

Thirdly, the Revised Treaty makes clear that the primary beneficiaries of the single regional market are ‘community nationals’. The right of establishment in any part of the Community, the right to regional migration in order to seek employment, the right to move goods and capital and the right to provide services across national borders are available only to Community nationals. The reservation of these ‘fundamental core rights’ to Community nationals is of profound importance. As the CCJ itself said in a case decided last year in the original jurisdiction, the conferral of these rights reflects the commitment of Member States, “to establish conditions which would facilitate access by their nationals to the collective resources of the Region on a non-discriminatory basis”.¹¹

⁹ See e.g., Article 32 (prohibition of new restrictions on the right of establishment), Article 36 (prohibition of new restrictions on the provision of services), Article 39 (prohibition of new restrictions on movement of capital and current transactions). ¹⁰

¹⁰ See e.g., Article 37 (removal of restrictions on provision of services), Article 38 (removal of restrictions on banking, insurance and other financial services), Article 40 (removal of restrictions on movement of capital and current transactions)

¹¹ *TCL and TCL Guyana Inc. v Guyana*, [2009] CCJ 1 (OJ), quoting preamble

The definition of ‘Community national’ is a potent indicator of the interpenetration of the Caribbean Community into the Caribbean nation state and *vice versa*.¹² Nationals of each Member State and persons belonging to that State are regarded as ‘community nationals’ and thus share a common entitlement to the collective resources of the Region. For a company to be similarly entitled, it must be incorporated in a Member State and owned and effectively controlled by individuals who are nationals of a Member State.¹³ Community nationals are entitled to seek enforcement of their community rights against any Member State and against the Community itself indirectly through their national state or directly through initiation of private proceedings on satisfaction of certain conditions.¹⁴

Fourthly, the Revised Treaty acknowledges that some Member States, particularly less developed countries, enter the CSME at a disadvantage by reason of the size, structure and vulnerability of their economies. Measures and mechanisms are established to assist disadvantaged countries, regions and sectors and thereby reduce the threats to economic and social cohesion in the Community. A Development Fund is established in the Revised Treaty for this purpose and is now operational. Technical and financial assistance as well as technological and research facilities are provided in order to help redress differences in resource endowment and levels of economic development.

Fifth and finally, there are organized policy and institutional frameworks that allow for dynamic decision-making within an ever evolving Community. The Conference, as the supreme political

¹² Article 32 (5), Revised Treaty.

¹³ Whether the beneficial ownership and control must rest with nationals of the Member State in which the company is incorporated is not expressly stated but is likely to be an unnecessary conditionality given equal basis on which all Community nationals are to be given access to the collective resources of the region.

¹⁴ For these conditions, see: Article 222, Revised Treaty. Note that a recent decision suggests that the Community national may even be able to proceed against the State of his nationality directly in order to ensure respect for his Treaty rights: *Trinidad Cement Limited and TCL Guyana Inc v. Guyana* [2009] CCJ 1 (OJ).

Organ of the Community, as well as the other Organs, have power to take decisions that are legally binding.¹⁵ Recommendations, although not binding, could constitute ‘soft law’ and the basis for the development of regional custom. A Competition Commission, based in Paramaribo and including in its membership, the distinguished Dr. Hans Lim A Po, Director of this Institute, oversees the enforcement of competition law and policy. Finally, supreme judicial authority is vested in the Caribbean Court of Justice to interpret and apply the Revised Treaty and treaty and legislative provisions exist to facilitate enforcement of the judgments of the Court.

What thus emerges is the legal constitution of a *single* Community whose territorial space is made up of the separate territorial entities of its Member States. The emphasis throughout the Revised Treaty is not on the parts but rather on the whole. *The Treaty is meant to recognize and to give vitality to this wholeness.* This is perhaps best represented in acknowledgment that the primary actors and the beneficiaries of the Community are the nationals of each of the Member States who have access to the collective resources of the region on an equal footing. There are provisions that are intended to ensure social cohesion by channeling assistance to less developed countries as well as to disadvantaged countries, sectors and regions. Regional institutions permit democratic and dynamic governance of the Community.

Revised Treaty as Constitution of the Caribbean Community

From the foregoing, a second essential fact would have become obvious but must nonetheless be emphasized. The Revised Treaty of Chaguaramas is the Constitution of the Caribbean

¹⁵ Articles 28, 29, Revised Treaty. The Conference and the Community Council of Ministers are the principal Organ. In the performance of their functions, the principal Organs are assisted by the following Organs: the Council for Finance and Planning (COFAP); the Council for Trade and Economic Development (COTED); the Council for Foreign and Community Relations (CFCOR); and the Council for Health and Social Development (COHSOD).

Community. The Treaty is the constituent document of the Community in that it literally brings the Community into legal existence.¹⁶ Adopted by the Heads of Governments of Member States in a transparent and democratic process that compares favourably with the adoption of most national constitutions,¹⁷ the Agreement gives voice to the aspirations of the Caribbean people for a closer economic union. In the pursuit of this objective certain fundamental and guiding principles are pronounced. Discrimination on the grounds of nationality is prohibited.¹⁸ Each Member State is obliged to accord to another Member State no less favourable treatment than that accorded to a third Member State or to third States.¹⁹ And Member States must take all appropriate measures to ensure the carrying out of obligations arising from the Treaty itself or from decisions taken by the Organs of the Community established under the Treaty.²⁰

Treaty of Rome

An appropriate analogy for the Revised Treaty is probably the 1957 Treaty of Rome creating the European Community.²¹ The preamble to the Treaty of Rome premises that Agreement on the determination for an ever closer union among the peoples of Europe, elimination of national barriers which impeded the economic and social progress of Member States, reduction of

¹⁶ Article 2, Revised Treaty.

¹⁷ In general, Caribbean constitutions were not popularly conceived documents but instead the legislative enactment of the British Parliament.

¹⁸ Article 7, Revised Treaty.

¹⁹ Article 8, Revised Treaty.

²⁰ Article 9, Revised Treaty.

²¹ The European Community [EC] Treaty, originally known as the European Economic Community [EEC] Treaty, together with the Euratom Treaty, were signed in Rome on 25 March 1957 and entered into force on 1 January 1958. Both treaties are of unlimited duration. A third treaty establishing the European Coal and Steel Community, was actually the first European treaty to this genre to have been completed – it was signed in 1951 but was stated to be of fifty years duration. It came into force in 1952 and terminated in 2002 when its functions were taken over by the EC. Until very recently the EC was based on the 1957 Treaty as well as the Treaty on European Union (Maastricht Treaty, effective since 1993). These agreements are now to be read in light of the Treaty of Lisbon, concluded December 2007 and entered in force December 2009. Although the establishment of CARICOM is commonly but mistakenly assumed to have been influenced by the 1957 Treaty of Rome, there is some evidence that the European Free Trade Association (EFTA) did influence the structure and orientation of the Common Market Annex to the Caribbean Community.

differences between the various regions and the backwardness of the less developed regions, and the resolution to pool national resources in the interest of economic advancement. These are uncannily similar to the aspirations outlined in the Revised Treaty.

Furthermore, the substantive regimes also bear comparison. The provisions in the Rome Treaty are geared towards creating, among erstwhile sovereign states, an internal market characterized by the abolition of obstacles to the free movement of goods, persons, businesses, services and capital.²² Discrimination on the basis of nationality is prohibited.²³ The three sources of law recognized the Rome Treaty for the regulation and continued growth of the EC are also similar to those authorized by the Revised Treaty, namely: the founding treaties as products of the Member States, secondary legislation produced by the political institutions, and judicial decisions of the Court of Justice.

The constitutional nature of the Treaty of Rome and its place in the legal systems of its constituent Member States is now well established in European jurisprudence. Judicial pronouncement of the constitutional nature of the Treaty fell to the European Court of Justice. Adopting a teleological approach to interpretation of the object of the Treaty, the Court developed the key notions of the supremacy and direct effect of community law. The object of a seamless regional market could not be achieved unless that law was supreme and directly effective in the laws of Member States.

The direct effect of community law within the legal systems of Member States was established in the landmark case of *Van Gend Loos* (1963).²⁴ There, the ECJ found that Article 12 of the Rome

²² Article 3 (c). Admittedly, the Rome Treaty goes further than the Revised Treaty in recognizing that integration must take place in accordance with the principles of the Charter of the United Nations and thus linking directly to the human rights regime. However, the Revised Treaty does allude to Charter of Civil Society. It is also the case that the Rome Treaty establishes a more complex system for the making of different types of community law.

²³ See, Article 7, Treaty of Rome.

²⁴ Case 26/62, [1963] ECR 1.

Treaty, which prohibited the imposition of new custom duties in the internal market, was directly effective in the laws of Member States. This was so even though the Treaty itself did not provide for the direct effects doctrine and academic and governmental views were sharply divided on the point.²⁵

The supremacy of community law was established shortly thereafter in *Costa v ENEL* (1964).²⁶ In a classical statement of the nature of the Rome Treaty, which could have been almost as easily a description of the Revised Treaty, the Court said:

“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 spirit of the Treaty, make it impossible for 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. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty and giving rise to the discrimination prohibited by Article 7.”

²⁵ Trevor Hartley, *The Foundations of European Community Law* (Fifth Edition, Oxford University Press, 2003) at p. 197.

²⁶ Case 6/64, [1964] ECR 585.

The subsequent case of *Simmenthal* (1978)²⁷ provides specific insights into the relationship between European Community law and national courts. Where there is a conflict, national courts are obliged to give effect to Community law. This is so irrespective of whether the community law came before, or after, the national law; and regardless of whether the national constitution required the application of the law until declared unconstitutional by the Constitutional Court. Hence, on the facts in *Simmenthal*, an Italian law of 1970 imposing a fee for a public health inspection of beef imported from France, could not prevail over earlier secondary community law passed in 1964 and 1968 prohibiting such fees. The ECJ held that there was a duty on the national court to give effect to community law and that there was no need to wait for the law to be set aside by the constitutional court *or* by the legislature.

In a critical passage, the Court said this:

“Furthermore, in accordance with the principle of precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but – in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States – also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.”

And the Court continued:

²⁷ Case 106/77, [1978] ECR 629, at 651-2.

“Indeed any recognition that national legislative measures which encroach upon the field within which the community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community.”

There thus emerges from the decisions of the European Court of Justice, a coherent set of legal principles governing the Community based upon the constitution of the constituent document, the Treaty of Rome. This is quite remarkable given the lack of specific guidance in the Treaty and *given the absence of an appellate jurisdiction in the ECJ.*

However, EC member states have recognized and accepted the validity of these constitutional principles, albeit on varying grounds. Monist states inherently make provision in their legal systems (normally in their constitutions) giving international agreements direct effect in certain cases and thus can readily recognize the supremacy of European law. Dualist countries must normally make legislative provision to transfer powers to the Community and this is usually done by way of a constitutional amendment.²⁸ Undoubtedly, had the ECJ been the final court of appeal for its member states, the question of the acceptability of the direct effect and supremacy of community law would have been even more readily perceived and accepted.

²⁸ See e.g. Article 24 (1), German Constitution; Article 20, Danish Constitution; Article 67 of the Dutch Constitution; Article 11 of the Italian Constitution (authorizing such limitations on sovereignty as may be necessary to ensure peace and justice between nations).

Relationship between the original and appellate jurisdiction of the CCJ

Let us, then, return to the relationship between the original and appellate jurisdiction of the CCJ from this perspective of regional integration. It is clearly desirable that the CCJ should exercise both jurisdictions. This is because the twin operation of the two jurisdictions supports the CSME by ensuring the uniform application of the laws of Member States, *and* because the exercise of both jurisdictions will assist in the growth of the fledging Caribbean Community.

CSME is supported by uniform application of laws in Member States

In the first place, this is necessary for the smooth operation and growth of the CSME. The laws in the individual member states have already been altered or repealed, as necessary, in compliance with the 2002 Programme for the Removal of Restrictions. By one estimate, some 450 restrictions on the core rights of community nationals had to be removed.²⁹ In Suriname, some 13 laws were amended (with other alterations being effected through the doctrine of self-executing provisions in the Revised Treaty). These changes cover the gamut of legal rules in a society, including provisions in the law relating to international trade, customs and immigration, companies, real and personal property, alien land holdings, environmental regulation, corporate finance and various professional associations.

In order to ensure an identical legal environment so that the expectations of regional and foreign investors will not be disappointed, it is important that there be uniform interpretation of these laws.

²⁹ Rt. Hon. Owen Arthur, CSME: The Way Forward, Delivered as part of the Distinguished Lecture Series on 23 April 2004 (Frank Collymore Hall, Bridgetown, Barbados), at p. 23.

This is best achieved by a single court have final appellate jurisdiction in relation to disputes affecting these laws.

Referral obligation

Already, the Community arrangements have sought to ensure that national law in Suriname (and elsewhere in the Community) is interpreted in conformity with the Revised Treaty. This is attempted through the referral obligation contained in Article 214, which reads as follows:

“Where a national court or tribunal of a Member State is seised of an issue whose resolution involves a question concerning the interpretation or application of this Treaty, the court or tribunal concerned shall, if it considers that a decision on the question is necessary to enable it to deliver judgment, refer the question to the Court for determination before delivering judgment.”

This provision is at present part of the law of Suriname. Moreover it would seem to be self-executing in as much as no further legislative action is required. All that is needed is for the Supreme Court to refer legal questions that raise questions of the interpretation or application of the Revised Treaty to the CCJ.

To emphasize, this means that even at the present time, the interpretation of Suriname law that has a direct bearing on the smooth operation of the CSME law must be referred to the CCJ for determination. This obligation is binding on all levels of court in Suriname. In other words, the Court is already empowered and required to pronounce upon the civil law of Suriname. It will begin to do so, as soon as the first referral is made from the courts in Suriname to the CCJ.

The civil law tradition in Suriname is no bar to this procedure. The *Simmenthal* case (1978)³⁰ is directly in point. It was the express ruling in that case, that the courts in Italy could not wait for a local law which offended Community law to be overturned by the legislature or by the constitutional court. The national court, whether at first instance or at the second tier, was obliged to apply community law in preference to national law: this meant interpreting the national law in accordance with the community law where possible, but discarding it where it conflicted with community law. An identical obligation applies, it is suggested to Judges in Suriname. Indeed the case here is even stronger, since, notwithstanding the provisions in the 1975 Constitution, the Constitutional Court is yet to become operational.

But the referral obligation may not be sufficient to guarantee that the uniformed application of the national laws to support the single market and economy. There could be technical qualifications in local law which debar a reference in particular circumstances, this was illustrated last year in the *Linton v Attorney General of Antigua and Barbuda*³¹ Revised Treaty had been enacted in parliament and had received the assent of the Head of State but had not been brought into force by ministerial decree, as required by the Act. This meant that the Judge was not able to rely on the provisions in the Treaty to refer the dispute to the CCJ.

Even in the absence of the peculiar situation in *Linton* there could be general questions of law that do not necessarily raise issues in the Revised Treaty but which are nevertheless important to the CSME. I am thinking of the general law of contract and tort in the common law countries (and their counterparts in the civil law system). Surely the general rules about contract formation, breach, and damages for breach do not necessarily fall within the ambit of the Revised Treaty, but

³⁰ Case 106/77, [1978] ECR 629, at 651-2.

³¹ Claim No. ANUHCV 2007/0354, delivered June 29, 2009.

their uniform interpretation and application could be critical to creating the kind of climate which is conducive to transnational investment decisions. Similar arguments could be made in relation to liability for torts or *delicts*: investors, service providers, and traders would probably prefer a uniform and pre-determined landscape so as to calibrate business plans and decisions.

Another major range of legal issues concern the unfinished agenda in the Revised Treaty. Article 239 lists five areas, critical to the CSME but on which agreement is yet to be reached. These are: electronic commerce, government procurement, treatment of goods produced in free zones, free circulation of goods, and contingent rights. Litigation on any of these issues could easily bring into question the consistency of Suriname law with community law. But it is possible that a reference could be resisted on the basis that these matters are not yet the subject of agreement among Member States and therefore cannot fall within the referral obligation. For similar reasons it seems pretty clear that it could not be argued that the treaty provisions are ‘self-executing’. In such cases, therefore, the best realistic hope for convergence of application of laws critical to a viable CSME would be their common interpretation by a final appellate court.

Finally, there is the paradoxical situation where the appellate jurisdiction could fill in possible weaknesses in the original jurisdiction. It is possible to imagine circumstances in which litigation in the appellate jurisdiction does not resolve a dispute because, for example, that jurisdiction is ousted by the jurisdiction of a global tribunal. The recent *Mexico-Soft Drinks* case, (US, Canada v Mexico),³² illustrated that the dispute settlement body of the WTO will not easily give way to resolution by regional adjudication, even where the dispute is between Member States of a

³² 24th March 2006 (WTO). See also, *Brazilian Retreaded Tyres*, WTO, AP, 3 December 2007; 29 August 2008.

Regional Trading Agreement. In these circumstances a decision by a regional court having both original and appellate jurisdiction over the parties would appear to have a better chance of surviving interference by the global body.

Development of a fledging Caribbean Community

In the second place (and I must have discussed the first place many pages ago!), exercise of original and appellate jurisdiction by a single court is important and appropriate to the development of the fledgling Caribbean Community. Few would deny that an appellate jurisdiction in the European Court of Justice would have greatly assisted that court in the development of the doctrines of the direct effect and supremacy of community law. The exercise of both jurisdictions by the United States Supreme Court is also an appropriate case in point. It is not being contended the United States Constitution, which constituted a State, is to be equated with the Revised Treaty, which, after all, still facilitates an association of sovereign states. What *is* argued is that a single Court at the pinnacle of the regional efforts at integration is critical in the forging of a sense of the collective identity of the Caribbean people whilst respecting the autonomy of the constituent states.³³

The regime that is most conspicuous by its absence from the Revised Treaty is a regime of human rights. This was understandable at the time of the Treaty's drafting since the concern and the emphasis, coming out of movement from the custom union, to a free trade area and then to the single market and economy was clearly economic in nature. But a community is built on more than economics and, in order to survive, must embrace the protection of human rights which, at

³³ The current litigation in the United States between the federal and state governments concerning the constitutionality of the individual mandates in the federal Affordable Health Care Act provides a good example of the issue.

least on one theory, is also fundamental to economic growth. The Caribbean has acknowledged this issue. We are still in the early stages of the efforts to develop an international human rights treaty for the Caribbean Community. Such an agreement would build on the 1997 Charter of Civil Society adopted by the Conference of Heads of Government as “reaffirming the human rights of their peoples”.³⁴

Whether spurred by a regional treaty or not, the harmonious interpretation of human rights provisions in our constitutions by the CCJ would seem to make for good sense in the process of community building. It could even lessen the existing dependence on international human rights adjudication.³⁵ The distinguished director of this Institute, Dr. Hans Lim A Po, has made the suggestion that as a first step towards full embrace of the appellate jurisdiction, Suriname could consider appeals to the Court in relation to human rights issues only.³⁶ This suggestion is worthy of further study and I hope it will receive serious consideration. After all, as we have suggested, decisions concerning the human rights regime are critical to defining our shared values and beliefs and are therefore fundamental to the kind of society we hope to build within the common space occupied by the CSME.

Conclusion

From the foregoing it will be seen that membership in the Caribbean Community and CARICOM Single Market and Economy involves participation in Caribbean integration. The CSME is the vehicle through which economic advancement is to be achieved. It is an essential component, but

³⁴ See e.g., Preamble to the Revised Treaty.

³⁵ It would seem to be the case that the presence of a Bill of Rights (and a regional human rights treaty) lessens the necessity of having appeals to the IACHR. Such appeals imply the placing of a judicial institution above the CCJ.

³⁶ This suggestion was made in a courtesy call by the UWI/CLIC Team (Professors Winston Anderson and Simeon McIntosh) on the Minister of Justice and Police of Suriname, The Hon. Chandrakerpersaud Santokhei.. on Monday, 8th March 2010.

not the entirety of the Community. The Community is a tentative effort in reconstructing a Caribbean identity. From this broad perspective it becomes very important that the CCJ exercises both an original and an appellate jurisdiction. This is necessary in order to ensure similarity of the landscape for the smooth operation of the CSME and the continued growth of CARICOM.

Suriname is a full and valued Member of the Community, and this country's fullest participation in the integration movement is critical to the movement's integrity and ultimate success. There are, of course, technical and practical requirements of acceding to the appellate jurisdiction which this paper does not attempt to get into. But against the conceptual and policy background of the experiment in linking countries into a CARICOM whole that is more than the sum of its sovereign parts, the real question is not, it is submitted: "Is joining the appellate jurisdiction of the CCJ an option for Suriname?"

Rather, the fundamental question is better put in the following way: "*Is NOT joining the appellate jurisdiction of the CCJ an option for Suriname?*"

Thank you very much.