

# THE CARIBBEAN COURT OF JUSTICE AND ITS RELATIONSHIP WITH THE CARICOM SINGLE MARKET

BY

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Before I commence discussion on the topic of this address, I wish to congratulate heartily the Barbados Public Workers' Cooperative Credit Union on the celebration of its 36<sup>th</sup> Anniversary, and on its outstanding success over the past years. I am extremely impressed with the progress made from a small savings society in 1970 with a capital of \$1732 and operating out of a suitcase to assets to over \$400M today. What an achievement! The progressive success of this outstanding institution is testimony to the dedication, unswerving commitment, loyalty and determination of its members. Special tribute must be paid to the union's founding member, Sister Olive Trotman whose contribution was the cornerstone on which its present success was built. I am indeed honoured to have been asked to deliver this year's lecture in the Memorial Lecture Series honouring this outstanding lady, and also to be the first female to do so. My tribute to Olive Trotman is summed up in this phrase – *“Never underestimate the power of a dedicated woman.”*

I understand that the initial response and performance of the Civil Service Credit Union as it was then known was disappointing, and this makes the progressive development of the present credit union even more awesome, and continuous growth over the years overwhelming. From being referred

to as “the poor man’s bank” you are now a financial giant in the world of commercial banking. The words of the Committee headed by Ralph Boyce and which was established in 1975 to make recommendations for the resuscitation of the credit union which had gone into a decline, were prophetic and indicative of the grit and determination that propelled you to your present position. That Committee determined that “the Credit Union would be transformed to a powerful economic grouping which will set the pattern for others to follow”. You have proved that prophecy to be correct, and may have even surpassed all expectations.

Any organisation is as strong as its members and its leaders want it to be, and it is obvious that the collective leadership and membership of the Barbados Public Workers’ Cooperative Credit Union have taken their responsibilities to their organisation and the Barbados public seriously.

The contribution of credit unions in the Caribbean Region is incalculable and significant as these unions provide financial and other support to the communities in which they operate. They contribute to the well-being of their members who in most instances would have been economically deprived of the means and the wherewithal to improve their financial positions.

The mission statement of the BPWCCU attests to this. It reads thus:

“Our mission is to render excellence in service to our members while providing the means for enhancing their financial, economic and social

well-being, in consonance with cooperative principles.”

The continued growth of the credit union demonstrates that it is fulfilling its mission, and I am positive will continue to do so in the future.

I shall now embark on the subject of this lecture, and begin with a discourse about the Caribbean Court of Justice.

## **THE CARIBBEAN COURT OF JUSTICE**

The Caribbean Court of Justice is now a reality having been inaugurated on 16<sup>th</sup> April 2005. In spite of public awareness efforts by the CARICOM Secretariat several months before the inauguration, misconceptions about the Court abound in relation to its functions, independence and its relationship with the domestic courts of the Region. The Caribbean Court of Justice which I shall hereafter refer to as “the Court” exercises two jurisdictions – an appellate and an original. Even though the focus of this lecture will be on the original jurisdiction, with which the CARICOM Single Market will be concerned, I shall digress briefly to mention a few facts about the appellate jurisdiction.

For most of the English-speaking CARICOM countries, the Judicial Committee of the Privy Council was and still is the final court for appeals emanating from their domestic appellate courts. Since the inauguration of the Court, only two CARICOM states have elected to utilise the appellate

jurisdiction – Barbados for whom the Privy Council was its final appellate court, and Guyana whose domestic court of appeal was its final court. Obstacles in the form of referenda in some and objections by opposition political parties to the passage of the required legislation in others have delayed the signing on to the appellate jurisdiction in these states.

The original jurisdiction, however, has the full support of all Member States of CARICOM. The Court in its original jurisdiction operates as an international tribunal adopting and applying international law in its interpretation of the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy, which in the preamble thereto affirmed that the original jurisdiction of the Court is essential for the successful operation of the Single Market and Economy. In 2001 the Agreement Establishing the Caribbean Court of Justice came into effect conferring on the Court exclusive jurisdiction to hear and deliver judgment on:

- (a) disputes between Contracting Parties to the Agreement;
- (b) disputes between any Contracting Parties to the Agreement and the Community;
- (c) referrals from national courts or tribunals of Contracting Parties to the Agreement;
- (d) applications by nationals in accordance with Article XXIV,

concerning the interpretation and application of the Treaty.<sup>1</sup>

Both the Treaty and the Agreement recognise the sovereignty of the Member States of the Caribbean Community, and a natural consequence of this is that each Member State could interpret and apply the Treaty as it sees fit. Of necessity, this would lead to varied interpretations and differences of opinion. With the establishment of the Court certainty and uniformity of interpretation of the terms of the Treaty are guaranteed. It is beyond dispute that certainty of an important international instrument such as the Treaty is a *sine qua non* in attracting investment to the Region, and it follows that uncertainty and unpredictability of legal decisions on economic issues will become a disincentive to any commercial activity.

While preservation of the sovereignty of Member States is acknowledged and the desirability of entrenching the Court in their national constitutions is accepted, it was recognised that the original jurisdiction of the Court must be compulsory, *ipso facto*, without special agreement.<sup>2</sup> This means that there are no options if uniformity and certainty is to be achieved when applying and interpreting the Treaty. Hand in hand with this compulsory nature of the original jurisdiction is the dictate that judgments of the Court when handed down must be complied with promptly by Member States, organs, bodies and entities of the Community as well as by any persons to whom a judgment applies<sup>3</sup>. Enforceability of judgments of domestic courts is usually provided for by legislation enacted in Member States. In relation to enforcement of the judgments of the Court, Member States agree to take all

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<sup>1</sup> Article XII

<sup>2</sup> Article 216 of the Treaty; Article XVI of the Agreement.

<sup>3</sup> Article 215 of the Treaty; Article XV of the Agreement.

necessary steps, including the enactment of legislation, to ensure that all authorities act in aid of the Court, and that any judgment, order, decree or sentence of the Court be enforced by all courts and authorities of a Member State in the same way as any judgment, order, decree or sentence of a superior domestic court of that State.<sup>4</sup> This provision applies to both jurisdictions of the Court as does Article III of the Agreement that the decisions of the Court shall be final.

In any court the doctrine of stare decisis or judicial precedent is important for its stability and predictability, and both the Treaty and the Agreement<sup>5</sup> address this by providing that judgments of the Court shall be legally binding precedents for parties in proceedings before the Court unless such judgments have been revised.

Even after a judgment has been delivered it may be revised within five years on an application based only upon discovery of some fact of such a nature as to be a decisive factor, and which was unknown to the Court and the party claiming the revision when the judgment was given.<sup>6</sup>

In exercising the exclusive jurisdiction conferred on the Court provision is made in the Treaty for the delivery of advisory opinions at the request of Member States to a dispute,<sup>7</sup> and referrals<sup>8</sup> which arise when a national court of a Member State being seised of an issue whose resolution involves a question concerning the interpretation or application of the Treaty, considers

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<sup>4</sup> Article XXVI of the Agreement.

<sup>5</sup> Article 221 of the Treaty; Article XXII of the Agreement.

<sup>6</sup> Article 219 of the Treaty; Article XX of the Agreement.

<sup>7</sup> Article 212; Article XIII of the Agreement.

<sup>8</sup> Article 214; Article XIV of the Agreement.

that a decision on the question is necessary to enable it to deliver judgment. That national court must refer the question to the Court for determination before delivering judgment in keeping with the desirability for uniformity of interpretation; no other court or tribunal of any Member State is vested with the power to interpret or apply the provisions of the Treaty which is the sole prerogative of the Court applying in this regard such rules of international law as may be applicable. In applying rules of international law the Court is obligated to make a finding and cannot remain silent because of obscurity of the law. All of this, however, is without prejudice to the Court's power to decide disputes on equitable principles if the parties so agree.<sup>9</sup>

Much reliance will be placed and assistance gleaned from international tribunals such as the European Court of Justice and the Court of Justice of the Common Market for Eastern and Southern Africa which are courts established with a similar function to interpret and apply relevant instruments.

Advisory opinions can be sought from the Court only by Member States or the Community itself on issues covered by the Treaty whenever necessary.

A question that may spring readily to the minds of citizens of the Region is whether individual persons have access to the Court in its original jurisdiction. As mentioned earlier the Court's jurisdiction includes hearing applications by nationals which include individual persons as well as legal persons such as companies. However, this is possible only with the special leave of the Court in proceedings where:

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<sup>9</sup> Article XVII of the Agreement.

- (a) the Court determines in any particular case that the Treaty intended that a right conferred by it on a Member State should enure for the benefit of its nationals;
- (b) the persons concerned establish that they have been prejudiced in the enjoyment of that benefit;
- (c) that the Member State which is entitled to espouse the claim in the proceedings before the Court either omitted or declined to do so or expressly agreed that the persons concerned may espouse the claim instead of the Member State; and
- (d) the Court finds that the interest of justice requires that the persons be allowed to espouse the claim.<sup>10</sup>

Primarily the focus of the Court's jurisdiction will be in hearing and determining disputes between Member States and disputes between Member States and the Community. If the aforementioned conditions are satisfied persons (natural or legal) may have access to the Court in relation to issues which may arise under the Treaty. This may, for example, be claims of a commercial nature or of the free movement of skills, goods or services.

Apart from launching proceedings a national may apply to the Court to intervene in a proceeding before the Court if it is felt that such a person or entity has a substantial interest of a legal nature which may be affected by a

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<sup>10</sup> A summary of Article XXIV of the Agreement.

decision of the Court.<sup>11</sup> This also applies to a Member State or the Community.

Universally, procedures for settlement of disputes usually form part of investment instruments in the commercial arena. The desire to promote the concept of alternative dispute resolution (in all forms) is recognised in both the Treaty and the Agreement<sup>12</sup> which urge Member States to the maximum extent possible, to encourage and facilitate the use of arbitration and other modes of alternative dispute resolution for the settlement of private international commercial disputes among nationals of the Community as well as among Community nationals and nationals of third States.

I here reiterate that the Court in exercising its original jurisdiction shall apply international law which is applicable to both civil law and common law jurisdictions thereby rendering it acceptable to the Member States of Suriname and Haiti with civil law jurisdictions.

At this stage I shall move on to discuss the relevance of the Court to the CARICOM Single Market, my knowledge of which is somewhat limited and for which I crave your indulgence.

### **CARICOM SINGLE MARKET**

When the Revised Treaty of Chaguaramas establishing the Caribbean Community was signed it included the CARICOM Single Market and

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<sup>11</sup> Article XVIII of the Agreement.

<sup>12</sup> Article 223 of the Treaty; Article XXIII of the Agreement.

Economy. I am informed that only the Single Market has survived, and the “Economy” has been deferred hopefully for some opportune and auspicious time in the future.

Perforce one is compelled to ask what is meant by and envisaged as a “single market” within the Caribbean Community. I have gleaned much from an article by Mr. Ivor Carryl, Programme Manager for the Single Market and Economy in the CARICOM Secretariat, entitled “*Notes on the Operationalisation of the Single Market and Economy*”.<sup>13</sup> He explained it thus:

“The applied notion of the CSME includes the **equal** right or access to any market by natural and juridical persons whether as buyers or sellers, **irrespective of nationality** or the **location** of the good without reiteration except as authorised by or specified in the Treaty as **negotiated** by the contracting parties.”

Mr. Carryl indicated certain basic criteria which have to be satisfied, namely,

- (a) negotiating equal rights and terms of access of nationals from different states to supply goods and provide services and skills in particular markets; and
- (b) enjoying these negotiated rights or access when the states making the commitments take action to remove restrictions that prevent entry and participation in the negotiated markets.

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<sup>13</sup> “Caribbean Court of Justice – Issues and Perspectives” (2001) Vol. 1.

He went on to state that when all of the restrictions or discriminatory treatment that existed at the time of entry into force of the Treaty have been removed in all of the markets which were the subject of negotiation and agreement, the sum total of the markets against which measures were removed results in the creation of the Single Market and Economy. A court would have jurisdiction over the rights and terms of access and the commitments to grant them on or after the date when they fall due and none other; further, some markets may not be included in the Single Market at a particular point in time and would be outside the jurisdiction of courts.

I apprehend the CSME to be one large single economic zone within which people, markets, services and skills can move freely with minimum restriction. Inevitably problems will arise, for instance, with removal of restrictions that prevent entry and participation in the negotiated markets, and it is in this regard that the Court's original jurisdiction comes into operation in resolving disputes between Member States or applications by nationals.

There is another area covered by the Treaty in which the Court's jurisdiction will be employed. The Treaty establishes a competition policy the goal of which is to ensure that the benefits expected from the creation of the CSME are not frustrated by anti-competitive business conduct,<sup>14</sup> and for the purpose of implementing that policy provides for the establishment of a Competition Commission<sup>15</sup> with a variety of powers to deal with business conduct which prejudices trade or prevents competition within the CSME.

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<sup>14</sup> Article 169

<sup>15</sup> Article 171

The Treaty empowers the Competition Commission to apply to the Court for relevant orders when conducting investigations and also for a party aggrieved by a determination of the Commission to apply to the Court for a review of the determination<sup>16</sup>. In addition, the Court may on an application of the Commission, review a decision of the Commission where the decision was induced by deceit or improper means.<sup>17</sup>

All of the foregoing indicates that the future of the CSM is heavily dependent on the Court and on its interpretations of the Treaty whenever it is called upon to make them. In this regard the Court while utilising all relevant aspects of international law and the experience of other international tribunals will over time build for itself a body of precedents relevant to our Region.

## **CONCLUSION**

The way ahead for the Court as it exercises its original jurisdiction will present many challenges particularly in its interpretation and application of

the provisions of the Treaty. The learned President of the Court, The Rt. Hon. Mr. Justice Michael de la Bastide, T.C., P.C., in a presentation at a conference<sup>18</sup> held here in Barbados last year on a similar topic indicated areas in which the Court will have to chart its own course, one being the extent to which effect should be given to provisions in the Treaty which are not expressly incorporated into domestic law or are inconsistent with local

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<sup>16</sup> Article 175

<sup>17</sup> Article 180

<sup>18</sup> Conference on the CARICOM Single Market and Economy: Toward CSME and Beyond, May 5, 2005.

law. He posed as an example the question of how the freedom of movement of capital is to be reconciled with exchange control restrictions that have not been modified to accommodate it.

Reference was made at the beginning about several misconceptions which have plagued acceptance of the Court as part of the judicial systems of the Region; chief among these is that the Court will be controlled by the politicians and Governments. Let me explode this myth immediately by stating that unlike the judges of the European Court of Justice who are appointed by the Ministers of Government, the judges of our Court are appointed by an independent Regional and Legal Services Commission comprising:

- (a) two representatives each of the Regional Bar Associations;
- (b) two jurists nominated by the Regional universities and the Council of Legal Education;
- (c) the Chairman of one of the Judicial Service Commissions of a Member State;
- (d) the Chairman of one of the Public Service Commissions of a Member State;
- (e) two persons from civil society nominated jointly by the Secretary General of CARICOM and the Director General of the OECS, and
- (f) two persons nominated jointly by the Bar or Law Associations of the Member States.

The President of the Court is the Chairman of the Commission which in addition to appointing the judges of the Court also appoint officials and employees and determine their conditions of service. The only office to which the Commission does not make an appointment is that of the President of the Court who is appointed by the Heads of Government of the Region on a recommendation from the Commission. Applications for appointments to the Court are considered from qualified persons from all over the Commonwealth, and is not confined to persons from the Region. I can see no room for political interference or control in appointments of the judges, and to suggest that these persons can be influenced by politicians is an insult to the integrity of those who comprise the Court.

Another misconception surrounds the financing of the Court which popular opinion regards as being a burden on the Member State in which the Court is located. A Trust Fund has been established by all of the Member States with technical assistance from the Caribbean Development Bank which was also instrumental in raising the sum of US\$100M from international financial markets for the purpose of financing the Court. This sum was lent to the Member States, and is repayable over a period of between fifteen (15) to twenty (20) years at low rates of interest so as not to impose an undue financial burden on them. The amount raised was paid over to the Trust Fund which is administered by a Board of Trustees comprising reputable persons, some skilled in business and others holding high judicial office. The object was to ensure that the finances of the Court are in safe hands.

Other misconceptions suggesting that the Court was established to enforce the death penalty, and that the judges will not be of equal intellectual calibre

as those of the Privy Council are not worthy of comment, and I mention them only in passing.

Before concluding this lecture I wish to correct an omission to mention that the Original Jurisdiction Rules 2005 have been finalised and are now available from the Court and accessible on the Court's website: [www.caribbeancourtofjustice.org](http://www.caribbeancourtofjustice.org). These Rules were drafted in keeping with provisions in both the Treaty and the Agreement<sup>19</sup> and which empowered the President of the Court to establish Rules of Court for the exercise of the original jurisdiction. It is hoped that with the Rules in place the Court will be utilised fully in carrying out its mandate.

The Court is now a reality, and there is no turning back. We can only go forward and strive in the years ahead to craft a jurisprudence for the Caribbean Region of which we can all be truly proud. The time has come to throw off the last shackles of colonialism, and assume responsibility for dispensing justice to our own people in our own courts and according to our own customs and culture.

Thank you once again for inviting me to be part of your 36<sup>th</sup> Anniversary celebrations.

Congratulations and best wishes for the future!



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<sup>19</sup> Article 220 of the Treaty; Article XXI of the Agreement.