

THE CARIBBEAN COURT OF JUSTICE (CCJ) : CHALLENGE AND RESPONSE

“... the case for a Caribbean Supreme Court could be based on the need for a regional Court of last resort to apply laws incorporating a collective regional ethos, reflecting the moral imperatives of the Caribbean social reality and amenable to interpretation by judges who would have internalised the values informing the content of that social reality.” (Duke Pollard, CARICOM Perspective, June 1998).

The Draft Agreement Establishing the Caribbean Court of Justice must be perceived as constituting the measured institutional response of competent decision-makers in the Caribbean Community to a challenge which persisted in the Region for several decades. This challenge is multi-faceted, comprehending dimensions which include juridically misconceived appeals to sovereignty, genuine concerns about autonomous judicial decision-making, the legal erudition of potential incumbents and the financial insecurity of an indigenous Court of last resort. All of these issues were ventilated by both members of the Judiciary and the private Bar at a symposium organised and sponsored by Caribbean Rights in Bridgetown, Barbados on 28 November 1998 and will be employed as the point of departure for much of the discussion which follows.

Among the more ardent proponents of the argument that an indigenous Court of last resort is necessary to complete the independence of Member States of the Caribbean Community is Mr. Justice Telford Georges. In his characterisation, the learned judge maintained:

“(s)tarkly put, it appears to me that an independent country should assume the responsibility for providing a court of its own choosing for the final determination of legal disputes arising for decision in the country. It is a compromise of sovereignty to leave that decision to a court which is part of the former colonial hierarchy, a court in the appointment of whose members we have absolutely no say. The counter argument is that ... on achieving independence the countries (of the Caribbean) had a choice of either allowing appeals to an external court to continue or of abolishing them. It is therefore not a derogation from sovereignty to allow appeals to continue. It was in effect an exercise of that right. I think this is the type of argument which the average person would call a lawyer’s argument. It asserts that it is an exercise of sovereignty and of independence to choose a situation of dependency. In real life, any one who behaved in that way would evoke pity and exasperation, like the grown man who demonstrates his independence by continuing to live free at home.”

However, from the perspective of the norms applicable to State interaction in the international community, it appears to be in the nature of an axiomatic juridical postulate that the essence of sovereignty is the faculty to compromise it. And, as postulated, the sovereignty argument is based on the wrong conclusion for the wrong reason. As the quotation at the commencement of this article suggests, the case for an indigenous Court of last resort may be persuasively advanced without an appeal to popular sentiment by reference to our colonial past. Nor should lawyers desist from employing lawyer's arguments to demonstrate the relevance of legal rules. Indeed, the layman's inability to appreciate such arguments should not be more a cause of concern than the lawyer's inability to grasp the mathematical complexities of Einstein's theory of relativity nor the scientific implications of Newton's corpuscular theory of light. And in this context, it does appear to be less a construct of Cartesian logic than an incident of special pleading to introduce at this juncture of the debate a simile whose pertinence for addressing socio-attitudinal phenomena appears to be unimpeachable but which is unlikely to be accorded any persuasive value in analysing inter-state relations governed by generally accepted norms of international law.

An issue of considerable and continuing concern to the private Bar in the Caribbean Community is the insulation of the Caribbean Court of Justice (CCJ) from political manipulation. In the present submission, this concern is common to polities the world over. In the present submission, it would be disingenuous to assume a greater disposition in the Caribbean to interfere with the Judiciary than exists among the States of the European Union. Despite this, the appointment of judges to the European Court of Justice and to the Court of First Instance of the European Community is made by the political directorate. Thus Article 167 of the Rome Treaty provides:

"The Judges and Advocates General shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence; they shall be appointed by common accord of the Governments of the Member States for a term of six years ... and shall be eligible for reappointment..."

In order to address this concern of the private Bar in the Community, the political directorate have agreed to remove the appointment of judges of the Caribbean Court of Justice

from direct political control. Thus Article V(1) of the Agreement provides for the establishment of a Regional Judicial and Legal Services Commission, and Article V(2)(1) charges the Commission with responsibility for the appointment of judges other than the President (Article IV(5)). The President is to be appointed or removed by a qualified majority vote of the Contracting Parties on the recommendation of the Regional Judicial and Legal Services Commission. The President of the European Court of Justice is elected by the members of the Court from among their number for a term of three years and may be re-elected (Article 167). Thus in both cases the appointment of the President is one remove from the political directorates of the European Union and the Caribbean Community. In either case, the temptation to compromise the independence of the Court is likely to be a function of the relevant political culture and the viability of the perception of the role of the justice sector in overall development of national economies. In this connection, it does appear to be pertinent to submit that as a general rule the political directorate in the Caribbean Community underrate the contribution of the judicial sector to national economic and social development. But, in the present submission, its contribution must be seen to be critical. Suffice it to comment that investment decisions by potential investors are not unrelated to perceptions of the effectiveness of judicial remedies in one or another jurisdiction.

In the submission of Mr. Justice Telford Georges, one distressing fact is that the opposition of the private Bar in the Community to the establishment of an indigenous Court of last resort is the quality of judges before whom counsel are constrained to appear. However, this perception of the private Bar has been vigorously contested in informed quarters. In one submission, the validity of this perception is brought into question by the fact that most appeals to the Judicial Committee of the Privy Council from the Caribbean are dismissed. And, in any event, it has been observed that there is no requirement established by the relevant provisions of the Agreement Establishing the Caribbean Court of Justice that members of the Court be appointed from among sitting incumbents. Moreover, the argument should be advanced that, more often than not, the quality of judicial pronouncements is a function of the quality of the submissions of counsel in the relevant case. Indeed, the West Indian Commission, in its celebrated Report, submitted that:

“In the matter of judicial talent for staffing the Court, there can be no room for doubt. Some of our own highest judicial officers have sat on the very Privy Council itself; the Caribbean has now provided a judge of the world’s highest judicial tribunal - the International Court of Justice at the Hague; several of our lawyers have been in demand

as Chief Justices and Judges of Courts of Appeal in jurisdictions like The Bahamas, Bermuda, the Seychelles and several countries of continental Africa. When Commonwealth countries look for legal talent, it is often to the Caribbean that they turn. What ails us that we lack the confidence to go forward.”

And competent decision-makers are in no doubt that the required expertise can be accessed from among qualified persons in the Community.

Concerns expressed by the private Bar and one or two opposition political parties in the Region about the willingness and ability of Governments of the Community to provide the funding necessary to establish and maintain the Caribbean Court of Justice are not without considerable merit. In the characterisation of the Mr. Justice Telford Georges:

“ ... if Great Britain had given a grant on the dissolution of the Federation for the construction of buildings and the provision of a basic library for a Caribbean final Court and had agreed for a period of ten years to make available judges paid by them, one may today have been looking forward for the celebrating of the 40th anniversary of that Court rather than being timid about setting it up if not downright opposed.”

In the submission of the West Indian Commission:

“ ... A CARICOM Supreme Court will require the provision of resources but, in one sense, this is like straining at a gnat when we have already swallowed a camel in terms of national expenditure on the judicial system. Even so, we should find ways of reducing costs. One way, we feel, is to locate the Court in one place. We have already referred to the generous offer by Trinidad and Tobago; that is a great help. Another device might be to allow some of the members of the Court to remain in their home locations - other perhaps than the Chief Justice. Communications have improved so greatly, both physical communications and telecommunications, that savings can be explored in new and imaginative ways. Where the resources will be most needed will be in attracting and retaining the very best of our judicial talent for service on the Court. On this we cannot skimp; but it will be one of the most productive investments the Region can make in the interest of making CARICOM work and in the wider cause of civil society throughout our Region.”

In an attempt to defuse the arguments of the Court’s detractors concerning political direction and financial insecurity of the proposed Caribbean Court of Justice, the Preparatory Committee on the Establishment of the Caribbean Court of Justice at its Fourth Meeting in

Barbados on 16 February 2000 adopted a Financial Protocol to the Agreement Establishing the Caribbean Court of Justice. The Protocol provides, *inter alia*, for sanctions for the non-payment of contributions to the Budget of the Court as follows:

“A Member State whose contribution to the Budget is in arrears shall not commence proceedings in the Court while that Member State’s contribution remains in arrears.”

In its original formulation, the relevant provision, to wit, Article 7, had excluded nationals of States whose contributions were in arrears from access to the Court. However, there was strong opposition to this provision on the ground that citizens should not be made to suffer for the delinquency of States parties to the Agreement Establishing the Caribbean Court of Justice. From the perspective of the institutional development of CARICOM, Article 7 of the Protocol is the most far-reaching sanction yet to be agreed for non-compliance with international obligations.

More significant, however, is Article 8 of the Protocol which authorises the establishment of a Trust Fund to discharge the liabilities of the Court on a sustainable basis. The establishment of such a Fund can operate to compromise the persuasive objections of the Court’s detractors concerning the diffidence of the Member States to contribute to the budget of the Caribbean Court of Justice on a regular and timely basis. Indeed, the historical record supports the allegation that funding of the operations of the Court is likely to be a major constraint on its effectiveness, not to mention its vulnerability to political direction. Given the foregoing, it would be reasonable to assume that much opposition to the Caribbean Court of Justice would be preempted by the successful establishment of the Fund. Potential donors to such a Fund could be the European Union, the United States of America and Canada, all of whom have posited good governance as a consideration in extending aid and are also sensitive to the requirement of judicial probity and independence in the war on the illicit traffic in narcotics.

As concerns the issue of jurisdiction, competent policy-makers have responded positively to the recommendation of the West Indian Commission to invest the Caribbean Court of Justice with original jurisdiction in respect of the interpretation and application of the Treaty of Chaguaramas as amended. In his excellent presentation on the Caribbean Court of Justice, the learned Mr. Justice Telford Georges expressed doubt about such a course of action. In his submission, Articles 11 and 12 of the original Treaty were adequate to address the issue of disputes among Member States concerning the interpretation and application of the Treaty. In his

submission, disputes arising between Member States on issues of unfair trading practices will be disputes similar to the one between the European Union and the United States on the scheme of preferences afforded bananas from ACP territories as contrasted with bananas from Central and South America:

“... and the sense of bitterness may be no less ... (and) it would be unwise to permit the possibility of exposing a Caribbean Court still building its reputation to a divisive dispute of that sort among the members where there is an allegation of unfair trading.”

In the present submission, it would be foolhardy to disregard lightly the submissions of the learned Justice, especially in view of his acknowledged erudition and vast experience on the bench. This observation notwithstanding, it is pertinent to indicate some issues of considerable importance which might have been overlooked. Foremost among these is the fact that whereas the regime of rights and obligations established by the original Treaty of Chaguaramas was relatively meagre on rights and weak on obligations, the new dispensation contemplated by the far-reaching revision of the Treaty creates a qualitatively different regime in which extremely important rights are being conferred and equally important obligations are being imposed on Member States. In this new dispensation, it cannot be business as usual and relevant decisions cannot remain unimplemented if the stated objectives of the CARICOM Single Market and Economy are to be realised. An immediate task confronting all Member States on the entry into force of the revised Treaty would be its implementation by the enactment of relevant legislation. The practical effect of such enactments would be to endow national courts with jurisdiction to interpret and apply the Treaty thereby facilitating a Pandora's box of interpretations which are not required to be consistent with one another.

The case for investing the Court with original jurisdiction was persuasively argued by the West Indian Commission in its celebrated report *Time for Action*. In the characterisation of the Commission:

“... there is now another reason for establishing a court of high authority in the Region, and that is the process of integration itself. Integration in its broadest economic sense - involving a Single CARICOM Market, monetary union, the movement of capital and labour and goods, and functional co-operation in a multiplicity of

fields - must have the underpinning of Community law. Integration rests on rights and duties; it requires the support of the rule of law applied regionally and uniformly. A CARICOM Supreme Court interpreting the Treaty of Chaguaramas, resolving disputes arising under it, including disputes between Governments parties to the Treaty, declaring and enforcing Community law, interpreting the Charter of Civil Society - all by way of the exercise of an original jurisdiction - is absolutely essential to the integration process. It represents in our recommendations one of the pillars of the CARICOM structures of unity.

Essentially, our recommendation is that the Court should have an original jurisdiction in matters arising under the Treaty of Chaguaramas (as revised) and that any CARICOM citizen (individual or corporate) and any Government of a Member State of the Community or the CARICOM Commission itself, should have the competence to apply for a ruling of the Court in a matter arising under the Treaty. This will include, perhaps prominently so, matters in dispute between Member States in relation to obligations under the Treaty, particularly under the Single Market regime; but it will also provide for clarification of Community law as it develops pursuant to decisions taken within the CARICOM process. As already indicated, we envisage that that original jurisdiction should also be exercisable to a limited degree in the context of the CARICOM Charter of Civil Society which we have separately recommended.

We believe the arguments for the Court to be unassailable. It needs only to be added as an important footnote to what we have said about the establishment of the CARICOM Supreme Court that the process of development of Community law in the future will be part of the equally necessary evolution of reform of our legal systems themselves. The point we make here is that we can now look for return on the investment the Region has made in the development of law as a major discipline in the University of the West Indies.”

The foregoing submissions of the West Indian Commission touch on three important issues which have been addressed by the draft Treaty Articles and the draft Rules of Court of the Caribbean Court of Justice relating to the original jurisdiction of the Court. These relate to the following:

- (A)** uniformity in the interpretation and application of the Treaty;
- (B)** *locus standi* for both public and private entities in matters of which the Court is seised; and

- (C) development of Community law pursuant to decisions taken within the CARICOM process (*stare decisis*).

Before examining these issues, however, it is proposed to offer some clarification on the term “Caribbean Community” and “Community law” as they are employed in the CARICOM context. As a first step in any such examination, it is important to bear in mind that despite its misleading nomenclature, to wit, “Caribbean Community”, the regional integration movement from its very inception and, indeed, up to the present time, remains an association of sovereign States. This status was clearly established by the voting procedure employed in the Conference of Heads of Government. Article 9 of the original Treaty provides: “*The Conference shall make decisions and recommendations by the affirmative vote of all its members*”. Article 18(1) of Protocol I which amends the Treaty provides: “*Save as otherwise provided in this Treaty and subject to paragraph 2 of this Article and the relevant provisions of Article 17, the Conference shall take decisions by an affirmative vote of all its members and such decisions shall be binding*”. Paragraph 2 of Article 18 provides that abstentions in an amount not more than one-quarter of the Community’s membership shall not operate to impair the validity of decisions of the Conference, while Article 17(3) provides that decisions of all Organs of the Community, including the Conference, on procedural issues shall be reached by a simple majority of the Member States.

In effect the unanimity rule, which is ordinarily perceived by international lawyers as the legal expression of sovereign equality of States, operates to deprive the highest Organ of the Caribbean Community of any attribute of supra-nationality which is a standard ingredient of communities in the juridical sense. Further, the Caribbean Community possesses no organ like the European Union and the Andean Common Market, whose acts create legally-binding rights and obligations directly for private entities, that is, without the intervention of national legislatures. In short, the term “Community law” appearing in the West Indian Commission’s submission quoted above is ordinarily employed to characterise norms arising from or under relevant international instruments and which create rights and obligations directly for private law entities. *Stricto juris*, therefore, the term “Community law” is juridically misconceived in its application to the Caribbean regional integration movement.

(A) **Uniformity in the Interpretation and Application of the Treaty**

The objective of uniformity in the application and interpretation of the constituent instrument of any integration movement would appear to be as axiomatic for its successful development as it would be for the efficient functioning of the CARICOM Single Market and Economy. Given that the Treaty of Chaguaramas creates rights and obligations for Member States only and has to be implemented by national law before private entities can benefit from its provisions, it would be reasonable to assume that, in the absence of an agreed mechanism for authoritatively and definitively interpreting and applying the Treaty, the aphorism *quot homines tot sententiae* would prevail. Such an eventuality would, in the present submission, constitute a prescription for legal uncertainty with daunting adverse consequences for foreign direct investment, and the structured development of the CARICOM Single Market and Economy. Postulated in other terms, not only should the proposed Caribbean Court of Justice have jurisdiction to interpret and apply the Treaty, but that jurisdiction must either be exclusive or final if legal certainty, which is indispensable for the successful development of the CARICOM Single Market and Economy, is to be secured.

The founding fathers of the European Union, buoyed by similar sentiments, crafted Article 177 of the Rome Treaty to read as follows:

“ Article 177

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) *the interpretation of this Treaty;*
- (b) *the validity and interpretation of acts of the institutions of the Community;*
- (c) *the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.*

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.”¹

It does appear from an ordinary reading of these provisions that the European Court of Justice is the final, though not the only, tribunal competent to rule on the interpretation and

application of the Rome Treaty. The ultimate objectives of legal certainty and uniformity in the applicable norms are, however, the same. Similar considerations appear to have informed the establishment of the Court of Justice of the Cartagena Agreement, whose final preambular paragraph reads as follows:

*“Certain that both the stability of the Cartagena Agreement and the rights and obligations deriving from it must be safeguarded by a juridical entity at the highest level, independent of the governments of the member countries and from the other bodies of the Cartagena Agreement with the authority to define communitarian law, resolve the controversies which arise under it, and to interpret it uniformly”*²

Consistently with the foregoing, the provisions of the said Agreement on **Advisory Opinions** read as follows:

“ Article 28. It shall correspond to the Court (sic) to interpret, through prior advisory opinions, the norms which comprise the juridical structure of the Cartagena Agreement, in order to assure uniform application in the territories of the member countries.”

¹ The Articles relating to the European Court of Justice are set out in **Appendix I**

² The Agreement Creating the Court of Justice of the Cartagena Agreement is set out at **Appendix II**

Article 29. National judges who have before them a case in which any of the norms which comprise the juridical structure of the Cartagena Agreement must be applied may petition the Court for its interpretation of such norms, but provided that the ruling is subject to appeal within the national judicial system. In the event that it is necessary for the national court to issue its ruling before receiving the interpretation of the Court, the judge must proceed to decide the case.

In the event that the ruling is not subject to appeal within the national judicial system, the judge shall suspend the proceeding and petition the interpretation of the Court, ex officio in all cases, or upon the petition of an interested party, if so required by law.

Article 30. The Court shall restrict its interpretation to defining the content and scope of the norms of the juridical structure of the Cartagena Agreement. The Court may not interpret the content and scope of domestic law nor judge the substantive facts of the case.

Article 31. The judge hearing the case must adopt the interpretation

of the Court.” ² (Footnote 2 also applies here)

The approach adopted by the draft Articles is to invest the Caribbean Court of Justice with exclusive jurisdiction in respect of the interpretation and application of the Treaty. Indeed, this was the only rational approach open to the drafters if the objectives of legal certainty and uniformity in the applicable norms were to be secured. The decision of the Conference to invest the Caribbean Court of Justice with original jurisdiction, as distinct from exclusive jurisdiction, would not operate to deprive municipal courts within the Community of concurrent jurisdiction in respect of the interpretation and application of the Treaty. In the premises, the objectives of legal certainty and uniformity in the applicable norms would only be secured if the Court were also invested with final appellate jurisdiction in respect of the interpretation and application of the Treaty. Since, however, the relevant decision of the Conference was confined to an original jurisdiction only, the objectives of legal certainty and uniformity in applicable norms, which appear to be the subject of a compelling inference from the context informing the decision, could only be secured by making the jurisdiction of the Court exclusive as well.

The foregoing considerations appear to explain the thrust of the draft Treaty Articles which read as follows:

“ Article IX (a)

The Court shall have (exclusive) jurisdiction to hear and deliver final judgment on:

- (a) *(actions) (applications) by Member States parties to this Agreement;*
- (b) *referrals from national courts of Member States parties to this Agreement disputes between Member States parties to this Agreement and the Community,*

concerning the interpretation and application of the Treaty.”

“ Article IX (c)

Where a national court or tribunal of a Member State Party is seised 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 judgment, refer the question to the Court.”

Consequently, even though the Conference did not pronounce on the exclusive jurisdiction of the Court, the Legal Affairs Committee will need to advise the Conference that in the absence of such exclusivity, the exercise of an original jurisdiction by the Court will not operate to secure the objectives of legal certainty and uniformity in applicable norms, both of which are required for the efficient and successful development of the CSME.

(B) Locus Standi for both Public and Private Entities

Since traditional international law only recognised States and State entities as subjects of international law, only such entities were recognised as capable of espousing a claim in an international forum. Consequently, there was no machinery in the international domain by which persons, natural and juridical, could have asserted a claim against foreign States and their nationals.³ In the submission of the Permanent Court of International Justice, predecessor to the

³ D.P. O'Connell, International Law, Vol.II 2nd Edition 1970, p.1029.

International Court of Justice (ICJ), the claimant State, in espousing the claim of its national, was in effect asserting a right with respect to a wrong committed against the State in respect of its national.⁴

When a State determines that an international delinquency has been committed against one of its nationals or his property, the foreign office of the State concerned normally makes a claim against the offending State, initially, by diplomatic representation designed to secure an *ex gratia* settlement, and ultimately, by judicial settlement if the parties so agree.⁵ In the absence of consent, an international tribunal is not competent to determine the claim. For the claim to succeed, the claimant State must establish:

- (a) the nationality of the claim, or its legal entitlement to espouse the claim;
- (b) the exhaustion of local remedies in the jurisdiction of the delinquent State;
- and
- (c) the jurisdiction of the tribunal to hear the claim.

And, in the absence of a contrary agreement, the State espousing a claim must establish

continuous nationality, or that the person aggrieved was its national at all material times, that is, both at the time of the incident grounding the claim and at the date of espousal of the claim. Where the claim is by a State for breach of treaty provisions respecting its nationals, the injury is considered to be a breach of good faith and an injury directly to the State itself.⁶ *“Only in the rare instance where the treaty is intended to confer rights directly upon the individual can it be said that the individual is also injured ...⁶. Even where the national has rights directly under the treaty, the contracting State alone should have the competence to bring suit and this competence should be independent of any change in nationality”*.⁶ Where the national aggrieved is a company or corporation, the nationality of the claim will be determined by one or more genuine links such as the place of incorporation,⁷ the place of domicile,⁸ the place of the *siege social* or administrative direction, or the disposition of effective control.⁹

⁴ The Mavrommatis Concession Case (Jurisdiction), P.C.I.J., Sec. A. No.2, 1924.

⁵ For international responsibility and the protection of the property of aliens, see D. E. Pollard, Law and Policy of Producers' Associations, Oxford University Press, 1982, p.283.

⁶ D. P. O'Connell, *op.cit.* at pp.1036-7.

⁷ Standard Oil Co. of N.Y. (U.S.) v Germany. U.N. Rep., Vol. VII, p.301 (1926)

⁸ F.W. Flack (G.B.) v United Mexican States, U.N. Reports, Vol. V, p.61 (1929).

⁹ Daimler Co. v Continental Tyre and Rubber Co. (1916), 2 A.C. 307.

Consonant with traditional international law, the Statutes of the International Court of Justice (ICJ) accord *locus standi* to States only. Article 34(1) of the Statutes of the ICJ reads as follows: *“Only States may be parties in cases before the Court”*.¹⁰ These provisions are in sharp contrast to the provisions of Article 173 of the Rome Treaty which reads as follows:

“The Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.”

Similarly, the Court of Justice of the Cartagena Agreement accords *locus standi* to both public and private entities as provided in the following Articles of the Treaty creating the Court of Justice of the Cartagena Agreement:

“Article 17

*It shall correspond (sic) to the Court to decide the nullification of Decisions of the Commission and Resolutions of the Junta adopted in violation of the norms which comprise the juridical structure of the Cartagena Agreement, including **ultra vires** acts, when these are impugned by any member country, by the Commission, by the Junta, or by natural or juridical persons as provided in Article 19 of the Treaty.”*

“Article 18

The member countries may only bring an action of nullification against the Decisions approved without their affirmative vote.”

¹⁰

See Articles relating to the International Court of Justice at **Appendix III**.

“Article 19

Natural and juridical persons may bring actions of nullification against Decisions of the Commission or Resolutions of the Junta which are applicable to them and cause them harm. ”

It is important to note, however, that in both cases where private entities have *locus standi* in matters before the courts, such entities are directly affected by the acts of competent organs of the integration movement. In both integration movements, provision has been made for legislation with direct effects. Thus, Article 189 of the Rome Treaty which addresses Community legislation, provides as follows:

“ In order to carry out their task, the Council and the Commission shall, in accordance with the provisions of this Treaty, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.”¹¹

Similarly, the relevant provisions of the Agreement creating the Court of Justice of the Cartagena Agreement provides as follows:

“Article 2

Decisions are obligatory for the member countries as of the date they are approved by the Commission.”

¹¹ See Treaty Establishing the European Economic Community, Rome 25 March, 1957, London, HM Stationery Office. (See **Appendix IV**). Also Richard Plender, A Practical Introduction to European Community Law, Sweet & Maxwell, London, 1980, p.7.

“Article 3

Decisions of the Commission are directly applicable in the member countries from the date of their publication in the Official Gazette of the Cartagena Agreement, unless the decision provides for a later date”

The question now falling to be examined and determined by competent decision-makers is whether, given the broad objectives of the CARICOM Single Market and Economy as set out in the various Protocols and the role the private sector is required to play in this new paradigm of economic development, private sector entities should not have *locus standi* in matters before the Caribbean Court of Justice. At its Second Ordinary Meeting held in The Bahamas from 7-10 September 1998, the Legal Affairs Committee, *inter alia*, “noted the recommendation that a procedure should be considered to afford individuals, institutions or other private entities, the opportunity to appear before the Court in special circumstances”.

The draft Articles, consonant with traditional international law, do not accord private entities *locus standi* in matters before the court. Consequently, a private entity aggrieved by a Member State or any of its nationals must have its claim espoused by the State of nationality. Alternatively, the party aggrieved may institute legal proceedings in the national courts of the delinquent party and secure a ruling of the Caribbean Court of Justice on any issue relating to the interpretation or application of the Treaty through a reference by the national court to the Caribbean Court of Justice. In both instances, therefore, access to the Caribbean Court of Justice by private entities would be indirect. The issue falling to be determined is whether, in the considered view of

the Legal Affairs Committee, such access should not be direct.

Unlike the Treaty of Rome, which legislates directly and derivatively for private entities in the European Union with direct effects, the Treaty Establishing the Caribbean Community, as revised, does not create rights and obligations directly for private entities within the Community. Nor does any Organ of the Caribbean Community like the Council and the Commission of the European Union or the Commission of the Andean Common Market, have the competence to create rights and obligations for private entities within the domestic jurisdiction of Member States without the intervention of national legislations. The rights and obligations created by the Treaty of Chaguaramas are both primary and derivative, issuing either from the Treaty itself or from competent organs established by the Treaty *and which have legal incidence for Member States only*.

Rights and obligations enjoyed or endured by private entities in the Caribbean Community and expressed in the Treaty have legal incidence for such entities where the relevant Treaty provisions have been enacted into local law. It would appear to follow, therefore, that all claims of private entities arising in connection with the Treaty would have to be espoused by the country of nationality or made the subject of a reference to the Court by national courts seised of the issue. For example, where the Treaty as amended provides for the removal of restrictions on the right of establishment, the provision of services or the movement of capital in the Caribbean Community, enjoyment of such rights by private entities is contingent on:

- (a) the enactment of Protocol II into local law by Member States;
- (b) the establishment of the relevant programme for the removal of relevant restrictions by the Council for Trade and Economic Development (COTED) or the Council for Finance and Planning (COFAP) as appropriate;
- (c) compliance by Member States with the programme established for the purpose by appropriate legislative or administrative measures.

On the basis of the foregoing submissions, the Attorneys-General of the Region have determined that private entities should be accorded *locus standi* in proceedings before the Caribbean Court of Justice by special leave of the Court on the satisfaction of specified conditions. Consonant with this determination, Article IX(n) of the Draft Agreement Establishing the Caribbean Court of Justice reads as follows:

**“Article IX(n)
Locus Standi of Private Entities**

“ Nationals of a Contracting Party may Nationals of a Contracting Party may, with the special leave of the Court, be allowed to appear as parties in proceedings before the Court where:

- (a) *the Court has determined in any particular case that the Treaty intended that a right conferred by or under the Treaty on a Contracting Party shall inure to the benefit of such persons directly; and”*
- “(b) *the persons concerned have established that such persons have been prejudiced in respect of the enjoyment of the benefit mentioned in sub-paragraph (a) of this Article; and*
- (c) *Contracting Party entitled to espouse the claim in proceedings before the Court has:*
 - (i) *omitted or declined to espouse the claim, or*
 - (ii) *expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party so entitled; and*
- (d) *the Court has found that the interest of justice require that the persons be allowed to espouse the claim.”*

(C) Development of Community Law Pursuant to Decisions taken within the CARICOM Process

*“Although no international decision is binding on subsequent tribunals, there is a natural reluctance to depart from principles and rules which have proved satisfactory in the past for the settlement of legal issues. Hence a tendency towards **stare decisis** is most marked”.*

This submission of O’Connell¹² eloquently adumbrates the current position in international law where decisions of international tribunals create rights and obligations only for the parties to the dispute and constitute a *res inter alios acta* in respect of a third State or party. And it would appear to follow from the doctrine of sovereignty that decisions of an international tribunal involving third parties cannot operate to establish rights and obligations for a State in the absence of the State’s consent.

In effect, the doctrine of *stare decisis* is perceived to have no place in international law but is a doctrine of municipal law associated with common law jurisdictions. The foregoing notwithstanding, publicists like Hersh Lauterpact¹³ detect in the practice of international tribunals a Jurisprudence constant, or a tendency for such tribunals to be influenced by judicial decisions of one another even though adherence to such decisions is not a legal requirement.

¹² *Op.cit* at p.32.

¹³ The Development of International Law by the International Court (1998).

Since, therefore, it is proposed that the Caribbean Court of Justice should apply international law in the exercise of its original jurisdiction, the Court, in the absence of a contrary intention, would be precluded from being constrained in its determinations by the doctrine of *stare decisis*. But given, as mentioned above, that legal certainty was required for the successful operation of the CARICOM Single Market and Economy, the question falling to be decided is whether such certainty was possible of achievement in the absence of the application of the doctrine of *stare decisis* in the Court's determinations. The draft Articles have opted for the application of the doctrine of *stare decisis* in the determinations of the Court. Proposed draft Article IX(e) reads as follows:

“Member States parties agree that decisions of the Chamber shall create legally binding precedents for parties in proceedings before the Chamber, unless such judgments have been revised in accordance with Article IX(j).”

Alternate Formulation

“Decisions of the Court are binding on the parties in respect of the particular case; they constitute binding precedents for parties in subsequent proceedings before the Chamber unless such judgments have been revised in accordance with Article IX(j).”

The Legal Affairs Committee will be required to examine and formulate a recommendation on this issue to the Conference.

DP:ys

3 May 1999

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(CCJ) :**

CHALLENGE AND RESPONSE

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