

# **THE ORIGINAL JURISDICTION OF THE CARIBBEAN COURT OF JUSTICE AND ITS ROLE IN THE SUCCESSFUL IMPLEMENTATION OF THE CSME**

## **INTRODUCTION**

Although few can dispute the significant implications of the proposed appellate jurisdiction of the Caribbean Court of Justice (CCJ) for the region as a whole, it is most likely to be the case that the greatest impact of the court in the lives of the peoples of the region will be felt by virtue of its Original Jurisdiction. Indeed, while the public and professional focus on the court's appellate jurisdiction is understandable, given its revolutionary implications for the administration of justice in the region, it may be thought that such a focus has been, to some extent, at the expense of an understanding of the court's fundamental role in the success of the CARICOM Single Market and Economy (CSME).

It should of course always be acknowledged that the scrutiny of the appellate nature of the court is a necessary process which CARICOM states had to undergo, in order to ensure that the establishment of the court reflected the legitimate concerns of the citizens of the region. However, that process should in no way detract from or diminish, the essential aspect of the court as the final and only body with responsibility to interpret and apply the provisions of the Treaty of Chaguaramas as amended. As Dr. Carla Barnett, Deputy Secretary General of CARICOM noted in Georgetown Guyana on November 27<sup>th</sup> 2000, in an address to the second meeting of the Regional Collaborative Network to support the CARICOM Single Market and Economy, it is perhaps in respect of the Court's Original Jurisdiction, that the move towards full political sovereignty and independence of the region, will be best realised.

## **A SINGLE ECONOMIC SPACE**

In order to fully comprehend the symbiotic relationship between the CCJ and the Single Market and Economy (CSME), it is of course necessary to have at least a basic understanding of what we mean when we refer to a 'single market and economy'. Prime Minister Owen Arthur of Barbados has highlighted the importance of the CSME to the very economic survival of the region as a whole, noting that prosperity in the region depends upon the removal of those restrictions impinging upon the free movement of the factors of production. Effectively, the underlying philosophy of the CSME rests upon the principle that the free movement of capital, people, services and enterprise between CARICOM states, will lead to a situation in which various actors in the economic process can maximise their talents and resources, thereby leading to greater efficiency and increased profits and prosperity. In effect, the basic assumption is that liberalisation of key factors, contributes to increased activity which necessarily results in greater yields for all involved.

Put in other terms, the CSME is one large single economic space, within which peoples, capital and providers of services are able to move in an environment of minimum restriction. This single economic space will create opportunities for investment

previously unavailable, so that companies and businesses will be able to establish themselves in the most favourable conditions for their particular sphere of economic endeavour. A key element of this equation is of course people, who will be in a position to move freely within the region in order to gain employment in those countries and sectors in which whatever skills they possess are most needed.

So for example, skilled veterinarians in St. Lucia who may be unable to find employment at home might be able to move to another CARICOM state where those skills may be more in demand. A soft drink maker or manufacturers of sweets might be able to establish themselves in another state where some of the raw materials required for manufacture may be directly available or simply in order to expand their business. Manufacturers of alcoholic drinks in one state might be able to export to previously closed markets and be subject to the same taxes as national manufacturers. Or a public relations firm might be able to establish offices in a number of member states and increase it's reach and influence in the region, thereby making it more effective for those seeking regional promotion.

As each actor invests according to its own needs, making the best use of its own available resources and of those of a particular member state, each will begin to realise greater returns for every investment, essentially because it will be operating in the optimum conditions for its own particular sphere of economic activity. Just as trained architects can move to where the demand for that skill is greatest, so too can a used car dealer establish his business where there is a great demand for used cars but only a limited supply. And therein lies the fundamental assumption upon which the creation of the single economic space is based.

### **A NEED FOR PREDICTABILITY**

However, as Mr. Duke Pollard has noted in a paper on the Original Jurisdiction of the Caribbean Court of Justice, prepared through the CARICOM Secretariat and submitted on the 7<sup>th</sup> August 2000, the entire economic space described above hinges on an element of predictability, for investors and individuals alike. Essentially, in order for those actors referred to above to be able to take advantage of the potential for economic advancement, it is necessary that a stable environment obtains. This stability in the economic climate is essential for investors and individuals, firstly to be able to make reasonable assessments of the risks involved in any one decision to engage resources, and then most significantly to feel the necessary confidence required to go ahead and act on those decisions.

Such a stable economic environment is integrally related to certainty and predictability in the law. This is because any rights and privileges giving rise to opportunities for establishment, will naturally flow from a regulatory framework established according to legal principles and with the force of law, i.e. established by the law. Within such a framework clear guidelines must be established along with prescribed sanctions for breaches to which investors and individuals may make reference in order to determine their rights and responsibilities. In addition, and perhaps even more importantly, where this single economic space extends geographically across and within several sovereign

nations, the stability and predictability of that environment, necessarily depends upon the uniformity of application of that regulatory framework giving rise to those very rights and responsibilities, i.e. uniformity in the application of the law.

### **AN ORIGINAL JURISDICTION**

It is within such a context that the CCJ's function as the final arbiter on all matters relating to the interpretation and application of the amended treaty, will be crucial to the success of the CSME, since it will essentially be the custodian of that very environment of predictability and stability. This is what is meant by reference to the Original Jurisdiction of the CCJ. So that, where a dispute arises between member states, or for example, between a community national and a member state, as to the extent of the rights and responsibilities of either as referred to above, it will be for the CCJ to interpret the relevant provision of the treaty and to determine once and for all, what rights and responsibilities accrue to whom and in what circumstances. In this way, all actors may be assured of what certain provisions of the treaty mean, and what privileges they may be able to enjoy. In such a case, actors will be able to plan their activities by making the reasonable assessments needed and have the necessary confidence to move around within the single economic space.

### **SOME QUICK FACTUAL SCENARIOS**

In order to illustrate the above, it may be instructive to consider a few factual scenarios against which the original jurisdiction of the CCJ may be examined. Consider the above mentioned example of the soft drink manufacturer wanting to export product into another member state. Assuming for the moment that soft drinks did not enjoy Article 56 protection, under the Treaty of Chaguaramas 1979, it would be the case that such a manufacturer would be able to benefit from the creation of a single market in some of the following ways. First, the manufacturer would be protected, inter alia, from the imposition of quantitative restrictions, i.e. restrictions or prohibitions on goods whether made by way of quotas, import licences and otherwise, on the importation of goods of community origin. The manufacturer would also be able to benefit from a lack of the imposition of any import duties on his goods, and the absence of any export duties in his own state, to name a few of the methods by which the single market seeks to achieve free movement of goods.

Now imagine a situation in which, upon attempting to export the product into another member state, the manufacturer was met with a requirement that in order to be able to import the soft drinks into say, St. Lucia, it must first provide St. Lucia customs with a certificate from the government of the manufacturer's state, certifying the right of the goods to be regarded as being a recognised product of the exporting country. Or, imagine a situation in which the manufacturer is met with conditions in respect of packaging, which would have the effect of making his soft drinks more expensive than their local counterpart. Alternatively, imagine a situation in which that manufacturer was met with a quota, limiting the quantity of product it could export into St. Lucia, or was told that it

was a mandatory requirement that the manufacturer had an agent in the territory of the importing state, or possibly, the manufacturer was met with all of the above conditions.

In all of the above circumstances, the CCJ could be called upon by either the manufacturer's member state or the manufacturer itself represented by the member state, in order to determine whether any of the restrictions placed upon the goods by the Government of St. Lucia, were lawful under the amended treaty. So, the CCJ would be required to give judgement on whether the requirement of a certificate amounted to a quantitative restriction as imagined by the treaty, or on whether, the requirements in respect of packaging were reasonable in the circumstances. The CCJ would interpret the relevant provisions of the treaty, and in seeking to apply the provisions, require the compliance of the defaulting member state, if it found that the requirements amounted to breaches of the treaty.

In this way, the court would effectively be telling all manufacturers of soft drinks considering exporting to any CARICOM state, what the Governments of the importing states could and could not do, and what restrictions, if any, they would have to face. In this way, the exporter of soft drinks is able to enjoy a degree of predictability in terms of its intended activities within a member state and within the wider single market.

### **BUT IF NO CCJ**

Without a CCJ, courts in every member state would have to interpret and apply the provisions of the treaty in isolation from each other. In such a case, a court in Trinidad might interpret the same provision differently to the way a Barbadian court might decide the very same point. This would undoubtedly lead to widespread chaos, by having the effect of completely undermining the legal assumptions upon which the single economic space was based. Consequently, as with the establishment of the European Court of Justice in the European Single Market, the establishment of a CCJ with an Original Jurisdiction to finally determine disputes arising in the interpretation and application of the treaty, is a natural and logical extension of the need to ensure the uniformity of the application of treaty provisions throughout all member states in the CARICOM Single Market and Economy. For it is this very uniformity which promotes the stable economic environment upon which everything depends.

### **THE LEGAL FRAMEWORK**

The scope and nature of the Original Jurisdiction described above finds expression in articles IX(a) to IX(n) of the Agreement Establishing the CCJ. Article IX(a) reads:

*Subject to the Treaty, the Court shall have exclusive jurisdiction to hear and deliver judgement on:*

- a. disputes between Contracting Parties to the Agreement;*
- b. disputes between any Contracting Parties to this agreement and the Community;*

- c. *referrals from national courts or tribunals of Contracting Parties to this Agreement;*
- d. *Applications by nationals in accordance with Article IX(n),*

*concerning the interpretation and application of the Treaty.*

Clearly then, the court will operate in certain specified circumstances essentially to rationalise specific issues arising between certain categories of persons. And in this connection, a few points arise for consideration. The four categories of persons 'named' in the Agreement are (1) Contracting Parties, (2) the Community, (3) National courts of Contracting Parties and (4) Nationals themselves. An examination of the scope of the Agreement itself will in fact reveal the several means by which the Original Jurisdiction of the Court will serve the purpose of promoting the desired stability and uniformity referred to earlier.

### **THE POWER OF REFERRAL**

One of the key Articles of the Agreement in the context of promoting **uniformity** in the application of the provisions of the treaty will inevitably be Article IX(c), which reads:

*Where a superior court of a Contracting Party or a tribunal is seized of an issue whose resolution involves a question concerning the interpretation or application of the Treaty, the court or Tribunal concerned shall, if it considers that a decision on the question is necessary to enable it to deliver judgement, refer the question to the Court for determination before delivering judgement.*

The importance of this 'referral' Article to the overall process of cohesion within the single economic space can not be overstated. Essentially, the Article makes it clear that national courts of member states can refer particular issues to the CCJ for clarification and or interpretation, where those issues impact in some way on the particular matter immediately before them. Once that issue has been referred, the CCJ will then deliberate and issue it's decision, and submit that decision to the national court. That national court will then apply those principles issuing from the CCJ to the particular matter at hand, in order to arrive at a final decision. This power of referral is an essential element of the need to ensure that the Treaty provisions are uniformly applied on an ongoing basis. Effectively, it allows for an organic development of Treaty law within member states, which will extend uniformly to other member states in which national courts are seized of similar issues.

It may be noted with interest that it is possible for the CCJ to issue a decision upon a referral under article IX(c), that may have the effect of finally disposing of the matter in the national court. It may equally be possible that the CCJ's decision will only help to settle, a discrete and distinct issue, which is part of a number of other issues of which a national court is seized. While it will depend on the circumstances of each case, it is of course essential that those national courts and tribunals of Contracting Parties make use of this power to refer matters to the CCJ, if the purpose of the Article is to be fulfilled.

The availability of the referral power is the first and most fundamental pillar of co-operation between courts of Contracting Parties and the CCJ and the very success of the partnership depends upon the willingness of national courts to seek the aid of the CCJ when matters of Treaty law arise.

In addition, it may be thought that in this capacity, the CCJ will effectively be serving as a tool or tribunal of interpretation. In this sense also, the jurisdiction of the CCJ is parallel to that of the national courts, to the extent that in principle at least, it will be for the national court or tribunal to finally determine the matter once the decision of the CCJ has been submitted. In this way, both national courts and the CCJ itself will be working in conjunction to promote that environment of stability and predictability which investors and individuals require to participate fully in the CSME.

## **TWO BRIEF CASE STUDIES**

As above, it is again instructive to consider some factual scenarios which might help to better highlight the power of referral under IX(c) of the Agreement. One of the most important areas in which community law will likely have a fundamental impact is that of competition law and policy within all the member states within the region. Now consider a situation in which a manufacturer of various alcoholic beverages enters into agreements with two major supermarket chains of again, St. Lucia, to sell quantities of product according to a specific price regime, in which certain discounts are specified based on volume of product purchased by the larger supermarket chains. However, suppose that the same manufacturer offers an altogether different pricing regime to small businesses, irrespective of the volume purchased. In other words, a small business might receive a smaller discount than that received by the larger chain on the same amount of product purchased from the one manufacturer, assuming for the moment that it could afford to purchase the very same quantity of product a larger chain could purchase.

Consider that by virtue of the above, a legal dispute arises between the small businesses association and the manufacturer of alcoholic beverages, before an industrial tribunal of some kind, in which the small businesses association seeks to coerce, if possible, the manufacturer of the alcoholic beverages to put an end to the practice. Assume for the moment also that there exists a prior agreement between the small businesses association and the manufacturer which the former claims has been breached by virtue of the agreement between the manufacturer and the larger chains, and that in the course of the dispute, a question arises as to whether the agreements between the manufacturer and the chains is in breach of community competition law.

By virtue of Article IX(c), that tribunal before which the question arises, will be able to refer the question of the agreements to the CCJ for a ruling on whether the activities arising thereby, between the larger chains and manufacturer, is prohibited under the CARICOM Treaty and is in breach of the law. The CCJ will again interpret the relevant provision, and forward its answer to the tribunal, which will then be in a position to state how the anti competitive practices have caused damage to the small business sector, and

make such pronouncements and arrive at such determinations as are required in the circumstances.

Or suppose two soft drink manufacturers in a member state agree to raise prices of their product, giving rise to a prima facie case of anti competitive conduct. Suppose one manufacturer reneges on the agreement and the other manufacturer sues the defaulting party before a national court of a member state. Assuming for the moment that a legitimate cause of action existed and survived, where the defaulting party raises as its defence, the unlawfulness of the price agreement, the national court could refer to the CCJ in order to determine, whether in that particular circumstance, such an agreement would have a detrimental effect on the local economy and on the principles upon which the single market and economy were based. In such a case, the CCJ's ruling would play a decisive role in resolving the civil dispute between the parties.

### **THE ECJ AND THE CCJ**

In the context of the European Union, the power of referral similar to that under Article IX(c) of the Agreement Establishing the Court has played a fundamental role in ensuring that community law has been applied uniformly throughout all the member states. The celebrated English case of FACTORTAME, in which the precedence of Community law over national law of member states was reaffirmed where conflict arose, might provide some guidance on how the same power to refer to the CCJ may and may not operate within the context of the CARICOM Single Market. In any eventuality, it is likely to be the case that Article IX(c) of the Agreement establishing the Court, will attain similar importance in the context of the CARICOM Single Market as its European counterpart.

### **THE APPLICATION OF THE LAW**

Finally, it should be remembered that in applying the law, Article IX(g) provides:

*1. The court, in exercising its original jurisdiction under Article IX a and b, shall apply such rules of international law as may be applicable.*

As such, it should always be remembered that the CCJ will, in its original jurisdiction, be serving as an international court and applying principles relevant and in keeping with that status. However, one key distinction between the CCJ and similar international courts, is that the principle of Stare Decisis, or the doctrine of binding precedent, will apply to the deliberations of the CCJ. This effectively means that the CCJ will be bound by its own previous decisions. The decision to allow the CCJ to adopt the doctrine of binding precedent, must again be seen within the context of a desire of the framers of the Agreement establishing the court to ensure that the Court is effectively equipped to be the agent of stability and predictability within the Single Market and Economy.

### **CONCLUSION**

In conclusion, it must be remembered that the connection of the CCJ to the Single Market and Economy is fundamental. For clearly, the one can not exist without the other. The challenge has been for the framers of the Agreement Establishing the Court to construct it in such a manner, in order to outfit it adequately to deal with the demands of a stable economic environment, so absolutely necessary for the success of the CSME. As the CSME succeeds, the CCJ will play a decisive role.

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