

JCC 221-P64

THE CARIBBEAN COURT OF JUSTICE: AN INNOVATION IN JUDICIAL INSTITUTION BUILDING



I Background

- 1.1 The genesis of the Caribbean Court of Justice dates as far back as 1901 when an editorial in the Daily Gleaner of Jamaica surmised that the Judicial Committee of the Privy Council (JCPC) was out of joint with the times and serious consideration should be given to establishing for the region a court of last resort. The idea of a regional court of last resort was again canvassed at a meeting of colonial governors of the Commonwealth Caribbean in Barbados in 1947 but did not commend itself favourably to the gathering. At the Sixth Heads of Government Conference in Kingston (1970), the Jamaican delegation proposed the establishment of a Caribbean Court of Appeal, but once again the proposal did not commend itself to the meeting.

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1.2 However, the issue was not allowed to remain dormant for any considerable length of time and the Organization of Commonwealth Caribbean Bar Associations (OCCBA) shortly after established a Representative Committee which was mandated to consider and report on the establishment of the Caribbean Court of Appeal in substitution for the JCPC. The Representative Committee submitted its report in 1972. In that report not only was a favourable recommendation made to establish a Caribbean Court of Appeal in substitution for the JCPC, but a recommendation was also made for this Court *“to be vested with an original jurisdiction in respect of matters referred to it by agreement between the Caribbean States or any two or more of them arising out of such original treaties as the CARIFTA Agreement or by the Council of the Area or such matters as the interpretation of the Agreement”*. And there the matter rested for almost two decades.

1.3 The issue of establishing a Caribbean Court of last resort was again addressed by the West Indian Commission set up by the Heads of Government meeting in Grand Anse, Grenada in 1989 to consider recommending modifications to the Treaty of Chaguaramas 1973 in order to take the Caricom States into the twenty-first century. In its landmark report entitled *Time for Action* (1992), the Commission like the Representative Committee of OCCBA recommended the establishment of a Caribbean Supreme Court with both an appellate jurisdiction to replace that of the JCPC and an original jurisdiction to interpret and apply a Revised Treaty of Chaguaramas on the basis of applicable rules of international

law. Subsequent meetings addressing the issue of establishing a Caribbean Court of last resort took place within the portals of the Caribbean Community which saw the matter to a successful conclusion on 14th December, 2001 when the Agreement Establishing the Caribbean Court of Justice (CCJ) was signed by member states of Caricom at Bridgetown, Barbados.

- 1.4 The protracted gestation period of the CCJ was punctuated by acrimonious debates about the pros and cons of establishing a regional court of last resort in substitution of the JCPC. Paradoxically, these arguments like others in the Commonwealth tended to a striking similarity irrespective of their locus of origin, be it in New Zealand, Australia or the West Indies. And this has prompted interested commentators to perceive the uniformity of submissions in such far flung jurisdictions as attesting to the persistence and viability of colonialism as a psychological and cultural phenomenon. Succinctly postulated, protagonists relied heavily on the higher levels of legal erudition to be expected of judges of the JCPC, the alleged economies to be derived from maintaining links with the JCPC which was a charge on the British exchequer, as well as the Olympian dispassionateness which distance was likely to imbue determinations of the JCPC. Opponents of retaining links with the JCPC canvassed the misperceptions which distance, either geographical, cultural or psychological, from social realities was likely to evoke, the dubiousness of alleged economies issuing from retention of the link with the JCPC, given the practice of regional governments to pay for representation of Counsel in capital cases, and the reverse *amour propre*

displayed by proponents in deferring to the alleged superior legal erudition of the judges of the JCPC.

- 1.5 At the time of writing the CCJ is up and running with all members of Caricom subscribing to the original jurisdiction which is *a sine qua non* of membership in the Caricom Single Market and Economy (CSME). However, due to the tortuous and intractable constitutional amendment procedures required to be complied with in order to delink from the JCPC, only Barbados and Guyana to date have made use of the CCJ in its appellate jurisdiction. Several states of the OECS require referendums to delink from the JCPC and the main political parties of Jamaica have agreed to hold a referendum to determine the issue of delinking although this is not a constitutional requirement. And the political uncertainties known to attend referendums probably explain the tardiness in taking this course of action.

II Configuration of the CCJ

Appellate and Original Jurisdictions

- 2.1 The Caribbean Court of Justice (CCJ) is a unique judicial institution in terms of its jurisdiction, composition and financing. The CCJ, like the European Court of Justice (ECJ), is also intended to perform the role of a catalyst for regional economic integration. The uniqueness of the CCJ as an institution is not a function of its status as a multinational municipal court of appeal; the Eastern Caribbean Supreme Court is also a multinational municipal court of appeal as is

the Court of the Economic Organisation of West African States (ECOWAS). Nor is the uniqueness of the CCJ based on the fact that it combines in its composite remit an appellate and original jurisdiction. Indeed, the very Judicial Committee of the Privy Council (JCPC), whose jurisdiction as a court of last resort the CCJ is designed to replace for several independent Commonwealth Caribbean States, boasts both a municipal appellate jurisdiction and an original jurisdiction in respect of direct references of a bill of the Scottish Parliament or the Northern Ireland Assembly.¹ The Supreme Court of the United States in addition to being a court of last resort also exercises original jurisdiction in all cases affecting ambassadors, consuls and other public ministers. Similarly, the Supreme Court of Ghana has both an appellate jurisdiction and an original jurisdiction in respect of constitutional motions.² The uniqueness of the CCJ is to be found in the fact that it combines in its remit a municipal appellate jurisdiction of last resort and an original jurisdiction in the exercise of which it is mandated to employ relevant rules of international law in interpreting and applying the constituent instrument of the Caribbean Community.³

- 2.2 As a municipal court of last resort for several independent states of the Commonwealth Caribbean, the CCJ was designed to be the apotheosis of legal institutional arrangements in the Commonwealth Caribbean and which had their

¹D.E.E. Pollard, *The Caribbean Court of Justice: Closing the Circle of Independence*, Caribbean Law Publishing Co. Kingston (2004) p. 130.

² *Idem* p. 67

³ See Article 217 of the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the Caricom Single Market and Economy ("The Revised Treaty")

provenance in the establishment of the Council of Legal Education in 1970. The Council of Legal Education determines the parameters for the professional training of legal practitioners in the Commonwealth Caribbean. The objective of these institutional arrangements was the stimulation of a regional jurisprudence relevant for Commonwealth Caribbean States and reflecting the collective value system and social ethos of their peoples.

- 2.3 The appellate jurisdiction of the Court is eminently encapsulated in Article XXV of the Agreement Establishing the Caribbean Court of Justice. The provisions of this Article read as follows:

"1. In the exercise of its appellate jurisdiction, the Court is a superior Court of record with such jurisdiction and powers as are conferred on it by this Agreement or by the Constitution or any other law of a Contracting Party.

2. Appeals shall lie to the Court from decisions of the Court of Appeal of a Contracting Party as of right in the following cases:

- (a) Final decisions in civil proceedings where the matter in dispute on appeal to the Court is of the value of not less than twenty-five thousand dollars Eastern Caribbean currency (EC\$25,000) or where the appeal involves directly or indirectly a claim or a question respecting property or a right of the aforesaid value;*
- (b) Final decisions in proceedings for dissolution or nullity of marriage;*
- (c) Final decisions in any civil or other proceedings which involve a question as to the interpretation of the Constitution of the Contracting Party;*
- (d) Final decisions given in the exercise of the jurisdiction conferred upon a superior court of a Contracting Party relating to redress for contravention of the provisions of*

the Constitution of a Contracting Party for the protection of fundamental rights;

- (e) Final decisions given in the exercise of the jurisdiction conferred on a superior court of a Contracting Party relating to the determination of any question for which a right of access to the superior court of a Contracting Party is expressly provided by its Constitution;*
- (f) such other cases as may be prescribed by any law of the Contracting Party.*

3. *An appeal shall lie to the Court with the leave of the Court of Appeal of a Contracting Party from the decisions of the Court of Appeal in the following cases:*

- (a) Final decisions in any civil proceedings where, in the opinion of the Court of Appeal, the question involved in the appeal is one that by reason of its great general or public importance or otherwise, ought to be submitted to the Court; and*
- (b) Such other cases as may be prescribed by any law of the Contracting Party.*

4. *Subject to paragraph 2, an appeal shall lie to the Court with the special leave of the Court from any decision of the Court of Appeal of a Contracting Party in any civil or criminal matter.*

5. *Nothing in this Article shall apply to matters in relation to which the decision of the Court of Appeal of a Contracting Party is, at the time of the entry into force of the Agreement pursuant to the Constitution or any other law of that Party, declared to be final.*

6. *The Court shall, in relation to any appeal to it in any case, have all the jurisdiction and powers possessed in relation to that case by the Court of Appeal of the Contracting Party from which the appeal was brought.*

2.4 In the exercise of its original jurisdiction, the CCJ is expected to be the institutional centre-piece of the Caricom Single Market and Economy (CSME) which is generally perceived by competent decision-makers as essential for the

structured and sustainable economic development of the region in the emerging liberalized and globalised international economy. In this context, the CCJ is expected to secure for nationals of the Community the rights accorded them in the Revised Treaty and which, collectively, are intended to provide the basis of sustained economic and social development. Furthermore, the capital-importing status of the regional economy of necessity thrusts itself on the regional agenda, and with it, the need to promote and foster a favourable regional investment climate.

- 2.5 As was pertinently observed, *“FDI promotion policy is a critical part of development strategy which must be integrated into the overall economic policy framework for the Region’s transformation into a dynamic growth pole.”*⁴ In 1997, FDI flows into Caricom were **US \$1,986 millions**, in 2001 **US \$2,349 millions**, and in 2004 **US \$2,470 millions**.⁵ In 2004 Trinidad and Tobago’s share was **US \$1 billion**, Jamaica’s **US \$650 millions** and Bahamas **US 206 millions**. After 2005, FDI flows into Trinidad and Tobago are likely to increase significantly due to the investments in the natural gas sector and energy intensive industries like aluminum. The majority of FDI flows into Caricom is in the form of equity capital and reinvested earnings. The origin of these FDI flows is largely United States, Canada and U.K. FDI also originates in Europe and some

⁴ Caribbean Trade & Investment Report 2005 at p. 146

⁵ Idem at p. 134

developing countries like Malaysia and Columbia. The most attractive sectors for FDI flows are mining, tourism and forestry.

- 2.6 An attractive investment climate must afford the foreign investor stability of expectations in terms of returns on his investment. In the absence of stable expectations the prudent prospective investor is likely to commit his investment in a more attractive climate. An attractive investment climate, in effect, must be one that enables the prospective investor to predict with a fair degree of certainty the outcomes of investment decisions. And this in turn requires certainty in the operational environment. And this is where the CCJ is required to play an important role by unifying the applicable law and establishing certainty and predictability in the relevant norms in order to provide a viable basis for sound interpersonal and economic decisions.
- 2.7 In this connection it is important to bear in mind that the Caribbean Community is an association of dualist sovereign states each of which is extremely protective of its political and economic autonomy of decision – a status which constitutes a prescription for conflicting policies and a road map for fragmentation and institutional disintegration in the proposed economic integration regime. The existence of a single court charged with the two jurisdictions alluded to above automatically averts a potential source of judicial discord and tension since the CCJ is expected to promote both economic and legislative convergence in order to

fulfil its international obligations as the determinative disputes resolution mechanism for the CSME.

- 2.8 Consistently with the approach adopted by economic integration movements like the European Union (EU), the Economic Community of West African States (ECOWAS) and Community of Eastern and Southern Africa (COMESA), the Revised Treaty of Chaguaramas provided for the settlement of disputes relating to its interpretation and application. This important issue is addressed in Chapter Nine of the Revised Treaty. Chapter Nine affords states parties to the regime a full gamut of procedures for disputes settlement including consultations, mediation, conciliation, good offices, arbitration and judicial settlement. Despite this, the preferred method of disputes settlement appears to be judicial settlement, since this method has the advantage of generating rules *erga omnes* rather *inter partes* and which can contribute to a regime of disputes settlement binding on all participants. To date, however, it appears that member states display a distinct preference for consultations which ordinarily terminate amicably in the resolution of disputes without legally compromising their autonomy of decision. For example, disputes between Jamaica and Suriname over the origin of dairy products, between Guyana and other member states over rice, Antigua & Barbuda and St. Vincent and the Grenadines over flour and Trinidad & Tobago and Belize over detergents are being resolved by consultations.

- 2.9 The requirement of certainty and uniformity in the applicable law governing economic transactions in the CSME persuasively underscores the importance of the CCJ as a pivotal institution in the regional economic integration process. In this context, it is important to bear in mind that the Caribbean Community is an association of dualist sovereign states. Relevant institutional arrangements are characterized by the absence of central institutions with supranational competence to legislate for parties to the integration regime with direct effect in order to ensure uniformity and certainty in the applicable norms. This is the role played by the Council and Commission in the European Union by virtue of the defining decision of the European Court of Justice in the landmark case of **Costa v ENEL**.

Implications of Dualism for Caricom States

- 2.10 The regime established by the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the Caricom Single Market and Economy operates, initially, at the international plane and creates rights and obligations for the sovereign states of Caricom only as subjects of international law. This is a function of the inherited dualist approach of Caricom states to international law. In the characterization of Roskill LJ: *“(w)hen the Crown in the exercise of its prerogative powers concludes a treaty, the subject gains no personal rights under that treaty enforceable in our courts unless the treaty becomes part of the municipal law of this country and provides for the subject to acquire certain*

specified rights thereunder”⁶ This *dictum* eminently adumbrates the dualist principle which also determines the approach of the United Kingdom to international law.

- 2.11 Nationals of the Caribbean Community may only enjoy the rights set out in the Revised Treaty when this instrument is incorporated in the municipal law of their respective Member States through legislative enactment. In effect, the dictum of Roskill J applies, *mutatis mutandis*, to treaties concluded by the national executives of various Caricom countries even though these political entities are no longer apart of British dominium. Most Member States in the Caribbean Community have ratified and incorporated by indirect enactment the Revised Treaty Establishing the Caribbean Community including the Caricom Single Market and Economy⁷ and the Agreement Establishing the Caribbean Court of Justice. Incorporation of these instruments gives rise to peculiar problems in international and municipal law which will have to be addressed by the CCJ.

⁶ *Laker Airways v Department of Trade* (1977) 1 QB at 717-18; see also *Simsek v Mc phee* (1982) 56 AIJR 277; *Blackburn v Attorney-General* (1971) 2 All ER 1380; Ian Brownlie *Principles of Public International Law*, 5th edn.; Clarendon Press 1998, p. 557; Wade Phillips *Constitutional law*, 8th edn. (1977) and Mann *Studies in International Law* (1975) p. 328.

⁷ Consider in this context section 3 of the Caribbean Community Act of Antigua and Barbuda – No. 9 of 2004 dated 17th September 2004; Section 3(1) of the Barbadian Caribbean Community 2003-8 dated 24th April, 2003; Section 3(1) of the Caribbean Community Act of Belize 2004, No. 17 of 2007 dated 17th August, 2004; Section 3(1) of the Guyana Community Act No. 8 dated 29th March, 2006; Section 3(1) of the Jamaica Caribbean Community Act No. 15 dated 25th March, 2004; Section 3(1) of Saint Lucia Caribbean Community Act No. 12 dated 04th August, 2004; Section 3(1) of the St. Vincent and the Grenadines Caribbean Community act No. 5 dated 16th March, 2005 and Section 3(1) of the Caribbean Community Act dated 17th February, 2005

- 2.12 Rights and obligations arising under those instruments and which are to be deliberated and determined by the CCJ are conferred/imposed, in the first instance, on states parties to them as subjects of international law. Municipal courts of the countries of Caricom subscribing to the dualist doctrine of international law, in effect, all such states except Suriname and Haiti which subscribe to the monist doctrine of international law, have no power to interpret and apply treaties.⁸ They may look at them, however, in order to determine compliance by states with their international obligations assumed thereunder. In this context, Caricom States subscribing to dualism and incorporating the Revised Treaty have all provided in their enactments that the provisions of the instrument shall have the force of law as indicated in footnote 7.
- 2.13 In **Littrell v USA (No. 2)**, Lord Hoffmann, in addressing the peculiarity of dualism as a legal doctrine, cited with approval the *dictum* of Lord Kingdon in **Secretary of State in Council of India v Kamachee Boye Sahaba (1859) 13 Moo PCC 22 at 75** where he asserted: “*The transactions of independent states are governed by other laws than those which municipal courts administer: such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make*”. In short, unincorporated treaties cannot create rights and obligations for citizens of Caricom. In the absence of incorporation, treaties concluded by countries of Caricom, like those of the United

⁸ *Malone v Metropolitan Police Commissioner* (1979) 2 WLR 700.

Kingdom, are not justiciable in the municipal courts of Caricom countries⁹. And where treaties are incorporated by legislative enactment they lose their status as international law instruments and become, *ipso facto*, municipal law instruments subject to the ordinary rules of statutory interpretation.¹⁰

2.14 Since unincorporated treaties are not self-executing in the dualist jurisdictions of Caricom states, they have to be enacted into municipal law in order to have legal incidence for private entities.¹¹ Incorporation of a treaty may be by direct or indirect enactment. Where direct enactment is employed by the draftsman the instrument in the *dictum* of Lord Diplock is “*couched in conventional ... legislative idiom ... designed to be construed exclusively by ... judges*”.¹² However, direct enactment yields no plausible guarantee of the uniform application of a treaty which has many parties since drafting styles in different jurisdictions are vulnerable to the well-known aphorism “*quot homines tot sententiae*” (there are as many opinions as there are men).

2.15 Indirect enactment does not involve the draftsman in attempting to cast in more exacting legislative idiom the looser provisions of a treaty. All the drafter is required to do is to expressly provide in the enacting instrument that one or another provision of the treaty shall have the force of law in the relevant

⁹ *Malone v Metropolitan Police Commissioner*; *J.H. Rayner (Mincing Lane) Ltd. v Department of Trade and Industry*; *Mattadeen v Pointu* (1999) 1 AC 98. *Isma Holder et al v Council of Legal Education*.

¹⁰ *Fothergill v Monarch Airlines* (1950) 3 WLR 209.

¹¹ *Fothergill v Monarch Airlines Ltd.* (1981) 251 at 271; *Laker Airways v Department of Trade* (1977) QB 643 at 674 and *Pan American World Airways v Department of Trade* (1976) 1 Lloyd’s Reports 257.

¹² *Fothergill Monarch Airlines Ltd.* (1981) AC 251 at 281-7.

jurisdiction. In the characterization of Francis Bennion, “(w)ith indirect enactment, instead of the substantive legislation taking the well-known form of an Act of parliament, it has the form of a treaty. In other words, the form and language found suitable for embodying an international agreement become, at the stroke of a pen, also the form and language of a municipal legislative instrument.”¹³ But where direct incorporation is employed, “(i)t is not the treaty but the statute which forms part of English law. And English courts will not (unless the statute expressly so provides) be bound to give effect to interpretations of the treaty by an international court, even though the United Kingdom is bound by international law to do so”: per Lord Hoffman in **Regina v Lyons and Others**¹⁴. This statement of the law applies, *mutatis mutandis*, to the Caricom dualist jurisdictions. But incorporation of a treaty by indirect enactment even though, *stricto juris*, this method subjects the instrument to the ordinary rules of statutory interpretation, it facilitates interpretation of its terms “unconstrained by technical rules” and by reference to “broad principles of general acceptance”: per Lord Wilberforce in **James Buchanan & Co. Ltd. v Babco Forwarding and Shipping (UK) Ltd.**¹⁵ Such principles of general acceptance are to be found in Articles 31-2 of the Vienna Convention on the Law of Treaties.

2.16 As demonstrated above, nearly all the states of Caricom have incorporated by indirect enactment the Revised Treaty and the Agreement Establishing the

¹³ Statutory Interpretation, 4th edition, Butterworths, London, 2002 at pp. 580-1.

¹⁴ (2003) 1 AC 976 at 992.

¹⁵ (1978) AC 141 at p. 152

Caribbean Court of Justice. Such incorporation means that, in the absence of legislative provisions to the contrary, these instruments would be subject to as many interpretations as there are national jurisdictions in the Caribbean Community. Such a scenario would constitute a prescription for uncertainty in the legal regime governing the CSME and provide a formidable disincentive to foreign direct investment. And it is in this context it is apposite to evaluate the role of the CCJ in the CSME.

Role of the CCJ as an integrating mechanism: the original jurisdiction

- 2.17 An examination of the relevant provisions of the Agreement Establishing the Caribbean Court of Justice does appear to confirm that the primary thrust of its provisions dealing with the original jurisdiction is geared towards ensuring that the law applicable to the interpretation and application of this instrument is uniform. The relevant articles of the CCJ Agreement are replicated in the Revised Treaty of Chaguaramas for the purpose of ensuring that whatever ruling may emerge from the Judicial Committee of the Privy Council about the jurisdiction of the Court, its status as an international organization competent to interpret and apply the Revised Treaty through the employment of rules of international law would remain unimpaired. Consider in this connexion Articles 211 to 222 of the Revised Treaty.

- 2.18 In this connexion it is important to note that incorporation of the Agreement Establishing the Caribbean Court of Justice does not operate to affect the status of

this institution as an international organization.¹⁶ In this case mentioned in the footnote Lord Lowry endorsed the following remarks of Lord Templeman in **J.H. Rayner (Mincing Lane) Ltd. v Department of Trade (1990) 2 AC 418 at 478**, a case concerned with the International Tin Council created by a group of sovereign states in an international agreement: “*Consistently with the treaty, the UK could not convert the ITC into a UK organization. In order to clothe the ITC in the UK with legal personality in accordance with the treaty, Parliament conferred on the ITC the legal capacities of a body corporate. The courts of the UK became bound by the Order of 1972 to treat the activities of the ITC as if those activities had been carried out by a body incorporated under the laws of the UK*”.

- 2.19 Lord Lowry continued by endorsing the comment of Bingham J (as he then was) at (1991) 2 AC 114 at 140 to the effect “*that it would not be acceptable for one sovereign state, party to an international treaty, to hijack an organization to which it and other states had given birth and subject it (contrary to the treaty terms) to its own domestic jurisdiction ... Neither the 1972 Order nor the decree (of the UAE) created a domestic corporation but each was effective to confer legal personality in its respective municipal law on a body which would otherwise have lacked it*”. The aforementioned *dicta* applied, *mutatis mutandis*, to various enactments of Caricom Member States incorporating the Agreement Establishing the Caribbean Court of Justice, must be seen to support the conclusion that these

¹⁶ Arab Monetary Fund v Hashim (1991) 2 AC 114.

instruments do not transform the CCJ into a municipal court thereby bringing it within the determinations of the Judicial Committee of the Privy Council handed down in **Moses Hinds v the Queen**¹⁷ and **Jamaica Independent Council of Human Rights v Syringa Marshall-Burnett and the Attorney-General of Jamaica**.¹⁸

- 2.20 In order to achieve certainty and uniformity in the applicable norms, the scheme of drafting of the relevant articles of the relevant instruments proceeded as follows: Article XII of the Agreement Establishing the Caribbean Court of Justice (*“the Agreement”*) and Article 211 of the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the Caricom Single Market and Economy (*“the Treaty”*) invest the Court with exclusive jurisdiction to hear and deliver judgment on various disputes concerning the interpretation and application of the Treaty. It is interesting to note, however, that Article 211 of the Treaty also makes the jurisdiction of the Court compulsory. Since, however, sovereign states are not subject to the jurisdiction of international tribunals in the absence of their consent, express or implied, Articles XVI of the Agreement and Article 216 of the Treaty provide that the Member States of Caricom “recognize as compulsory, *ipso facto*, and without special agreement the original jurisdiction of the Court.” The jurisdiction conferred on the Court by these provisions will operate to ensure that disputes will not remain unresolved. In this connexion, it is interesting to note

¹⁷ (1977) AC 915

¹⁸ (2005) UK PC 3.

that Article XXII(2) of the Agreement and Article 217(2) of the Treaty preclude the Court from declining to make a determination on the ground that the applicable law is obscure.

2.21 In the exercise of its original jurisdiction, the Court is required to apply “*such rules of international law as may be applicable*”. Since states with civil law jurisdictions are also governed at the international plane by applicable rules of international law, both Haiti and Suriname encountered no difficulties in participating in the CCJ as an international tribunal interpreting and applying the Treaty to which they are both parties. This stricture on the mandate of the Court, however, is relaxed by Article XVII(3) of the Agreement (Article 217(3) of the Treaty) which empowers the Court to decide a dispute *ex aequo et bono*, that is, in accordance with equitable principles where the parties so agree.

2.22 Consistently with the scheme of drafting to ensure certainty in applicable norms to be employed in determining disputes concerning the interpretation and application of the Treaty, Article XXII of the Agreement (Article 221 of the Treaty) provides that “*judgments of the Court shall constitute legally binding precedents for parties in proceedings before the Court unless such judgments have been revised ...*”. This provision must be seen as an important innovation in international law. In the *dictum* of Lord Denning: “*(i)nternational law knows no rule of stare decisis. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give*

effect to change – and apply the change in our English Law – without waiting for the House of Lords to do it."¹⁹ Introduction of this principle into the norms applicable for employment in resolving disputes among Member States was intended to secure certainty in the law and to enhance predictability in the regional economic environment with a view to enhancing the quality of the investment climate.

- 2.23 However, the jury is still out regarding how the CCJ in the exercise of its original jurisdiction will construe and apply the doctrine of *stare decisis*. For example, will the Court regard the doctrine as a shackle to bind or as a guide to lead? Given that neither the House of Lords nor the Judicial Committee of the Privy Council regard themselves as being bound by precedent especially when the liberty of the subject is involved, will the CCJ be guided by their determinations in this context, or will the Court consider to be determinative the fact that in the exercise of its original jurisdiction the life or liberty of the subject is not likely to be involved? These are all important issues to be deliberated and determined when the Court is called upon to exercise its jurisdiction as an international tribunal. In exercising its appellate jurisdiction the Court has already determined that it was not bound by decisions of the JCPC, past or future,²⁰ even though such decisions will be accorded the highest consideration.

¹⁹ *Trendtext Trading Corporation v Central Bank of Nigeria* (1977) QB 529 at pp 553-4. This *dictum* may be open to some doubt since it does appear that the relevant determination will have to be made by the highest court in the land.

²⁰ *The Attorney General & Ors v Jeffrey Joseph & Anor.* [2006] CCJ 3 (AJ)

2.24 Article XIV of the Agreement (214 of the Treaty) addresses the important issue of referrals to the Court. Similar provisions are to be found in Article 177 of the Rome Treaty (1957) and Article 234 of the Treaty of European Union (TEU) signed at Maastricht Treaty in 1992. These referral provisions appearing in the instruments of the European Union, and which were intended to secure uniformity of interpretation in the applicable norms, have been credited with catalytic significance in achieving a remarkable measure of economic and social cohesion in the European Union. In one submission the referral procedure “*allows the European Court of Justice to insinuate itself in important aspects of national law to ensure convergence of the applicable norms of national law and Community law.*” In the submission of Lord Denning, M.R. in **H.P. Bulmer v Bollinger SA**²¹: “*When it comes to matters of a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back. Parliament has decreed that the Treaty is henceforth to be a part of our law. It is equal in force to any statute. Any rights or obligations created by the Treaty are to be given legal effect in England without more ado.*”²² Competent decision-makers of Caricom determined that Article XIV of the Agreement would play a similar cohesive and integrating role in the CSME as it was credited with achieving in the European Union.

²¹ (1974) 2 ALL ER 1226.

²² See D. E. Pollard, *opcit* at p. 175

2.25 In this context, questions have been raised whether the referral provision constitutes an encroachment on the jurisdiction of the constitutional courts or an infringement of the separation of powers principle. Lord Hoffman in addressing this issue opined: *“Parliament may pass a law which mirrors the terms of the treaty and in that sense incorporates the treaty into English law. But even then, the metaphor of incorporating may be misleading. It is not the treaty but the statute which forms part of English law. And English courts will not (unless the statute expressly so provides) be bound to give effect to interpretations of the treaty by an international court.”*: **Higgs v Minister of National Security**.²³ To achieve uniformity in the applicable law Article XIV of the Agreement (214 of the Treaty) requires national courts or tribunals to refer issues of interpretation of the Treaty to the CCJ. Does this constitute an infringement of the existing jurisdiction of national constitutional courts? Certainly not! The jurisdiction to be conferred by the CCJ Act on national courts in respect of the Treaty as incorporated, is a new jurisdiction whose parameters are circumscribed by the requirement to be governed by the interpretation of the Treaty by the CCJ which, as indicated above, is not a municipal constitutional court. In the premises, the legislation of Member States incorporating the Agreement establishing the CCJ is not subject to the strictures enunciated by the JCPC in the **Moses Hinds** case nor the **Jamaica Independent Council of Human Rights** case mentioned herein.

²³ (2000) 55 2 AC 228

2.26 In its anxiety to ensure that the CCJ Act (No. 170 of 2005) enacted by it to incorporate the Agreement Establishing the Caribbean Court of Justice in its original jurisdiction did not offend relevant provisions of the Constitution, the Government of Jamaica provided in Section 7 as follows:

“7(1) Where a court or tribunal is seized of an issue whose resolution involves a question concerning the interpretation or application of the Treaty, the Court or tribunal concerned may, before delivery of its judgment in the matter in writing request the designated authority to refer the question to the Court for an advisory opinion to be given.

*(2) In this section-
“designated authority” means the public officer or authority designated by the Minister responsible for justice, for the purpose of making referrals under this section.”*

2.27 Quite apart from being egregiously misconceived, juridically, in terms of offending the separation of powers principle, this provision unquestionably places Jamaica in breach of its treaty obligations and is likely to engage that country's international responsibility. As stated above, the learning on the issue is very clear. Incorporation of the Act Establishing the Caribbean Court of Justice does not operate to transform the CCJ into a municipal court. The status of the Court remains that of an international organization with an international law jurisdiction which does not collide with the municipal law jurisdiction of the constitutional courts of Jamaica. In construing the provisions of the Treaty as incorporated the courts of Jamaica are not bound to accept interpretations of the CCJ unless so provided. Indeed, the requirement to refer is conditional and only arises where a court or tribunal considers such a referral necessary to deliver judgment.

Composition and Financing of the Court

2.28 The second unique feature of the CCJ as an international judicial institution is the manner of appointing its principal judicial officers. It may very well be that the CCJ is the only multinational judicial institution of its kind whose judges are not appointed directly or indirectly by the political directorate of states participating in the relevant regime. Competent decision-makers, in a determined self-denying effort to insulate themselves from the charge of influencing the appointment of the judges of the CCJ, opted for the establishment of an apolitical, independent Regional Judicial and Legal Services Commission (“the Commission”)²⁴ and charged it with responsibility for the appointment and disciplining of its judges. The members of the Commission are appointed by various institutions, the greater part of which hail from the regional legal fraternity, which is not known to be beholden to the regional political directorate, and representatives of civil society. Successful candidates for the Bench are determined by open competition, allowing any person with fifteen years standing at the Bar to put forward his candidature.

2.29 The only departure from this apolitical process of selection is to be found in the selection of the President of the Court who is appointed by a qualified majority of the Heads of Government on the recommendation of the Commission. But, in no case may the Heads of Government decline to appoint a candidate recommended

²⁴ See Article V of the Agreement Establishing the Caribbean Court of Justice signed at Bridgetown, Barbados on 14th February, 2001.

by the Commission and substitute a person of their own choice. This method of appointment contrasts singularly with the manner of appointment of judges of other international courts – the International Court of Justice (ICJ), European Court of Justice (ECJ), Court of First Instance (CFI), Central American Court of Justice (CACJ), Court of Justice of the Common Market for Eastern & Southern Africa (Comesa), Andean Court of Justice and so forth. The procedures for the removal of judges and to establish and secure their tenure are also designed to safeguard their personal independence from national administrations.²⁵

2.30 The third unique feature of the CCJ is to be found in the innovative arrangements for supporting its operations on a financially sound and sustainable basis in order to ensure its autonomy of decision from regional political decision-makers. In this context, the mechanism of a trust fund suggested itself to competent decision-makers for consideration and adoption. Under the existing arrangement the Caribbean Development Bank (CDB), on account of its excellent international credit rating, was requested to negotiate a loan of approximately US \$100,000,000.00 in international capital markets. This offering, which, incidentally, was oversubscribed, was on-lent on realization to member states of the Caribbean Community to be repaid with interest in amounts corresponding to their projected annual percentage contributions to the budget of the Court.

²⁵ See Article 1X(4) of the Agreement Establishing the Caribbean Court of Justice, *idem*.

2.31 Participants in the regime establishing the CCJ entrusted the capital so raised to trustees who were charged with its management pursuant to the Revised Agreement Establishing the CCJ Trust Fund. The income of the Fund was to be made available on an as-needed basis for financing the day-to-day operations of the Court and it is hoped and expected that the proceeds of the Fund will be sufficient to meet the needs of the Court in the foreseeable future. However, the capital expenditure associated with the establishment of the seat of the CCJ is expected to be defrayed by the Government of the host country. These arrangements for funding the operations for the CCJ were designed to ensure its administrative autonomy and institutional independence from the regional administration. No other judicial institution is known to enjoy such administrative autonomy

Other unique features of CCJ

2.32 Perhaps, one of the most important features of the CCJ is the role it has been designed to play in the regional economic integration process. The critical role of the CCJ in the institutional and economic development of the CSME is underscored by the fact that the Caribbean Community is, unlike the European Union, an association of sovereign states. Participating states have not surrendered any important attributes of national sovereignty to the Caribbean Community whose central organs lack the competence to make determinations with direct effect for private entities in the jurisdictions of participating states. The majority of these states are dualist in orientation, and consequently have to

enact into national law the Revised Treaty in every jurisdiction in order to generate legal consequences for private entities on the municipal plane.

2.33 The implications of the requirement for uniform rules of general applicability in the single economic space sought to be created by the CSME ought to be self-evident and explain the exclusive and compulsory jurisdiction accorded the CCJ in the exercise of its original jurisdiction. This circumstance places on the CCJ, in the exercise of its original jurisdiction, the unenviable burden of ensuring certainty and uniformity in the norms applicable in the common economic space. In effect relevant institutional arrangements constitute an attempt to superimpose a common economic space on a multitude of independent sovereign entities subscribing in a predominant measure to the dualist doctrine and is probably one of the most unique, distinctive and innovative features of the Caribbean Community in which the CCJ has been accorded the central institutional role of coordination and unification in order to achieve desired economic and social cohesion in the CSME.

2.34 Some other unique features of the CCJ relate to the law to be applied by the Court in the exercise of its original jurisdiction. In the exercise of its original jurisdiction the CCJ is a court of first and last instance. In interpreting and applying the constituent instrument of the Caribbean Community, the CCJ is

required to employ rules of international law²⁶, without prejudice to its competence to determine issues *ex aequo et bono* if the parties so agree.²⁷ Its determinations are expressed to create legally binding precedents for parties appearing in matters before it²⁸. This is a significant departure from the practice of international tribunals required to employ rules of international law in the settlement of disputes and whose decisions over time normally constitute *jurisprudence constante*. This departure is intended to generate a greater measure of certainty in the applicable norms, consistency in their application, stability of expectations on the part of investors who cherish predictability of outcomes, all of which are presumed to contribute to a favourable climate for foreign direct investment. Similarly, in order to vindicate their rights accorded them in the Revised Treaty in proceedings before the CCJ, provision is made for private entities to be accorded *locus standi* in proceedings before the Court at its discretion in specified circumstances.²⁹

- 2.35 The Rules of Procedure of the CCJ in the exercise of its original jurisdiction are also unique comprising a combination of common law, civil law and international law rules in order to accommodate some peculiarities of the jurisdictions of states parties to the Agreement establishing the CCJ. In this particular, case-management procedures have been incorporated in these Rules, the common law institution of the affidavit has been omitted and there is the civil law requirement

²⁶ Article 217(1) of the Revised Treaty.

²⁷ Article 217(2) of the Revised Treaty.

²⁸ Article 221 of the Revised Treaty.

²⁹ Article 222 of the Revised Treaty.

to deliver one consensus judgment which is not the case in the exercise by the CCJ of its common law appellate jurisdiction where separate concurring or dissenting opinions are allowed.

2.36 As mentioned above, to date only two states, Barbados and Guyana have fulfilled their international obligations to sign on to the CCJ in its appellate jurisdiction. The lethargy of other interested states in so doing may be explained by reference to the complex procedures for delinking from the Judicial Committee of the Privy Council. In several cases, not only is a qualified majority of Parliament required but also a majority vote, or even a qualified majority vote, in a national referendum must be achieved. Similarly, no cases have yet been tried in the original jurisdiction. This may be due in large measure to the novelty of the procedure involved and the requirement to employ rules of international law, largely unfamiliar to regional counsel, in determining disputes in this jurisdiction. More importantly, there is an evolving culture in Caricom for differences among states to be settled by recourse to quiet diplomacy rather than litigation.

2.37 However, it would be interesting to see how the Court's jurisprudence unfolds in its original jurisdiction, in particular. Regional States have all demonstrated a reluctance to indulge any approach that smacks of the loss of sovereignty. Yet, it is difficult to see how the objectives of the CSME may effectively be advanced in a manner that is fully consistent with current claims to sovereignty. Negotiating a consensus passage through that minefield of economic nationalism will certainly

pose major challenges for the Court. Faced with a similar dilemma, the European Court of Justice delivered some ground-breaking judgements (like **Costa v ENEL**) to which states of the European Union subjected themselves with extreme reluctance. And given the historical antecedents of Caricom, it is not to be surmised that the CCJ will traverse that course.

III **An Emerging Regional Jurisprudence**

- 3.1 As intimated above, one of the motivations of competent decision-makers in establishing the Council of Legal Education (CLE) in 1970 was the promotion of a jurisprudence reflecting the value of the region and relevant for the needs of the region. The statement of this objective underscored the perceived need for a new regional mindset, both in terms of a juridical paradigm shift and the preferred institutional arrangements for its attainment. The first was to be secured by the faculties of law in the universities, and the second by the displacement of the JCPC as the final judicial arbiter of the region. Destruction of the link with the JCPC was generally perceived in the region as the true measure of independence. For the CCJ was not only to be perceived as refining and correcting judgments of the courts below, but also as performing a defining role in charting the course for an evolving regional social ethic appropriate for needs and aspirations of its peoples. In the ultimate analysis, this will require extracting from past determinations of the JCPC those principles exhibiting eternal relevance for our

social and economic development and turning away from decisions which never possessed any relevance, or if they did, have now lost their relevance for our current development.

- 3.2 The determination of the CCJ in **The Attorney General & Ors v Jeffrey Joseph & Anor.** [2006] CCJ 3 (AJ) regarding the development of a Caribbean jurisprudence and the doctrine of *stare decisis* signalled the Court's readiness to undertake the task at hand. In this same case the CCJ demonstrated its readiness not to insulate the region from positive international human rights standards by imaginatively extending the parameters of the public law doctrine of legitimate expectations while simultaneously imposing fetters on judicial activism which threatened to compromise constitutional principles generally perceived as the basis of good governance in the region. In dismissing the appeal, the Court determined that in developing a Caribbean jurisprudence, it would consider very carefully the opinions of final courts of other Commonwealth countries, particularly those of the JCPC. Decisions of the JCPC while it remained the court of last resort for Caricom countries would be regarded as binding in the absence of any material difference in the applicable law involved unless expressly overruled by the CCJ. In this connexion, the Court determined that it was not open to competent decision-makers to arbitrarily terminate a legitimate expectation by announcing a change in policy and affording the party concerned an opportunity to be heard with a view to having the policy restored. Procedural

fairness prescribed that such a change in policy could not operate to the disadvantage of current representees.

- 3.3 Even more significant for good governance in the region, the CCJ ruled that the ratification of a treaty by the executive, *ipso facto*, was incapable of creating a legitimate expectation at the municipal plane in the dualist jurisdictions of Caricom. By this determination the Court overruled the JCPC in **Thomas v Baptiste** and disputed the reasoning of the JCPC in **Neville Lewis v Attorney General of Jamaica** even though accepting the outcome of that decision. In arriving at this conclusion, one judge of the court adverted to the unlikelihood of the ratification of a treaty creating a legitimate expectation for private entities of dualist jurisdictions at the municipal plane. Admission of such legal incidence would compromise the separation of power doctrine and the democratic principle on the part of conceding a competence by the executive to legislate through the exercise of powers at the international plane. One important implication of such an admission would be to accord third states a convenient vehicle to exert influence on municipal legislation in small vulnerable sovereignties lacking in relevant capabilities to participate effectively in the elaboration of international instruments and to evaluate their impact on the state prior to their ratification. This deficiency assumes considerable importance in view of the current role played in the elaboration of international instruments by non-governmental organizations with hidden agendas which are sometimes inimical to the interest of small states.

3.4 In yet another decision, one judge of the CCJ challenged the *dictum* of the JCPC in **Joseph v State of Dominica** which posited that the term “fair trial” did not lend itself to interpretation. All that was required was to apply the words to the facts of any given case. Quite apart from appearing to affront the intelligence of an interested observer, this *dictum* was perceived to betray symptoms of a juridical oxymoron with potentially negative implications for trials in the retentionist jurisdictions of Caricom states. At the end of the day the Court leaned towards the conclusion that every word in a legislative sentence had to be accorded a meaning and was consequently amenable to interpretation and that judges were not in a position to apply the text of an enactment that was not interpreted.

3.5 The above-mentioned determinations of the CCJ do appear to confirm that the CCJ accepts that an important role devolving on it is the creation of a jurisprudence relevant for the region and its readiness to perform such a role

The Hon. Mr. Justice Duke E.E. Pollard

Date: 19th September, 2007

