

**THE ADMINISTRATIVE AND FINANCIAL STABILITY
OF THE CARIBBEAN COURT OF JUSTICE (CCJ)**

**by
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This paper will focus on the provisions, in so far as the legal arrangements are concerned, for the financial stability of the CCJ as there are other members of the panel better able to speak to the Administrative functions which will govern its operations.

The Jurisdiction of the CCJ and Background.

In any examination of the provisions for Financial Stability of the CCJ it will be, first of all, necessary to examine its jurisdiction. As we are aware the CCJ is to be established pursuant to a treaty among Member States of the Caribbean Community known as the Agreement Establishing the Caribbean Court of Justice (“the Agreement”).

Article III of the Agreement provides that the Court is to be established with both an original jurisdiction and an appellate jurisdiction. In its original jurisdiction the CCJ will be empowered to hear and determine disputes arising out of the Treaty establishing the Caribbean Community (“the Treaty of Chaguaramas”). These disputes may be brought by states who are parties to the Agreement, Caricom, referrals from national courts or tribunals of States who are parties to the Agreement as well as nationals of member states in certain defined instances.¹ As regards its appellate jurisdiction member states will have the option of acceding to this immediately or at a later date. In its appellate jurisdiction the CCJ will act as the final Court of Appeal in relation to matters arising from the courts of member states in all civil and criminal matters. Article III of the Agreement also provides that all decisions of the CCJ shall be final.

Because the CCJ is a final Court of Appeal for member states its establishment must be done on the basis that it will be given all the tools and manpower necessary for the proper

¹ See Article XXIV

functioning of such a court. Such a court will therefore need the following tools and manpower to discharge its functions consistent with the obligations of the Agreement and a final Court of Appeal.

- Staff - *Judicial, quasi-judicial, administrative and non-judicial*
- Buildings - *appropriately configured which include certain necessary elements and design consideration*
- Systems - *rules, workflows, monitoring systems, registry, information technology, document flow, security human resource management, accounting records management, enforcement recording, library services, planning and development.*

It was against these basic elements that the costs for establishing and maintaining the CCJ were quantified and projected and the appropriate model developed which will enable funding for the court in perpetuity.

In addition to the above there were two other fundamental truisms that influenced the current model to enable the financial stability of the Court. These are firstly, that the CCJ must be financially independent and sustainable from its inception. This is necessary to instil confidence in a discerning Caribbean Public particularly in an atmosphere of cynicism. Secondly, the CCJ is the Court of Member states and they must be prepared to pay for its establishment and operations. While it would be desirable to attract loans and grants from bilateral sources, we at the CDB know only too well that such loans and grants often have “conditionalities” attached. It would therefore not be desirable in the prevailing atmosphere to seek funding from such sources as this could in either an actual or perceived way impact negatively on the establishment of the Court.

The Model.

In the circumstances the basic model for financing the CCJ on a stable and sustained footing can be briefly described as follows. Member states will, based on the Caricom formula for subscriptions to that institution, contract individually with the CDB for loans

to fund the establishment and operations of the Court. On a cumulative basis the amounts to be borrowed from the CDB will amount to approximately US\$99.5m. A sum of approximately US\$88m will be used to capitalize the Trust Fund (I will come to this later) in order to generate income for the operational costs of the Court and a sum of approximately US\$12m will be used to fund the establishment of the CCJ, i.e. the initial capital investment, namely, the provision of buildings, equipment, staffing *et al* for the start up, and for the first two years of operations of the Court.

In this regard the CDB has entered in loan agreements with its borrowing member countries to lend to them the sum of approximately US\$99.5m. Because Suriname and Haiti are not yet formally members of CDB, arrangements have been made for their agreed contributions to be initially met by others. Arrangements have also been made for Montserrat's contribution to the CCJ to be funded in a similar manner.

CDB under the Loan Agreements will be contractually obliged once member states have complied with certain conditions precedent to raise the amounts requested and to pass the principal sum to the Trustees under the Agreement Establishing the Caribbean Court of Justice Trust Fund ("Trust Fund Agreement")

CDB intends to raise the funds to finance the CCJ by way of a bond issue on the international capital markets. CDB is an investment grade bank rated triple "Aaa" by Moody's Investors Services, and with this high calibre rating CDB will be able to attract funds at a lower cost than most of its borrowing member countries which if they were to do so, on an individual basis. This of course would have implications for the affordability and sustainability of the CCJ. As interest rates are now at historic lows CDB feels that it is in the best interests of both its borrowing member countries and itself that it raises these funds now. In this regard CDB is now actively preparing to launch this issue. Once the funds are raised under the individual loan agreements CDB will be obliged under these agreements to pass these funds directly to the trustees of the Trust Fund. The borrowing member countries will then have the obligation to repay CDB principal and interest on the sums borrowed pursuant to the loan agreements. CDB will

in turn have a responsibility to repay principal and interest to the holders of the bonds in accordance with the terms of the issue.

Participants should note that under Article XXVII 1 of the Agreement there is an obligation on each contracting state to bear in such proportions as may be agreed the associated expenses and costs with the establishment of the CCJ including remuneration for judges. The said article also provides that the agreed contributions are to be charged by law on the consolidated fund or public revenues of that contracting state. In this regard the CDB Loans Act in its borrowing member countries and the necessary legislation to be enacted in member states pursuant to the Agreement, ensure that the amounts to be borrowed from CDB will be charged on the Consolidated Fund of each member state.

The Trust Fund

The Trust Fund is at the core of the CCJ's ability to finance itself on a stable and self-sustaining basis. It is through this vehicle that the CCJ is guaranteed its financial independence and stability. As previously stated once the funds are raised they are passed directly to the Trustees by CDB. These funds once received by the Trustees are impressed with a trust and can only be used for the purposes declared in the Trust Fund Agreement and in accordance with its terms. It is therefore worthwhile at this juncture to consider some of the provisions of the Trust Fund Agreement which will ensure financial stability.

The Trust Fund Agreement is a Treaty among the contracting states in their sovereign capacity. As such its interpretation will be governed by International Law. The Trust Fund Agreement will not be subject to the laws of a particular territory. It will accordingly be exempt from direct legislative interference. As such each member state is contractually obliged to accord to the Trust Fund and its officers certain immunities and privileges consistent with the international character of the instrument.

One of the most important provisions of the Trust Fund Agreement is its declared purpose. Under Article III the purposes for which the Fund is to be used is to finance the capital and operating budget of the court in perpetuity. The effect of this provision is that the capital which will constitute the CCJ Trust Fund can only be used to fund its operations. This provision locks in the funds for specified purposes and ensures that it must be used exclusively for such purposes.

Article IV of the Trust Fund Agreement is equally important. It provides that the resources of the Trust Fund shall consist of the following:

- (a) the contribution of Members – e.g. the proceeds of the bond issue by CDB which is passed over to the Trustees;
- (b) income derived from operations of the Fund or otherwise accruing to the Fund;
and
- (c) contributions of third parties being contributions which are not likely to prejudice the integrity or independence of the court.

In respect of the third category this should be read in conjunction with subsection 2 which provides that the Fund shall not solicit nor accept any grant, gift, or other material benefit from any source except with the consent of all the members. The members to the Trust Fund Agreement are the participating states and this provision ensures that even were the Trustees likely to accept a contribution to the CCJ from a third party, such contribution must first have the consent of all the members.

Article IV 7 is another provision which ensures the financial stability of the CCJ. This provides that there must be a review by the Trustees of the adequacy of the resources of the Fund after the first two years of its operations and every succeeding two-year period. It further provides that if the existing funds are found to be inadequate members are obliged to make additional contributions in proportions to those they made initially to the Trust Fund. These initial contributions are the same amounts that they borrowed from the CDB as their contributions to the Trust Fund. There is thus a legal obligation on the part

of the members of the Trust Fund Agreement to contribute additional resources in the event that the existing resources hamper the proper functioning and operations of the CCJ.

Like all other Trust Funds the Trust Fund Agreement provides for the appointment of Trustees and provides that the Trustees should consist of the following persons or their nominees.

- (a) The Secretary General of Caricom
- (b) The Vice Chancellor of the University of the West Indies;
- (c) The President of the Insurance Association of the Caribbean;
- (d) The Chairman of the Association of Indigenous Banks of the Caribbean;
- (e) The President of the Caribbean Institute of Chartered Accountants;
- (f) The President of the Organization of Commonwealth Caribbean Bar Association;
- (g) The Chairman of the Conference of Heads of the Judiciary of Member States of the Caribbean Community;
- (h) The President of the Caribbean Association of Industry and Commerce,
- (i) The President of the Caribbean Congress of Labour.

These are persons of high repute and integrity and as is customary in most trust instruments they can no longer occupy the post where there is:

- (a) resignation or death;
- (b) bankruptcy;
- (c) unwillingness or refusal to serve as a trustee;
- (d) conviction of an offence involving dishonesty; or where
- (e) in the unanimous opinion of the other members of the Board such a person becomes unfit or incapable to act as such.

These provisions go to ensure that the trustees who are the guardians of the Trust Fund remain persons of impeccable character and integrity.²

Under Article XI, the Trust Fund is given full juridical capacity and has the power to enter into contracts, acquire and dispose of immovable and moveable property as well as institute legal proceedings.

Another important provision is Article XII 7 which provides that the Fund, its assets, property, income as well as its operations and transactions shall be exempt from all taxation and all customs duties on goods imported for its official use. Article XII 8 provides that where such duties, taxes or imposts have been paid the members shall make appropriate administrative arrangements for the remission or return of such tax, duty or impost. These are also important provisions as the cash flow projections for the Court's first 10 years of operations are predicated upon these assumptions.

Article XVI provides that no reservations can be entered by a state in respect of the provisions of the Trust Fund Agreement and indeed none has been entered. Article XIX of the Agreement provides that members may withdraw from the Agreement, i.e. the Treaty Establishing the CCJ and such a member shall be deemed to have withdrawn from the Trust Fund Agreement upon such withdrawal. Subsection 2 of this Article however provides that a member who withdraws from the Trust Fund Agreement shall honour all obligations assumed by it before the date of withdrawal.

Major Risk

The major risk associated with the establishment of the CCJ relates to the adequacy of the capital of the Trust Fund and the accuracy of the estimates and operating costs of the CCJ. Every precaution has been taken to ensure that these costings are realistic. To this end calculations of the required investment yields for meeting the costs setting up and operations of the CCJ were based on a ten-year capital and operating budget developed

² Article VI

by the Caricom Secretariat. Recognizing that any underestimation of these costs would impact adversely on the adequacy of the capitalization of the Trust Fund, an independent review of those costs was financed by CDB. The review confirmed the original figures after taking into account estimates of annual inflation in the country where the Court will be located.

In order to have a financially stable CCJ much will depend on how the capital of the Trust Fund is handled and invested. The Trust Fund Agreement sets out a structure which will facilitate prudential handling of the Fund. As previously stated Article VI provides for the appointment of a Board of Trustees consisting of persons of high integrity and character. Article VII provides for the appointment of an Executive Officer of the Fund, and an External Auditor. It also provides for the appointment of an Investment Manager who shall invest the resources of the Trust Fund in accordance with investment guidelines for the Fund. The Executive Officer will have overall responsibility for the day-to-day operation of the Trust Fund including management of the relations with the investment advisors of the Trust Fund and the CCJ. CDB has provided resources to engage a consultant to assist the Trustees in developing appropriate investment guidelines.

Conclusion

Mr. Chairman, the above gives an overview of the legal framework and structure which we think would ensure the sustainability and stability of the CCJ. In order to recap I reiterate the following.

- The decisions of the CCJ will be final in respect of disputes arising out of the Treaty of Chaguaramas and in certain instances the final court of appeal for some member states in respect of all civil and criminal matters.
- As a final court of appeal it must instil confidence. In order to do so it must be financially independent and sustainable.
- A model has been developed to ensure its financial independence and stability.

- Under the model Caribbean Governments will borrow the bulk of the funding for its establishment and continuity from the CDB.
- The CDB as a condition of lending will be obliged to pass the proceeds from the individual loan agreements to the Trustees under the Trust Fund Agreement.
- The Trust Fund Agreement is a Treaty among sovereign states and its interpretation is governed by International Law.
- Under the Trust Fund Agreement the Trustees can only use the resources of the Fund to fund the establishment of the Court and its operations.
- The Trustees are persons required to be of impeccable character and integrity.
- The Trust Fund has full juridical capacity and every member has agreed to confer upon it certain privileges and immunities consistent with its international character.
- A major risk associated with the establishment and continued operation of the CCJ is how the resources of the Trust Fund are handled and invested.
- To this end the Trust Fund Agreement provides a framework for the selection and appointment of investment managers as well as the approval of investment guidelines by the Trustees as to how these funds should be invested and handled.

The above provides a comprehensive framework to ensure that the CCJ is properly established and that its operations are not jeopardized for want of resources. While one cannot guard against every contingency we feel that the risk mitigation measures that are in place so far and those yet to be implemented will ensure that under normal circumstances the CCJ will not be one of those institutions which will be hampered in its functions because of a lack of resources. Indeed it is our expectation that it will be a model for others to emulate and its success will be the launch pad for accelerated regional cooperation in keeping with the objectives of the Treaty of Chaguaramas.

Thank you.