

THE CARIBBEAN COURT
OF JUSTICE
**WHAT IT IS
AND WHAT IT DOES**

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PREFACE

At a time when the Caribbean Community is forging ahead with the creation of a Caribbean Single Market and Economy (CSME) as an answer to the aggressive pace of globalization and configuration of international trade, the establishment of a Caribbean Court of Justice is a critical component in this effort, especially in the exercise of its Original Jurisdiction.

The Caribbean Court of Justice will be called on to apply and interpret the Treaty of Chaguaramas as revised to create the Caribbean Single Market and Economy.

It is well understood that the establishment and integration of such a court is not a simple procedure and there are many aspects about which there are questions. Further discussions must continue to ensure that it is well established.

As part of the Public Education Programme in relation to the Caribbean Court of Justice, the Secretariat of the Caribbean Community offers this Q&A particularly for lawyers but comprehensive enough for other audiences.

INTRODUCTION

What is the Caribbean Court of Justice?

The Caribbean Court of Justice (CCJ) is the proposed regional judicial tribunal to be established by the Agreement Establishing the Caribbean Court of Justice. It had a long gestation period commencing in 1970 when the Jamaican delegation at the Sixth Heads of Government Conference, which convened in Jamaica, proposed the establishment of a Caribbean Court of Appeal in substitution for the Judicial Committee of the Privy Council.

Q. How is the proposed Caribbean Court of Justice different from the Court of Appeal proposed at the Sixth Heads of Government Conference?

A. The Caribbean Court of Justice has been designed to be more than a court of last resort for Member States of the Caribbean Community. For, in addition to replacing the Judicial Committee of the Privy Council, the CCJ will be vested with an original jurisdiction in respect of the interpretation and application of the Treaty Establishing the Caribbean Community. In effect, the CCJ would exercise both an appellate and an original jurisdiction.

Q. How is the appellate jurisdiction different from the original jurisdiction?

A. In the exercise of its appellate jurisdiction, the CCJ will consider and determine Appeals in both civil and criminal matters from common law courts within the jurisdictions of Member states of the Community and which are parties to the Agreement Establishing the CCJ. In the discharge of its appellate jurisdiction, the CCJ will be the highest municipal court in the Region.

In the exercise of its original jurisdiction, the CCJ will be discharging the functions of an international tribunal applying rules of international law in respect of the interpretation and application of the Treaty. In this regard, the CCJ would be performing functions like the European Court of Justice, the European Court of First Instance, the Andean Court of Justice, West African Court of Justice and the International Court of Justice. In short, the proposed CCJ is intended to be a hybrid institution – a municipal court of last resort and

an international court with compulsory and exclusive jurisdiction in respect of the interpretation and application of the Treaty.

Q. Is there general agreement on the establishment of the Caribbean Court of Justice?

A. No! Opinions are divided on the need for, or desirability of, the Caribbean Court Justice. Opposition to the CCJ appears to be informed by various considerations. One such consideration is suspicion of the unknown and professional resistance to change which is, more often than not, reinforced by the vigour of inertia. Some members of the legal community also entertain legitimate reservations about the ability and willingness of Member States of the Caribbean Community to provide adequate funding for the Court on a sustainable basis.

Other stakeholders question the likelihood of the CCJ attracting to its benches judges of the required expertise and legal erudition to inspire confidence among members of the legal community and litigants generally. Some of these considerations have been addressed here. Proponents of the Court perceive of this institution as completing the independence of Commonwealth Caribbean States. Other supporters of the Court consider that an indigenous Court consisting of regional judges is best suited to pronounce on issues of regional importance and, in so doing, contribute to the development of a regional jurisprudence.

**THE ORIGINAL JURISDICTION OF THE
CARIBBEAN COURT OF JUSTICE**

Q. What is the relationship between the Caribbean Court of Justice (CCJ) and the CARICOM Single Market and Economy?

A. The CARICOM Single Market and Economy (CSME) is established by the Treaty of Chaguaramas as revised by nine Protocols. The Treaty, as revised, is to be interpreted and applied by the CCJ in the exercise of its original jurisdiction.

Q. But how this function of the CCJ impact on the CARICOM Single Market Economy?

A. By interpreting and applying the Treaty which establishes the CSME, the CCJ will determine in a critical way how the CSME functions. The CSME creates an extensive range of rights and obligations for States parties to the Treaty and, through these States parties, for Community nationals.

Q. Why must Community nationals enjoy rights and discharge obligations through their States? Why cannot such nationals enjoy and discharge obligations without the intervention of their States nationality?

A. This is an important question which requires a clear and comprehensive response. Firstly, it must be borne in mind that treaties, like the Treaty of Chaguaramas, are governed by international law. International law is based on rules which are quite

different from the legal rules normally applied by judges in our national courts.

One important difference is that rules of international law ordinarily apply only to States which are called subjects of international law. Only in exceptional cases are those rules directly applicable to individuals. Consequently, individuals only enjoy rights in international law through their States of nationality of which those rights conferred by international law. For private entities or individuals to enjoy rights under an international instrument, the instrument would have to be implemented into local law by the State concerned.

Q. What are the exceptional circumstances in which rights and obligations under International laws are conferred on individuals directly?

A. One such exceptional circumstance is the example of the European Union created by the Treaty of Rome as amended by the Treaty of Maastricht and which grants rights and creates obligations directly for citizens.

Q. How is the Treaty of Chaguaramas different from the Treaty of Rome?

A. The Treaty of Rome created institutions like the Council of Ministers and the European Commission which are intended to make laws directly for European Nationals – that is, without the intervention of their national assemblies.

Q. Why cannot the Organs of the Caribbean Community, like the Conference of Heads of Government make laws directly for Caribbean Community nationals

without the intervention of their national assemblies?

- A. This is because any such arrangement appears to be politically unacceptable! Consequently, the Caribbean Community has always been and remains an association of the Organs of the Community must be enacted into local law by national assemblies before such decisions can create rights and obligations for nationals of the Caribbean Community. And this is an extremely important feature of the Caribbean Community!

Q. Why cannot the Member States of CARICOM agree to have the Treaty of Chaguaramas interpreted and applied in some way other than the CCJ? The Treaty of Chaguaramas has existed for more than twenty-five years without a Court. What is all this fuss about the need for a Caribbean Court to interpret and apply the Treaty?

- A. Yes! Indeed, the old Treaty of Chaguaramas provided for arbitration in the event of disputes concerning the interpretation and application of the Treaty. Unfortunately, however, the arbitral procedure was never used and serious disputes were never settled, thereby causing the Integration Movement to be hampered. Moreover, the rights and obligations created by the CSME are so important and extensive, relating to the establishment of economic enterprises, the provision of professional services, the movement of capital, the acquisition of land for the operation of businesses, that there is a clear need to have a permanent, central, regional institution to authoritatively and definitively pronounce on those rights and corresponding

obligations. The Caribbean Court of Justice is intended to be such an authoritative institution. Arbitral tribunals reach decisions which are binding only on the parties to a dispute. However, the determinations of the CCJ will create largely binding norms for all Member States parties to the Agreement establishing the CCJ.

Q. Would the absence of such a Court adversely affect the development and functioning of the CSME?

A. Definitely! The Caribbean Community is not known for significant capital accumulation. Consequently, it is largely a capital importing Region. Foreign investors seeking to invest normally prefer a stable macro-economic environment based on predictable laws in order to determine outcomes. Such an environment can and must be created by the CCJ.

Q. How can the CCJ create a stable macro-economic environment suitable for the attraction of foreign capital?

A. The CCJ has been configured to ensure that the laws of the CSME are uniform and predictable. Firstly, the CCJ will have exclusive jurisdiction in respect of the interpretation and application of the Treaty. If it had concurrent jurisdiction with other Courts of the Community, there is a likelihood of conflicting opinions on important economic, commercial and financial issues thereby creating uncertainty and unpredictability in the business climate and macro-economic environment! Stability of expectation is a fundamental requirement of investment

decisions.

Q. So what happens where another Court in the Caribbean Community is seized of an issue which involves a question concerning the interpretation and application of the Treaty? Must the Court decline to accept jurisdiction and pronounce on the case?

A. No! The Court must accept jurisdiction and refer the particular issue to the CCJ for determination before delivering judgment, which must respect the CCJ's determination of the relevant issue! A similar requirement of referral obtains in the European Union and it has been credited with promoting social and economic cohesion among the Member States.

Q. What happens if a delinquent party to a dispute refuses to submit to the Jurisdiction of the CCJ?

A. By signing on to the Agreement Establishing the CCJ, all Member States of the Community would be submitting to the jurisdiction of the CCJ in the exercise of its Original jurisdiction but when a court of last resort is seized of an issue concerning the interpretation or application of the Treaty of Rome, the Court must refer the issue to the European Court of Justice for determination.

Q. How are decisions of the CCJ enforced?

A. Member States signing on to the Agreement Establishing the CCJ would agree to enforce its decisions in their respective jurisdictions like decisions of their own superior courts.

Q. What recourse is open to an aggrieved party where the defaulting State refuses enforce a decision of the CCJ?

A. The simple answer is none! But in this respect the regime establishing the CCJ is not different from similar regimes establishing the European Court of Justice or the Andean Court of Justice. Participants in the regime would have undertaken to Respect and enforce the decisions of the Court and one would have to depend on a culture of respect for the rule of law and obedience to the determinations of competent tribunals to ensure enforcement of judgments.

Q. Can the CCJ reverse itself as it considers fit thereby creating uncertainty in the applicable norms?

A. The Agreement Establishing the CCJ does provide the revision of decisions in specified circumstances. But such revisions are intended to satisfy the ordinary requirements of justice! Revision of judgments is not to be secured lightly or capriciously. Indeed, in the ordinary course of events, decisions of the CCJ constitute *stare decisis*.

Q. What do you mean by *stare decisis*?

A. *Stare decisis* is peculiar to common law jurisdictions but it has been imported into the Agreement Establishing the CCJ to ensure certainty in the applicable norms. The doctrine of *stare decisis* or judicial precedent, requires the Court to pronounce the same manner provided the circumstances of the case are similar.

Q. You have mentioned the term “norms”. What are norms and are they peculiar to the original jurisdiction of the CCJ?

A. “Norms” are rules of law prescribing the conduct to be observed. Norms are not peculiar to the original jurisdiction of the CCJ. However, the norms applied by the CCJ in the exercise of its original jurisdiction would normally be rules of international law. In the exercise of its appellate jurisdiction, the CCJ would apply the norms peculiar to common law jurisdictions distinct from civil law jurisdictions.

Q. Since Suriname and Haiti have civil law jurisdictions, can they participate in the regime establishing the CCJ?

A. The response to this question would depend on the jurisdiction of the CCJ to which access is desired. Both civil law and common law jurisdictions can participate in the exercise of its original jurisdiction. This is so because the CCJ in exercising its

original jurisdiction is discharging the functions of an international tribunal applying rules of international law. International law rules are both common and civil law jurisdictions. However, problems would occur if Suriname or Haiti wished to participate in the appellate jurisdiction of the CCJ where municipal law rules and not international law rules apply. Conference has established a Working Group to examine the issue with a view to finding an acceptable solution.

Q. Can private entities, like enterprises or individuals, appear in proceedings before the CCJ?

A. The simple answer is yes, but only by special leave of the Court in special circumstances where the Court determines that the interest of justice requires it. However, in the ordinary course of events only States would be allowed to espouse a claim in proceedings before the CCJ. Consequently, where a private entity is aggrieved, the State of nationality concerned would espouse its cause in proceedings before the CCJ. This is one of the peculiarities of international law. For example, the parties to the “banana issue” involving private producers were States – the European Union and the USA. One may hazard a guess, however, that in the context of the CSME, States would allow their nationals to espouse their claims in proceedings before the CCJ wherever the opportunity presents itself.

THE APPELLATE JURISDICTION OF THE CARIBBEAN COURT OF JUSTICE

Q. Why does the Region need its own court of last resort for civil and criminal matters?

A. The simple answer is to ensure autonomy of judicial determinations in the Region in order to complete the process of independence. However, a more pragmatic basis, for the Region to inspire confidence and ensure voluntary compliance, they should mirror the collective social ethos of our peoples and, to be relevant and responsive, should be interpreted and applied by Judges who have internalized the values informing the content of that collective social ethos.

Q. But is it not reasonable to assume that the Judges of the Privy Council being removed from the social environment are likely to be more dispassionate in interpreting and applying the law?

A. Yes! And herein lies the problem! Law is not a static corpus of abstract normative Principles to be applied mechanistically in order to arrive at objectively valid solutions to resolve problems of human intercourse. Law is the normative outcome of the cut and human thrust of human interactions based on collectively determined or generally accepted social values and subject to a process of continuing adjustment to its environment of control. Consequently, persons interpreting and applying the law should be attuned to the relevant dynamics of social interaction, which determine the quality and intensity of human intercourse, and values

conditioning such dynamics. And by this is meant the values that make us cry; the values that make us laugh; the values that make us happy or sad; the values that make us responsible, productive, creative, caring, proud people. In short, the values that condition our uniqueness as a people. In the premises, to be far removed the immediate environment of social interaction to which the law applies would facilitate a dispassionate analysis of human events and judicially objective decisions but only to the detriment of desirable social behavior and social cohesion.

Q. Would the Judges of the CCJ be vulnerable to political manipulation?

A. It is generally accepted in our societies that independence of the judiciary is a vital and essential ingredient of the rule of law, **a basic principle of social engineering in CARICOM Member States.** To ensure independence of the members of the Court, appropriate provisions have been elaborated in the Agreement Establishing the CCJ to provide for credible institutional arrangements. Firstly, unlike the situation with the European Court of Justice, where Judges are appointed by the Ministers of Government, Judges of the CCJ are to be appointed by a Regional Judicial and Legal Services Commission whose composition should offer a reasonable degree of comfort to the Court's detractors. Of its nine members, four are to be appointed on the recommendations of the legal fraternity; two are to be chairpersons of the national judicial services commissions, one is to be a chairperson of a national public service commission, one is to be the Secretary-General or his Deputy and the other is to be the President of the Court. Provisions of the draft Agreement also address the security of the tenure of Judges.

Removal of Judges from office requires an affirmative recommendation of a tribunal established for the purpose.

The President of the Court is appointed by the Heads of Government of Participating States **on the recommendation of the Commission** and may be removed for cause only on the recommendation of the Commission acting on the advice of a tribunal established for the purpose. The Judges of the European Court of Justice, as indicated above, and the European Court of First Instance, are appointed by the Ministers of Government and those of the Andean Court of Justice are elected by States. In effect, the Caribbean Community will be the only Integration Movement whose Judges are not directly appointed by States!

Q. But are not the Judges of the Court paid by Governments which can exert decisive informal pressure on them to deliver self-serving judgments?

A. In order to preempt this eventuality, the Heads of Government have mandated the the Ministers of Finance to provide funding for the recurrent expenses of the Court for the first five years of its operation. In this connection, it should be noted that significant capital expenses have been assumed by the host Government and that the building for the seat of the CCJ is being provided by Trinidad and Tobago. During this initial period, a Trust Fund is to be established and capitalized in an adequate amount so as to enable the recurrent expenditure of the Court to be financed by income from the Fund. The Fund is to be administered by the Caribbean Development Bank or some other agreed institution. In this way, the

recurrent expenditure of the Court including the remuneration of the Judges would not be dependent on the capricious disposition of Governments.

Contributions to the Trust Fund should not be a cause of anxiety Extra-regional interests have genuine, legitimate concerns about the functioning of the CCJ.

Remember, that as a court of last resort, the CCJ would be pronouncing on the Operations of international criminal cartels whose activities impact adversely on the economies of third States. The CARICOM Secretariat has had indications of interest in contributing to the fund from sections of the international donor community. Most importantly, the political directorate has agreed that non-payment of contributions to the budget of the Court would result in the denial of access to its services by defaulting Member Governments. Agreement by Member States of the Community on such a sanction must be seen as a very significant development in the history of the economic integration movement where, historically, sanctions tended to be conspicuous by their absence.

Q. Is there any plausible assurance that the Judicial pronouncements from the CCJ would be of the desired quality?

A. In this connection, it must be borne in mind that the selection of Judges would not be confined to the Caribbean region. Candidates may come from any territory of the Commonwealth. And having cast the net so widely, there is a plausible assurance that Judges of the required expertise and legal erudition would come forward for appointment. In any event, critics from the legal community expressing

misgivings about the quality of judges should not forget that, in the final analysis, the quality of judicial determinations is not unrelated to the quality of submissions by Counsel. Indeed, the record would confirm that behind any sound judicial pronouncement in the Region, and there are numerous of them, the submissions of Counsel were very well researched, informed and persuasive in respect of both issues of law and fact. Finally, some comfort must be taken from the fact that most appeals to the Privy Council are dismissed underscoring the quality of judicial determinations of local Judges.

Q. Does the renewed interest in the establishment of the Caribbean Court of Justice have anything to do with the decision of the Privy Council in “Pratt and Morgan”?

A. The unfortunate coincidence of those events is a matter of grave concern. However, the answer must be in the negative and should be placed in historical perspective. What is often forgotten by detractors of the Court is that the revived interest in the Caribbean Supreme Court or the Caribbean Court of Justice, as it is now called, had its origins in the Report of the West Indian Commission (1992) which predated the landmark decision of the Privy Council in **Pratt and Morgan (1993)** by one year. Indeed, the recommendation for the establishment of a Caribbean Supreme Court in substitution for the Privy Council and vested with original jurisdiction concerning the interpretation and application jurisdiction concerning the interpretation and application of the Treaty of Chaguaramas, even though one of the

most seminal determinations of the West Indian Commission, was anticipated twenty years before by the Representative Committee of OCCBA set up to examine the establishment of a Caribbean Court of Appeal in substitution for the Judicial Committee of the Privy Council. In short, if **Pratt and Morgan** was a watershed Caribbean jurisprudence, the West Indian Commission's recommendation for a Caribbean Supreme Court was not an innovation in Caribbean judicial institutional development **and is largely unrelated to popular perceptions of required sanctions for socially deviant behavior.** In point of fact, one of the most compelling arguments for the establishment of the Caribbean Court of Justice is the need to have an authoritative, regional institution to interpret and apply the Treaty, as amended, in order to create the CARICOM Single Market and Economy. **But unfortunately, the original jurisdiction of the Caribbean Court of Justice and its importance for the success of the CSME is little understood and even less appreciated by many members of the legal fraternity at the present time.**

Q. Why does the Agreement Establishing the Caribbean Court of Justice provides for the withdrawal from the regime thereby conveying a perception of political convenience and impermanence?

A. It is trite international law that treaties must be observed in good faith (**pacta sunt servanda**). However, in exceptional cases, such as a fundamental change of circumstances (**renus sic stantibus**), a State may, as an attribute to sovereignty and in the national interest, withdraw from a treaty regime irrespective of the provisions of the relevant instrument, subject of course, to the engagement of any international

responsibility that may be involved. As such, provisions inhibiting withdrawal from an international regime is of marginal juridical significance. And the same observations hold good for the Agreement Establishing the Seat of the Caribbean Court of Justice.

Q. Would the retention of appeals to the Privy Council inspire foreign investor confidence, especially in the case of large investments, thereby facilitating a better investment climate?

A. There can be no doubt that credibility of the judicial sector reinforces investor confidence and promotes foreign direct investment. Undoubtedly, the Judicial Committee of the Privy Council has an international reputation for sound judgments and does inspire investor confidence. However, the stark reality is that the process of judicial settlement involving the Privy Council is too tardy to offer much comfort to the foreign **investor**. In fact, foreign investors with large sums to invest opt for self-contained instruments which include disputes settlement provisions tending to favour the ICSID route that is the International Convention for the Settlement of Investment Disputes sponsored by International Bank for Reconstruction and Development (IBRD).

Q. There are obviously many aspects of the CCJ to be understood. How are the people of the Region expected to learn and understand the facts surrounding the CCJ, the benefits that can come with its establishment, and how to access those benefits?

A. The communication component is certainly a very important consideration, and one that has been given deserved emphasis. That is why there is already in progress a regional Public Education Programme which is designed to foster understanding in relation to the CCJ, the reasons for its establishment, the rules which will guide it, and especially, implications relating to the CSM&E. This public education effort is being spearheaded at the national level, be national debate and dialogue, in order to adequately represent various interests, and address any questions or concerns arising within the national context.

At the regional level, there have already been very valid concerns raised in relation to the CCJ, especially with respect to its structure, funding and independence of its officers. Opportunity must be afforded for the questions to be asked and answered. The people of the Caribbean are therefore being encouraged to air their views, no matter where they are, through the various media, including the Internet, and in different for a such as town meetings, and ask the probing questions of persons who can answer them. The views of the people will naturally be instructive in helping the framers to further settle some aspects of the Court's establishment, and to create the structure which is both progressive and comfortable for the people of the Region.

The idea of a Caribbean Court is not a new one. It has been 30 years in incubation. Now that its time has come – this critical investment in our future viability – the real concern must be **how do we get it right.**

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