

DISPUTE RESOLUTION: THE REVISED TREATY OF CHAGUARAMAS AND THE CARIBBEAN COURT OF JUSTICE – COMPATIBILITY OR CONTROVERSY?

**The Hon. Mme. Justice Desiree P. Bernard, O.R., C.C.H.,
Judge, Caribbean Court of Justice
December, 2013**



DISPUTE RESOLUTION:
THE REVISED TREATY OF CHAGUARAMAS AND THE
CARIBBEAN COURT OF JUSTICE
– COMPATIBILITY OR CONTROVERSY?

By
The Hon. Mme. Justice Desiree P. Bernard, O.R., C.C.H.,
Judge, Caribbean Court of Justice



The collapse of the West Indian Federation in the early 1960s seemed then to have sounded the death knell to the dreams of the Caribbean Region for a united political and economic powerhouse hopefully achieving collectively what may have seemed impossible individually for small states with fragile economies based mainly on tourism, sugar and banana production controlled by the former colonial masters. All, however, was not lost when the political leaders of the day once again endeavoured to promote the economic development of the Region by establishing the Caribbean Free Trade Association (hereinafter referred to as “CARIFTA”) in 1965¹ with objectives to increase and expand trade between Member States thereby fostering harmonious development and liberalisation, and ensuring fair competition.

This tentative attempt at regional economic cooperation matured

¹ Founded by Antigua & Barbuda, Barbados and Guyana on 15 December, 1965, with the signing of the Dickenson Bay Agreement, and later joined by Trinidad and Tobago, Dominica, Grenada, St. Kitts-Nevis-Anguilla, St. Lucia, St Vincent and the Grenadines, Montserrat, Jamaica and Belize.

with the establishment of the Treaty of Chaguaramas Establishing the Caribbean Community and Common Market signed on July 4, 1973 by all Member States of the Region.² The vision of the signatories went beyond trade, and embraced the optimum utilisation of available human and natural resources of the Region by co-ordinated and sustained economic development. The Community's objectives embraced economic integration, coordination of foreign policies and functional cooperation with the Annex to the Treaty establishing the Common Market Council on which each Member State was represented. The Council's responsibilities can be summarised as being administrative (ensuring the efficient operation and development of the Common Market), supervisory (making proposals for the progressive development of the Common Market), adjudicatory (receiving and considering alleged breaches of obligations arising under the Annex and deciding thereon), and exercising such powers and performing such duties as were conferred upon it.

The response to the global economic challenges of the late 1980s which the Heads of Governments of the Caribbean Community anticipated would impact significantly on their fragile economies, together with a commitment to deepen regional integration, resulted in the Declaration of Grande Anse in 1989 establishing an independent Commission under the Chairmanship of Sir Shridath Ramphal, later Secretary General of the Commonwealth. This Commission produced in 1992 a report intitled appropriately "Time for Action" and embracing wide-ranging recommendations, among them being

² Signed at Chaguaramas, Trinidad and Tobago by Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts-Nevis-Anguilla, St. Lucia, St. Vincent, Trinidad and Tobago

rapid development of a Single Market and Economy. This led ultimately in 2001 to the signing and adoption of the Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy³ (hereinafter referred to as the “RTC”).

What will forever be regarded as a recommendation of outstanding significance coming out of that Commission led eventually to the establishment of the Caribbean Court of Justice (hereinafter referred to as the “CCJ”), a regional court which had been contemplated in several forms and by several regional groups over a considerable period of time. The Regional Heads of Government as Contracting Parties being “convinced that the Caribbean Court of Justice will have a determinative role in the further development of Caribbean jurisprudence through the judicial process,” brought into force an Agreement Establishing the Caribbean Court of Justice⁴ (hereinafter referred to as “the CCJ Agreement”) which provided for two jurisdictions – original and appellate.

Upon signing the RTC the States Parties affirmed that the original jurisdiction of the Court was essential for the successful operation of the Single Market and Economy, and provision was made in the RTC for the Court to have compulsory and exclusive jurisdiction to hear and determine disputes concerning the application and interpretation of the RTC⁵. Further, and of significant importance is the fact that the Member States agree that they recognise as compulsory, *ipso facto* and without

³ Signed on July 5, 2001 in Nassau, Bahamas by Heads of Government of the Community

⁴ Signed on February 14, 2001 in Barbados

⁵ Article 211

special agreement, the Court's original jurisdiction.⁶ Each Member State also undertook to employ its best endeavours to complete as soon as possible the constitutional and legislative procedures required for its participation in the regime establishing the Court.⁷

Separate and apart from the exclusive jurisdiction conferred on the CCJ under the RTC, both Treaties of 1973 and 2001 established procedures for settlement of disputes between Member States wherever these arose. Even before these treaties their forerunner, the CARIFTA Agreement of 1965 established a procedure for settlement of disputes between the three States which had signed that Agreement. This is a convenient point of departure to initiate a discussion on settlement of disputes between States as provided for in the Treaties.

Agreement Establishing the Caribbean Free Trade Association

This Agreement signed on 15th December, 1965 by the Governments of Antigua and Barbuda, Barbados and Guyana (then British Guiana), sought, *inter alia*, to promote the expansion and diversification of trade within the areas of the Member Territories, collectively called the Caribbean Free Trade Area. This was based on the recognition that they shared a common determination to fulfil the hopes and aspirations of the peoples of the Caribbean for full employment and improved living standards; also an awareness that the broadening of domestic markets through the elimination of barriers to trade between the Territories was a prerequisite of

⁶ Article 216

⁷ Article 224

development.⁸

The Agreement's Complaints Procedure⁹ provided for referral of disagreements or complaints by Member Territories to a Council comprising the institution and organs of the Association with power to make arrangements for examining the matter, and in so doing to have regard to whether it had been established that an obligation under the Agreement had not been fulfilled or any objective of the Association was being frustrated. The arrangements referred to included a reference to an examining committee comprising persons of competence and integrity, and appointed on such terms and conditions as were to be decided by the majority vote of the Council.

The responsibilities of the Council embraced exercising such powers and functions as were conferred upon it by the Agreement, supervising the application of the Agreement and keeping its operation under review, as well as considering any further action by Member Territories to promote the attainment of the objectives of the Association.¹⁰ In exercising its responsibility under the Complaints Procedure, the Council was empowered to take decisions and make recommendations which bound all Member Territories.

Treaty Establishing The Caribbean Community and Common Market

By 1973 when the Caribbean Common Market was established

⁸ Preamble of the Agreement and Article 2.

⁹ Article 26

¹⁰ Article 28

membership had expanded to twelve independent Caribbean States and Montserrat.¹¹

This Treaty with similar aspirations as CARIFTA provided for disputes concerning the interpretation or application of the Treaty to be determined by the Conference, one of the principal organs of the Community unless otherwise provided for.¹²

The Disputes Procedure within the Common Market as set out in the Annex¹³ adopted criteria similar to Article 26 of the CARIFTA Agreement, for the referral of disputes to the Common Market Council,¹⁴ the other organ of the Community, where a Member State considered that any benefit conferred upon it by the Annex or any objective of the Common Market was being or may be frustrated with no satisfactory settlement having been reached between the Member States concerned.

Among the powers exercisable by the Council was referral to an *ad hoc* Tribunal constituted in accordance with Article 12 of the Annex and comprising qualified jurists as arbitrators drawn from a list maintained by the Secretary General, and to which every Member State was invited to nominate two persons. If either the Council or the Tribunal found that any benefit conferred on a Member State or any objective of the Common Market was being or may have been frustrated, the Council could by majority vote make appropriate recommendations to the Member State concerned.

¹¹ Membership was also open to any other state of the Caribbean Region that is, in the opinion of the Conference of the Community able and willing to exercise the rights and assume the obligations of membership in accordance with Article 29 of the Treaty.

¹² Article 19.

¹³ Article 11

¹⁴ Article 5 of the Annex

Failure or inability to comply with such recommendations could result in the Council by majority vote authorising any Member State to suspend its obligations to the offending State as the Council considered appropriate. Provision was made for any Member State at any time while any matter is under consideration to request the Council to authorise interim measures to safeguard its position.

Sheldon McDonald in his literary work, "CARICOM and the New Millennium: Dispute Settlement Put Right"¹⁵ emphasised the fact that after such an involved procedure the only sanction was a non-binding recommendation, and unlike the Treaty proper, the Member State was under no duty to explain its failure to comply with the recommendation; further, whereas all decisions and recommendations under the Treaty required unanimity, this recommendation was by majority vote.

Mr. Mc Donald further commented on the fact that Member States did not assume the automatic right to refer disputes to the Tribunal; instead this rested with the Council with the possibility that the majority could frustrate a request for such a reference even though legitimate.

The Revised Treaty of Chaguaramas (RTC)

The States Parties to the RTC¹⁶ having committed themselves to deepening regional economic integration through the establishment of the CARICOM Single Market and Economy (CSME) in order to achieve sustained

¹⁵ See An analysis of the Dispute Settlement Regimes in the Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market And Economy within the Context of General International Law and International Trade Law particularly Regional Integration Law

¹⁶ Signed in Nassau, the Bahamas, on 5 July, 2001

economic development, and being mindful that disputes among States could affect adversely the desired goals, affirmed in the Preamble to the RTC that “the employment of internationally accepted modes of disputes settlement in the Community will facilitate the achievement of the objectives of the Treaty.” They also considered that “an efficient, transparent, and authoritative system of disputes settlement in the Community will enhance the economic, social and other forms of activity in the CSME” The scope of this system is considerably wider than the Treaty of 1973. Whereas resolution of disputes concerning the interpretation or application of the 1973 Treaty was the sole responsibility of the Heads of Government,¹⁷ and its mandate was to consider whether “any benefit conferred on a Member State or any objective of the Common Market was being or may be frustrated if no satisfactory settlement is reached between the Member States,” the scope of the RTC disputes settlement was widened to include, *inter alia*, allegations that an actual or proposed measure of another Member State is or would be inconsistent with the objectives of the Community.

Although the RTC’s disputes settlement regime is addressed extensively in Chapter 9, the Conference of Heads of Government still retains the right to consider and resolve disputes between Member States¹⁸ in much the same way as it did under the 1973 Treaty.

With the commitment to deepen regional economic integration by avoidance of disputes among Member States, the RTC advocates recourse to several internationally accepted modes of dispute settlement, namely,

¹⁷ Article 19 of 1973 Treaty

¹⁸ Article 12(8)

good offices, mediation, consultations, conciliation, arbitration and adjudication.¹⁹ Any of these modes of settlement may be utilised by Member States to resolve disputes without prejudice to the exclusive and compulsory jurisdiction of the CCJ in the interpretation and application of the RTC.

The mandate of the CCJ in the exercise of its exclusive jurisdiction is not confined to hearing and determining disputes between Member States or between Member States and the Community, but includes determining referrals from national courts of Member States,²⁰ and of immeasurable importance, hearing applications by private persons, whether natural or juridical, who may be allowed with special leave by the Court, to appear as parties in proceedings before the Court subject to specific conditions being satisfied.²¹

The delivery of advisory opinions concerning the interpretation and application of the RTC also falls within the remit of the CCJ's exclusive jurisdiction, the opinions being delivered only at the request of Member States parties to a dispute or at the request of the Community, possibly through the Secretary General.²²

In spite of the Court's compulsory and exclusive jurisdiction to determine disputes between Member States, alternative dispute resolution remains the primary objective of Member States of the Community.

¹⁹ Article 188

²⁰ Article 214 of the RTC; Article XIV of the CCJ Agreement.

²¹ Article 222 of the Treaty; Article XXIV of the Agreement.

²² Article 212 of the RTC; Article XIII of the CCJ Agreement.

The desirability of employing and exhausting all avenues for dispute resolution between Member States is emphasised in the mandatory language of the RTC which enjoins Member States to proceed expeditiously on agreement for modes of settlement and implementation of such settlements.²³ In fact, Chapter 9 addresses Disputes Settlement in Articles 187 through 223 including those Articles relative to the CCJ.²⁴ Significantly, in relation to the settlement of private commercial disputes among Community nationals as well as among Community nationals and nationals of third states, Article 223 of the RTC obligates Member States to encourage and facilitate the use of arbitration and other modes of alternative disputes settlement “to the maximum extent possible”, and so does Article XXIII of the CCJ Agreement which specifically refers to the settlement of international commercial disputes. Additionally, the mandatory nature of Article 223.2 of the RTC ensures that each Member State provides appropriate legislative procedures to ensure observance of arbitration agreements, and for the recognition and enforcement of arbitral awards in such disputes.

The Basseterre Treaty

The Treaty Establishing the Organisation of Eastern Caribbean States (the Basseterre Treaty) must also be considered. It was signed into force on 18th June, 1981 by the Heads of Government of the Eastern Caribbean States,²⁵ the main goal being cooperation in strengthening links

²³ Article 189.

²⁴ Articles 211 – 222.

²⁵ Antigua & Barbuda, Dominica, Grenada, Montserrat, St. Kitts-Nevis-Anguilla, St. Lucia, St. Vincent & the Grenadines.

by unified efforts and resources. The principal institution, “the Authority” comprises the Heads of Government of the Member States. In the relevant provision of the Treaty on the settlement of disputes arising between Member States, if such disputes cannot be resolved amicably by direct agreement, the Treaty mandates that they be submitted to a Conciliation Commission by either party upon an undertaking to accept the conciliation procedure. Any recommendation of the Conciliation Commission is final and binding in sharp contrast to the relevant provisions of the RTC. Of interest, all Member States of this Treaty are now Member States of the RTC thereby creating an overlap situation giving rise to the availability of two options.

Although the main thrust of this paper is the dispute resolution regime of the RTC, other issues connected with the CCJ in its principal role of interpreting and applying the RTC will be addressed.

It is convenient at this juncture to discuss the compulsory and exclusive jurisdiction of the CCJ. Member States under Article 216 of the RTC (Article XVI of the CCJ Agreement) agree to recognise as compulsory, *ipso facto* and without special agreement, the original jurisdiction of the Court.²⁶ In the exercise of its original jurisdiction, Article 217 of the RTC (Article XVII of the CCJ Agreement) enjoins the Court to apply such rules of international law as may be applicable, and under Article 221 of the RTC

²⁶ Judgment of the CCJ in *Trinidad Cement Ltd. v The Caribbean Community* [2009]CCJ2(OJ) and comment that “by signing and ratifying the Revised Treaty and thereby conferring on this Court *ipso facto* a compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Revised Treaty, the Member States transformed the erstwhile voluntary arrangements in CARICOM into a rule-based system, thus creating and accepting a regional system under the rule of law.”

(Article XXII of the CCJ Agreement) the judgments of the Court shall constitute legally binding precedents for parties who appear before it unless such judgments have been revised in accordance with Article 219 of the RTC (Article XX of the CCJ Agreement). It is apposite at this point to raise the following question.

Is the jurisdiction of the CCJ really exclusive?

The late Professor Ralph Carnegie²⁷ in a learned presentation at a Faculty Workshop Series of the Faculty of Law of the University of the West Indies on November 25, 2009, but which it seems was never published or disseminated up to the time of his death and is available only as a draft, posed the question – “How Exclusive is ‘Exclusive’ in Relation to the Original Jurisdiction of the Caribbean Court of Justice?” Several very interesting and thought-provoking opinions were expressed by him, a few of which will be advanced post mortem and attempts at answers given.

Article 211 of the RTC having conferred on the CCJ compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the RTC limited that jurisdiction by the opening words of the Article “Subject to this Treaty,” and which is circumscribed similarly in Article XII of the CCJ Agreement. Many opinions have been proffered as to the import of these words. Justice Duke Pollard, former Judge of the CCJ, posited the view that the said circumscription has extremely important implications for the interpretation of the RTC, and

²⁷ History Graduate of the University College of the West Indies, Rhodes Scholar, Graduated with First Class Honours in Jurisprudence from Oxford University, served as Fellow and Tutor in Law at Jesus College; founding Professor in Faculty of Law, Cave Hill Campus, UWI. Died on 7th January, 2011.

opined that the phrase “subject to” introduces a dominant provision followed by one or more subservient provisions as lawyers familiar with the elementary principles of drafting (as he is) must appreciate.²⁸ The conclusion he arrived at was that consequently the compulsory and exclusive jurisdiction of the CCJ cannot be construed to take precedence over other relevant treaty provisions, for example, the wide-ranging disputes settlement regime of Chapter 9 of the RTC, particularly Article 193.1 which imposes what may be regarded as a mandatory obligation on Member States in a dispute to enter into consultations. This is concluded by the use of the word “shall” in the Article instead of “may.” Realistically only failure of the consultative process permits Member States in a dispute to resort to arbitration or adjudication.

The exclusivity of the CCJ’s jurisdiction under Article 211 of the RTC and Article XII of the CCJ Agreement becomes more complex from Professor Carnegie’s point of view. In his discourse referred to earlier his reasoning raised the following queries about what he termed “the non-curial” modes of dispute settlement being those distinguishable from the CCJ’s adjudication:

“If the non-curial modes in Chapter 9 RTC are among the intended reference of the qualification ‘subject to this Treaty’ in Article 211 RTC, there is a problem in that recourse to those modes is not only also stated by Article 188.1 RTC to be ‘subject to the provisions of this Treaty’, but additionally, is under Article 188.4 RTC

²⁸ Presentation at the ACP-EU International Conference on 21st May, 2008 in Brussels, Belgium.

‘[w]ithout prejudice to the exclusive and compulsory jurisdiction of the Court in the interpretation and application of this Treaty under Article 211.’ So the Chapter 9 non-curial modes are not modes which prevail over the exclusive jurisdiction by virtue of the ‘subject to the treaty’ qualification in Article 211.1 RTC. How then can the non-curial modes have any application at all, if the CCJ’s jurisdiction is exclusive and, by virtue of the ‘without prejudice’ phrase, overriding also?’

An analysis of Professor Carnegie’s queries seems to suggest that since the non-curial modes of dispute settlement in Chapter 9 of the RTC are themselves circumscribed under Article 188.1 which begins “Subject to the provisions of the Treaty,” and additionally under Article 188.4 are “without prejudice to the exclusive and compulsory jurisdiction of the Court” they can be overridden, and are not modes which prevail over the CCJ’s exclusive jurisdiction; hence the jurisdiction of the Court is not circumscribed by the use of the words “Subject to this Treaty.”

Professor Carnegie theorised that the text excludes one hypothetical possibility, this being, that the other modes of settlement are only available if the CCJ consents to their operation. He enlarged his theory by stating that the choice to use one or more of the non-curial modes lies with the parties to a dispute, and when a Member State has recourse to a dispute settlement against another Member State, Article 189(a) mandates that they proceed expeditiously to an exchange of views. Professor Carnegie, however, suggests such a requirement seems superfluous if a non-CCJ

mode is available only at the option of the CCJ. In support of this theory he drew attention to the fact that there is no reference in the RTC text to an exchange of views being required when a private sector party (meaning a private individual or a private corporate entity) brings a claim before the CCJ under Article 222 of the RTC or when CARICOM is a party to the case. He alluded to the fact that no reference was made in any of the cases decided by the CCJ in its original jurisdiction to any obligation on any of the parties to initiate an exchange of views. He concluded that this is arguably *sub silentio* confirmation that the exchange of views requirement does not apply to an Article 222 matter. In response it is suggested that consideration must be given to the fact that although no provision for this has been made to date in the Original Jurisdiction Rules, parties are not prohibited after a court proceeding is launched to engage in an exchange of views without prejudice to its continuation provided such a course is accepted by the Court.

Article 187 of the RTC gives rise to an interesting array of reasons for non-curial modes of dispute settlement concerning the interpretation and application of the RTC. While Article 187(a) refers to allegations that an actual or proposed measure of another Member State is, or would be, inconsistent with the objectives of the Community, and hence can be invoked only by a Member State, the other allegations may be invoked by private parties, for example, by natural or juridical persons under Article 222 or any other entity,²⁹ and not excluding a Member State.

²⁹ TCL v CARICOM [2009] CCJ4 (OJ).

As mentioned earlier Article 188.1 lists the array of options for settlement of disputes available to any party. Article 188.2, however, provides that where the dispute is not settled either party may have recourse to another mode except arbitration or adjudication which can be regarded as rule-binding procedures. One may hazard a guess that the reason for excepting these two modes is that parties should endeavour to exhaust fully during the early stages of dispute resolution non-contentious modes of settlement before resort to the modes of arbitration or adjudication which could sometimes be contentious. Professor Carnegie posits the view, which is arguable, that the utilisation of the non-curial modes may be treated as preliminary procedures only and which may be followed by later reference to the CCJ at the option of any of the parties.

It is interesting, however, to analyse Articles 188.3 & 4. Article 188.3 permits the parties to a dispute to agree on recourse to good offices, mediation or conciliation while a settlement is pending subject to the procedural rules applicable in respect of arbitration or adjudication. One possibility that suggests itself is that even after parties to a dispute have resorted to arbitration or adjudication a settlement may be envisaged, and recourse may still be had to the non-contentious modes of settlement. Needless to say this depends on whether the procedural rules applicable to arbitration or adjudication permit such a course.

Support for this opinion can be found in Sheldon McDonald's treatise when he expressed the view with reference to Article 188.3 that it permits free choice, and allows parties to have negotiations even on the

margins of the two exceptions of arbitration and adjudication; if the recourse to the other modes resolves the matter report to the arbitration panel or the Court could be sanctioned and reflect a binding resolution of the dispute.

Article 188.4 makes specific reference to the CCJ's exclusive and compulsory jurisdiction under Article 211, and without prejudice to it, permits parties (by use of the word "may") to utilise any of the voluntary modes of settlement giving rise to the query whether the jurisdiction of the CCJ can be utilised as a first or last resort.

Significantly by virtue of Article 12.8 of the RTC the Conference being the supreme Organ of the Community, may consider and resolve disputes between Member States, the language of which suggests that this may be another option available to Member States, and must be read in conjunction with Article 189 which mandates Member States to proceed expeditiously to an exchange of views on agreement on a mode of settlement.

Of some importance as well is Article 13 of the RTC concerning the Community Council of Ministers which consists of Ministers responsible for Community Affairs and any other Minister designated by the Member States in their absolute discretion. The duties of the Council are defined in Article 13.4 of the RTC, and "without prejudice to the generality of the foregoing provisions", include, *inter alia*, to "ensure the efficient operation and orderly development of the CSME, particularly by seeking to resolve problems arising out of its functioning, taking into account the work and decisions of COTED" (Article 13.4(f)), and to "receive and consider

allegations of breaches of obligations arising under this Treaty, including disputes between Organs of the Community” (Article 13.4(g)).

When one considers the options for the settlement of disputes arising between Member States the choice of good offices, mediation or conciliation seem to be unrestricted although subject to expeditious resolution. Where, however, a requesting Member State alleges that the action taken by the requested Member State constitutes a breach of obligations arising from or under the provisions of the RTC consultations seem to be mandatory under Article 193, and such consultations must take place within 14 days of the request. This seems to indicate the serious nature of breaches of Treaty obligations whether by Member States against other Member States or against individuals or entities of Member States as reflected in Article 187 of the RTC.

Justice Pollard in reference to Article 193 in his treatise mentioned earlier, opined that the requirement to settle a dispute concerning the RTC by consultation where both disputants so prefer would operate to displace the jurisdiction of the CCJ, and it harkens back to the traditional and preferred mode of resolving disputes by states entities; in fact he concluded that since Member States are free to employ the broad range of other disputes settlement modes, it is a moot point how compulsory and exclusive is the jurisdiction of the CCJ in interpreting and applying the RTC. It may be that, consultations apart, in disputes between Member States concerning allegations of breaches of obligations under the RTC,

Article 12.8 (the Conference option) may be utilised notwithstanding the other options.

Professor Carnegie adverted to the fact that the CCJ has not had so far to address any issues pertaining to the dispute settlement function of the Conference, and opined that should this arise, it may perhaps be expected that “taking its cue from Article 12.8 RTC, the CCJ would show the kind of deference to the Conference that the International Court of Justice showed to the Security Council in the *Lockerbie* case.”³⁰ He explained that in that case the ICJ held that invocation by the Security Council of its powers under Chapter VII of the United Nations Charter prevailed over other obligations of the parties to the case under other international agreements. In the hypothetical instance before the CCJ, the express provision of Article 12.8 of the RTC makes the recommended deference easy to justify without reference to any overriding of treaty law.

Some concerns were raised by Professor Carnegie in relation to the Competition Commission, the establishment, composition, functions and powers of which are defined in Articles 171-174 of the RTC. He described disputes which may arise between a Member State and the Commission as a “turf dispute” which under Article 176.6 may be referred to the CCJ by the Member State concerned. He observed that the CCJ Rules do not refer to this procedure, and wondered where guidance on the procedure is to be found. He pondered whether it may perhaps be inferred from the CCJ’s decision in *Johnson v CARICAD*³¹ that such proceedings

³⁰ *Libyan Arab Jamahiriya v United States of America*

³¹ [2009] CCJ 3 (OJ).

would have to be treated as an action against the Community. No doubt Professor Carnegie's conclusions were based on the assumption that the Competition Commission was an Organ or at most an Institution of the Community. For this reason it is necessary to examine the functions of the Competition Commission and clarify some misconceptions.

The functions of the Competition Commission comprising seven members, a Chairman being one such member, include, *inter alia*, applying the rules of competition in respect of anti-competitive cross-border business conduct, promoting and protecting competition in the Community and co-ordinating the implementation of the Community Competition Policy. In determining anti-competitive business conduct which is addressed in Article 175 of the RTC, provision is made under sub-paragraphs 11 and 12 for recourse to the CCJ by the Commission (11), and (12) by a party aggrieved by a determination of the Commission under exercise of its powers granted in Article 174.4. Similarly, negative Clearance Rulings made by the Commission under Article 180 of the RTC are reviewable by the CCJ on an application by the Commission.

The relationship between the Competition Commission and the CCJ was defined and determined in the recent case of *Trinidad Cement Ltd. v The Competition Commission*³² where the Court held that the Commission enjoys full juridical personality making reference to the Agreement entered into between the Community, the Government of Suriname as the seat of the Commission and the Commission itself that the Commission "shall have

³² [2012] CCJ 4 (OJ).

full juridical personality”.³³ The Court, in considering its competence to review the decisions of the Commission, concluded that there was no conduct or exercise of power on the part of a Treaty-created institution which could escape its judicial scrutiny due to the CCJ’s compulsory and exclusive jurisdiction to adjudicate disputes concerning the interpretation and application of the RTC as well as the Treaty’s normative structure geared at transforming the CSME into “a regional system under the rule of law.”

This may have provided answers to some of the queries raised by Professor Carnegie in his paper concerning the Competition Commission. It is an exercise in superfluity to emphasise that the Competition Commission is not an Organ of the Community, its powers and functions having been defined in Articles 173 & 174. The Commission can carry out investigations and hold inquiries to determine anti-competitive business conduct by an enterprise. Article 175.11 empowers the Commission to apply to the CCJ for an order when an enterprise fails to take corrective action which the Commission had ordered. Similarly, a party aggrieved by a decision of the Commission can under Article 175.12 apply to the CCJ for a review of the decision; in fact the Commission itself can invoke the jurisdiction of the CCJ for a review of its own decision on an application for a negative clearance ruling when that decision was obtained by deceit or improper means.³⁴ All of the above indicates that the Competition Commission enjoys full juridical personality, and has no “Organic” status

³³ Article XV of the Agreement signed in St. Vincent & the Grenadines on 13th February, 2007

³⁴ Article 180.3

within the Community. The Commission has formulated its own rules of procedure, and in the Original Jurisdiction Rules of the CCJ procedural rules have been formulated in relation to matters concerning the Commission; these include provision for service of documents on persons and organs within the Community, including COTED which may be affected or were involved.

In relation to Article 175.12 Professor Carnegie queried whether this provision permitting a party aggrieved by the Competition Commission's determination of anti-competitive business conduct to apply to the CCJ for a review suggests inconsistency with the Court's jurisdiction being original, and can be regarded as being more akin to a supervisory jurisdiction by way of judicial review. Again, the answer to this contention lies in the aforementioned dicta in the judgment of the Court which emphasised the exclusivity of the CCJ's jurisdiction to scrutinise the conduct or exercise of power of any Treaty-created institution. This case was decided after Professor Carnegie's death, and one can only surmise whether had it been decided in his lifetime it may have influenced his conclusions.

Although not directly connected to the RTC's disputes settlement regime, it may be apposite to make reference to the referral provisions of the CCJ's compulsory and exclusive jurisdiction³⁵ and the delivery of advisory opinions (Article 212 of the RTC; Article XIII of the CCJ Agreement) referred to earlier. Neither of these has been utilised since the inauguration of the CCJ in 2005 so there is no precedent for their

³⁵ Articles 211.1(c) & 214 of the RTC; Articles XII (c) & XIV of the CCJ Agreement.

utilisation. The national courts of the Member States to the RTC whenever seised of matters which may concern the application or interpretation of the RTC are enjoined to stay completion of the matter until a ruling from the CCJ on the issue has been obtained. National courts were reminded of this in a recent case before the CCJ.³⁶ Hypothetically, assuming a claim is brought by a private individual or entity against a Member State which involves some provision of the RTC and a settlement is envisaged, it is suggested that wisdom should dictate that the proposed settlement be deferred until a definitive ruling on the interpretation and application of the RTC is obtained from the CCJ. In like manner Member States involved in a dispute which can be resolved by mediation or consultation may seek an advisory opinion from the CCJ on the application or interpretation of any provision of the RTC before settlement of the dispute. This may be advisable in order to test the legality of the proposed settlement.

Such an approach is discussed by Sheldon McDonald in his literary work³⁷ where he stated positively that it is permissible for parties by prior action emanating from consultations to agree to be bound by such an opinion. He went on to state that in this way the parties may avoid contentious court proceedings, and as a corollary it may be an invaluable contribution to the building up of Community Law. Having regard to the fact that the CCJ has not been as yet utilised in this regard this may be a long way off in becoming a reality.

³⁶ *Hummingbird Rice Mills Ltd. v Suriname & The Caribbean Community* [2012] CCJ1 (OJ) para. [26].

³⁷ *Ibid* p 42.

More detailed consideration will now be given to settlement of disputes by arbitration. Mention had been made earlier to Article 223 of the RTC and Article XXIII of the CCJ Agreement which by mandatory language suggest that arbitration be utilised as one of the primary modes of dispute settlement particularly those concerning private commercial transactions. Despite the fact that Article 204 of the RTC indicates arbitration as an option, the elaborate provisions in Articles 205 – 210 and 223 indicate that parties particularly where private commercial activity is involved should adopt this as their main form of settlement even above court adjudication. Provision is made for Third Party Intervention by a Member State who is not a party to a dispute (Article 208).

The importance attached to this mode of settlement is further highlighted by the mandate to each Member State to provide appropriate procedures in its legislation to ensure observance of arbitration agreements and the recognition and enforcement of arbitral awards (Article 223.2). Credit is even given under Article 223.3 to a Member State which has implemented the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the Arbitration Rules of the United Nations Commission on International Trade Law as having complied with Article 223.2.

One can presume with some degree of certainty that the motivation for urging the timely settlement of private commercial disputes, whether regional or international, is to avoid the adverse effects which protracted delays in resolution of such disputes could have on the fragile

economies of Member States as well as the resultant serious impact on the enhancement of the CSME; all of this is separate and apart from the drastic loss of confidence in the investment climate of the Region which may be engendered.

Comparisons and Contrasts between the CCJ and the ECJ

An assessment of these two international courts may indicate that the Caribbean Court of Justice is likely to be to the Caribbean Community what the European Court of Justice is to the European Union particularly in relation to the creation of a Single Market among Member States. In this regard certain provisions of the CCJ's original jurisdiction mirror those of the ECJ. The role of both Courts is a supervisory one charged with the responsibility of monitoring the application and implementation of economic treaties.

Justice Pollard, in a comparison between the two courts made the comment that the CCJ which in the exercise of its original jurisdiction as an international tribunal is considered in some quarters as the institutional centrepiece of the CSME, but unlike the ECJ it has no supranational competence, and is not integrated as an organ in the institutional arrangements of the Caribbean Community. He posited the view that this was due in large measure to the dual status of the CCJ as a municipal court of last resort for most but not all members of the Community, and as an international tribunal for all members of the Community.³⁸

³⁸ See "The CSME and the CCJ" a paper largely based on an article entitled The CSME, CCJ and the Private Sector which appeared in *The Caribbean Integration Process: A People Centred Approach* edited by K. Hall and M. Chuck-A-Sang, Ian Randle Publishers, Kingston, 2007, pp 24-47.

The issue of referrals from Member States is common to both Courts, but with different applicability. The import of Article 214 of the RTC is similar to Article 234 of the Maastricht Treaty which brought into being the European Court of Justice. In like manner if the issue of interpretation of the Treaty is raised before any court of a Member State, it may request the ECJ to give a ruling thereon. Although at first blush the provisions may appear to be similar, there are some crucial differences. Whereas the language used in Article 214 of the RTC appears to be mandatory in that where a court or tribunal of a Member State when seised of an issue involving the interpretation or application of the RTC shall refer the question to the CCJ for determination, a court or tribunal similarly placed with interpretation of the Maastricht Treaty may, if it considers that a decision on the question is necessary to enable it to deliver judgment, request the ECJ to give a ruling thereon. Article 234 extends this further to provide for situations where there is a case pending before a national court of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal may bring the matter before the Court of Justice.

Justice Pollard remarked on the difference between the two provisions by pointing to the fact that unlike the ECJ, the CCJ in cases of referrals from national courts or tribunals is competent to interpret and apply the RTC. Article 234 of the Maastricht Treaty provides only for an interpretation by the ECJ. Justice Pollard went on to point out that despite obvious differences in the formulation of the referral provisions in the two regimes, their essential thrust is similar, namely, to ensure certainty and

uniformity in the applicable law. He theorised that in much the same way that the provision of Article 234 was credited with promoting social and economic cohesion in the European Union by allowing the ECJ to insinuate itself in the domestic law of participating states, such a role may be of even greater importance within the Caribbean Community where the prevalence of dualism and the non-applicability of the principle of direct effect aggravates the problem of establishing a uniform legal infrastructure in CARICOM.

Continuing the discussion on referrals or references to the ECJ by national courts or tribunals, the case of *Julia Schnorbus v Land Hessen*³⁹ illustrates the basis on which a reference to the Court can be made when it noted that the Court has consistently held that it is solely for the national court to determine, in the light of the particular circumstances of the case, the need for a preliminary ruling in order to enable it to give its judgment, and consequently if questions submitted to the Court concern the interpretation of Community law, the Court, is in principle, obliged to give a ruling.

Unfortunately, to date the CCJ has not had the opportunity to make any ruling on referrals, but optimistically this may change in the near future.

The RTC in Article 221 (Article XXII of the CCJ Agreement) sought to ensure consistency in the judgments of the CCJ by providing that they shall constitute legally binding precedents for parties in proceedings

³⁹ Case C-79/99, judgment given on 7/12/2000

before the Court unless such judgments have been revised in accordance with Article 219. Consistency and uniformity in the application and interpretation of an economic treaty is a *sine qua non* for the development of confidence in tribunals and courts under whose mandate such interpretation fall. National courts of the European Union have accepted the supremacy of European law affirmed by the ECJ to a large extent in certain areas of dispute, for example, sex discrimination. In *Costa v ENEL* (ECJ Case 6/64) the ECJ established the principle of supremacy of Community law, a consequential result being that precedence must always be given to Community law over conflicting national law.

The CCJ in the recent case of *Shanique Myrie v The State of Barbados*⁴⁰ availed itself of the opportunity to define the supremacy of Community law when it upheld the validity and applicability of a 2007 Conference Decision of Member States permitting the right of entry of nationals of one Member State into another for a period of six months, this being an implementable decision at Community level, and therefore binding on all Member States without the need to be enacted domestically. The Court went on to hold that if binding regional decisions can be invalidated at the Community level by the failure of a Member State to incorporate those decisions domestically, the efficacy of the entire CARICOM regime would be jeopardised; further, the certainty, predictability and uniformity of Community law would be destroyed.

⁴⁰ [2013] CCJ3 (OJ).

The RTC and the WTO (World Trade Organisation)

Dispute settlement is regarded by the WTO which came into force in 1995 as the central pillar of international and multilateral trade, governed essentially by agreed procedures under the Dispute Settlement Understanding agreed to by member states of the WTO.

Part Three of the RTC on SUBSIDIES embracing Articles 96 – 116 covers every aspect of the imposition of subsidies under the remit of COTED, one of the Organs of the RTC, but Article 116.6 specifically provides that no Member State shall impose countervailing duties other than provisional countervailing duties without prior authorisation from COTED, and the determination and imposition of definitive countervailing duties shall be governed by the relevant provisions of the WTO Agreement on Subsidies and Countervailing Measures. COTED's authority seems to be limited to authorising only provisional countervailing duties.

The WTO Agreement on Subsidies and Countervailing Measures (the SCM Agreement) concerns multilateral disciplines regulating the provision of subsidies and the use of countervailing measures to offset injury caused by subsidised imports, an Agreement to which all member states of the WTO are expected to adhere. There is as a consequence a WTO dispute settlement mechanism which doubtless is utilised whenever the need arises.

It can be logically concluded that Article 116.6 was drafted in compliance with the WTO mechanism in mind and which may bind all

CARICOM Member States as members of the WTO. One can well understand why such disputes may not fall under the jurisdiction of the CCJ.

Conclusions

The Preamble to the CCJ Agreement indicates that the Contracting Parties were “convinced that the Caribbean Court of Justice will have a determinative role in the further development of Caribbean jurisprudence through the judicial process” with its establishment being “a further step in the deepening of the regional integration process.” The Preamble to the RTC affirmed that “the original jurisdiction of the Caribbean Court of Justice is essential for the successful operation of the CSME.” By this confident assertion the Regional leaders of the Community carved a niche for the CCJ to give effect to the traditions and mores of the people of the Caribbean Region through its judgments primarily in its appellate jurisdiction, though not exclusively so, and through its original jurisdiction blazing a trail through virgin territory of interpreting and applying a Treaty with the laudable objectives of enhancing “the participation of their peoples, and in particular the social partners in the integration movement.”

In the short and exhilarating experience of the Court the collective conclusion and prediction suggests that the jurisprudence deriving from its original jurisdiction will be advanced and developed primarily through disputes between natural and juridical persons and Member States of the Community rather than between the Member States themselves. This is due in large measure to the detailed Disputes Settlement Regime of

Chapter Nine of the RTC discussed earlier which suggests exhaustion of the listed options of resolution before energetic recourse to the CCJ when disputes arise between Member States. One can only surmise whether this was the intention of the crafters of the RTC; only time will tell.

The CCJ as a Catalyst for Change in the Administration of Justice

The CCJ in both its original and appellate jurisdictions has an obligation to foster and encourage the implementation and fashioning of alternative means of dispute resolution within the Region. The continuity of an overwhelming backlog of cases hampering the efficiency and ability of national courts to deliver justice in a timely manner must be the compelling motivator for the regional establishment of centres providing alternative means of case disposal if the maxim “justice delayed is justice denied” is to be relegated to the dump-heap of history in a forgotten past.

Progress has been made in the Region as most national courts have embarked on some form of alternative dispute resolution. It is predicted that these small steps will develop exponentially throughout our Region in the short term as we stride resolutely forward in improving the delivery and quality of justice to the people of our Member States.



The Hon. Mme. Justice Désirée P. Bernard
Judge, Caribbean Court of Justice
2013 Inns of Court Fellow
Institute of Advanced Legal Studies
London, England, December 2013