The CCJ and the CSME*

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I Introduction

The Caricom Single Market and Economy (the CSME) is the regime established by the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the Caricom Single Market and Economy, signed in Nassau, the Bahamas, on 05th July, 2001. This regime is successor to the regime established by the Treaty of Chaguaramas (1973) establishing the Caribbean Community and Common Market. The latter regime was based on the European Free Trade Agreement (EFTA) and was essentially designed to be a regional free trade agreement.

The Caribbean Community and Common Market was a regime characterized by unqualified protectionism, aggressive import-substitution economic development and inward-looking economic decision-making by some competent decision-makers based on ownership and control of regional resources. Consider in this context the Declaration on Regional Ownership and Control set out in the Final Act of the Chaguaramas Conference (1973)[1] and the nationalization of sugar, bauxite and other enterprises in Guyana, similar initiatives in Jamaica to exert greater influence and control in the bauxite industry and the abortive attempt by Trinidad & Tobago to join the Organization of Petroleum Exporting Countries (OPEC). Extra-regionally, the international climate favoured this type of regime established by regional decision-makers. Despite Britain's entry to the European

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[1] See p. 161 of the Treaty (1973); also Article 44 of the Treaty (1973).

Economic Community, Lome I granted preferential access to the EEC Market by regional products, particularly sugar, rum and bananas, while the cold war and the ideological threat perceived by the West to be posed by Cuba in the hemisphere guaranteed Caricom States significant economic largesse from the United States and relatively easy immigration to that jurisdiction. Competent decision-makers manipulated these conditions to their advantage.

However, during the last decade of the 20th century, unforeseen and, perhaps, unforeseeable developments occurred in the wider international community which cautioned regional decision-makers meeting in Grand Anse, Grenada, in 1989, to address the issue of a new economic dispensation to take the region into the twenty-first century. Among the more disturbing of these developments were the unexpected collapse of the Union of Soviet Socialist Republics and the emergence of one super power, the decision of leaders of the EEC to establish a Single Market by concluding the Treaty of Maastricht in 1992 and the persistence of the developed countries in maintaining the inequitable postwar configuration of international economic relations established by various multilateral regimes. The disintegration of the soviet empire around 1989 heralded the end of the cold war, the demise of communism as an alternative economic development paradigm for non-aligned developing countries, and the accelerated erosion of the geopolitical strategic significance of the Caribbean with all its implications for ready access to grants and concessional loans from the United States for national economic development. Moreover, the much-touted New International Economic Order (NIEO),[2] conceptualized and aggressively promoted by the developing countries never

[2] See D. E. Pollard, Law and Policy of Producer's Associations, Clarendon Press, Oxford, 1984, pp. 1-14.

materialized. Instead, the new rules-based World Trade Organization replaced the effete General Agreement on Tariffs and Trade (GATT) which was provisionally applied between 1947-94.

Of greater and more immediate significance to Caricom States, however, was the movement in Europe to establish a single market and to abolish non-reciprocal free trade regimes with the African, Pacific and Caribbean (ACP) countries exemplified in the Lome I Agreement. It came as no surprise, therefore, that the decision-makers of Caricom determined at Grand Anse that the time had come to effect fundamental changes to the economic development paradigm informing the policy and institutional arrangements of the Caribbean Community and Common Market. They set up the West Indian Commission under the chairmanship of Sir Shridath Ramphal with a mandate to *"formulate proposals for advancing the goals of the Treaty of Chaguaramas which Established the Caribbean Community and Common Market (Caricom) in 1973"*.[3] The report of the Commission set out in "Time for Action" is generally regarded as one of the landmark developments in the history of the Commonwealth Caribbean. Two defining institutions to emerge from the deliberative process which engaged competent decision-makers following the presentation of the Ramphal Commission's report were the Caricom Single Market and Economy and the Caribbean Court of Justice whose functions were perceived by competent decision-makers to be complementary.

[3] See Time for Action: Report of the West Indian Commission, Black Rock, Barbados, 1992 at p.4.

II **The Caricom Single Market and Economy (CSME)**

A sound appreciation of the CSME does appear to require an understanding of the economic arrangements characterizing Caricom relations in the post-independence period. The attainment of independence by Commonwealth Caribbean countries in the 1960's was followed by rabid nationalism and a measure of xenophobia which saw competent decision-makers establishing barriers to intra-regional trade and the unimpeded movement of capital, services and labour in order to secure for their nationals such limited economic opportunities as were perceived to exist within their jurisdictions. Despite the Treaty establishing the Caribbean Community and Common Market in 1973, providing for limited rights of establishment, the regulated movement of capital and the provision of services by Caricom nationals[4], no significant improvements in intra-regional trade and movement of factors were registered in the years immediately following. Provisions of the Treaty of 1973 did address issues relating to the right of establishment, provision of services and movement of capital[5] by nationals of the Caribbean Community but not in terms of obligations imposed on Member States accompanied by credible sanctions for non-compliance. Indeed, Article 38 expressly relieved Member States of the obligation *"to grant freedom of movement to persons into its territory whether or not such persons are nationals of other Member States"*. Similarly, various provisions of the Treaty (1973) provided for the coordination of economic policies and development planning.[6] However, the relevant provisions were elaborated in permissive/hortatory terms rather than obligatory terms accompanied by effective sanctions for non-compliance. Indeed, many of the provisions of the Treaty

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[4] See Articles 35, 36 and 37 of the Treaty (1973)
[5] Op-cit note 4
[6] See chapter six of the Treaty (1973)

(1973) avoided the main issues to be addressed. For example, article 37 obliged the Council to *"examine ways and means for the introduction of a scheme for the regulated movement of capital within the Common Market…"* In one authoritative submission the regulated movement of capital was *"the functional equivalent of the free movement of labor"* whatever that may mean.

In effect, competent decision-makers were caught up in semantics, theory and concepts rather than the identification of practical measures to make regional integration a reality. Consequently, relevant commitments to economic integration given by competent decision-makers appeared to be political undertakings not intended to be taken seriously. This appeared to be due in large measure to the absence of credible machinery for disputes settlement and deliberate effeteness of the sanctioning process of prescription. The arbitration machinery established by the Treaty of 1973[7] was largely dysfunctional and not a single dispute was settled during the life of the regime. Commitments by competent decision-makers were honoured more in the breach than in the observance and the prevailing laissez-faire institutional culture in Caricom rendered politically unacceptable measures to sanction non-compliance with obligations. Memory of the federal experience appeared to have died hard.

In the result, economic conditions began to worsen in the sub-region with the dismantling of preferential access to markets in Europe, escalation in the price of oil and the appalling rigidity in economic patterns of production. Competent decision-makers were reluctantly forced to recognize the need for a new regional economic development paradigm

[7] See Articles 11 and 12.

focusing on outward-looking market-development, international competitiveness of production of goods and services and moving away from unbridled protectionism, import substitution economic development and preferential market access to the EEC. The new regional economic development paradigm to be espoused was perceived to require the pooling of natural resources with a view to the achievement of scale economies, low tariff barriers, production integration and international competitiveness in the production of goods and services.

Consequently, the CSME was designed to be a seamless single economic space within which there were to be for Caricom nationals, the right of establishment, the right to provide services and move capital and the qualified movement of factors.[8] As such, free movement of labour, the political *bête noir* of competent decision-makers, was a long-term goal set out in Article 45 of the Revised Treaty, while in the short term, skills and services would be free to move to any area of this economic space in order to optimize production at internationally competitive prices. In January, 2006 six Member States initiated the Caricom Single Market in the confident expectation that the other Caricom countries will come on board by July, 2006. This required removal of restrictions on the right of establishment and the free movement of factors. The Caricom Single Economy, requiring complex economic and institutional arrangements, is due for commencement in 2008. These arrangements have been expressed to require convergent macro-economic policies, monetary union characterized by a regional central bank, convertibility of currencies at fixed exchange rates or a single currency, unified capital markets and viable

[8] See Articles 32-46 of the Revised Treaty.

financial arrangements to compensate weaker economies disadvantaged by the new economic dispensation.[9]

III **<u>The Caribbean Court of Justice</u>**

In my book the Caribbean Court of Justice: Closing the Circle of Independence,[10] the Court is perceived as the institutional centerpiece of the CSME. A sound appreciation of this perception does appear to require an understanding of the role of law and the judiciary in national economic development and the part expected to be played by the CCJ in the regional economic integration process.

Contrary to conventional wisdom, economists and persons of kindred expertise are not the primary movers and shakers of national economic development. Paradoxically, it is the law that is largely responsible for much national economic development. Consider in this context the role of the company in commercial enterprise world-wide and national economic development. This institution, whether conceived as a small national enterprise or as a large transnational economic aggregation, is a creature of the law and the prime mover of national and global economic development. Prior to the landmark judgment of the House of Lords in **Salomon v Salomon**[11] venture capital for investment involved unacceptable risks both financial and personal – bankruptcy, imprisonment or both. Today, however, the company is in the vanguard of research and development, technological innovation and scientific discoveries of both outer and inner space.

[9] See Ewart Williams, Would Region Benefit from Monetary Union: Business Guardian, May 4, 2006 pp. 10-11.
[10] The Caribbean Law Publishing Company, Kingston, 2004
[11] (18897) AC 22 HL

Money, moreover, in its various manifestations is a creature of law. As originally conceptualized, money was a chattel, issued under the authority of law, by reference to a defined unit of account, having the status of legal tender for the satisfaction of a debt of any amount. The role of money, a legal and not an economic concept, in the formation and execution of economic transactions is too well known to merit exhaustive analysis in the present context. Further, the law determines currency par values, exchange rates, the independence and liquidity of central banks, the parameters of fiscal deficits and so forth. In short, many instruments or measures perceived to be indispensable for macro-economic stability and structured national economic development are creatures of the law.

The law also plays an indispensable role in another important economic dimension. Law is required to import certainty in the national investment climate by establishing the permissible parameters of political, economic and social interaction. For Caricom, a largely capital importing region, an attractive investment climate is of seminal importance. Such an investment climate must afford the foreign investor stability of expectations in terms of returns on his investment. In the absence of stable expectations the prudent prospective investor is unlikely to commit his investment. An attractive investment climate, in effect, must be one that enables the prospective investor to predict with a fair degree of certainty the outcomes of investment decisions. And this in turn requires certainty in the operational environment. Outcome predictability in the operational environment is normally a function of certainty of the applicable rules of law,

efficiency of the justice sector and unqualified integrity on the part of judges who are required to interpret and apply the law. Equally important is a plausible assurance by the prospective investor about the impartiality and independence of the judiciary and expeditious delivery of judicial services. In effect, external perceptions of the rule of law and impartial administration of the applicable rules of the game are determinative. In the absence of these attributes in the justice sector the prospective investor cannot be assured of fair and expeditious settlement of investment disputes, a factor which provides an added attraction to the investment climate.

The requirement of certainty and uniformity in the applicable law governing economic transactions in the CSME persuasively underscores the importance of the CCJ as a pivotal institution in the regional economic integration process. In this context, it is important to bear in mind that the Caribbean Community is an association of sovereign states. Relevant institutional arrangements are characterized by the absence of central institutions with supranational competence to ensure uniformity and certainty in the applicable norms. This is the role played by the Council and Commission in the European Union. The regime established by the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the Caricom Single Market and Economy operates, initially, at the international plane and creates rights and obligations for the sovereign states of Caricom only as subjects of international law. In the dictum of Roskill LJ: *"(w)hen the Crown in the exercise of its prerogative powers concludes a treaty, the subject gains no personal rights under that treaty enforceable in our courts*

unless the treaty becomes part of the municipal law of this country and provides for the subject to acquire certain specified rights thereunder":[12]

Nationals of the Caribbean Community may only enjoy the rights set out in the Revised Treaty when this instrument is incorporated in the municipal law of their respective Member States. In effect, the dictum of Roskill J applies, *mutatis mutandis*, to treaties concluded by the national executives of various Caricom countries. Most Member States in the Caribbean Community have ratified and incorporated the Revised Treaty Establishing the Caribbean Community including the Caricom Single Market and Economy and the Agreement Establishing the Caribbean Court of Justice. Incorporation of these instruments gives rise to peculiar problems in international and municipal law which will have to be addressed by the CCJ.

Rights and obligations arising under those instruments and which are to be deliberated and determined by the CCJ are conferred/imposed, in the first instance, on states parties to them as subjects of international law. Municipal courts of the countries of Caricom subscribing to the dualist doctrine of international law, in effect, all such states except Suriname and Haiti which subscribe to the monist doctrine of international law, have no power to interpret and apply treaties.[13] They may look at them, however, in order to determine compliance by states with international obligations.

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[12] Laker Airways v Department of Trade (1977) 1 QB at 717-18; see also Simsek v Mc phee (1982) 56 AlJR 277; Simsek v Mc Phee (1982) 56 AlJR 277; Blackburn v Attorney-General (1971) 2 All ER 1380; Ian Brownlie Principles of Public International Law, 5th edn.; Clarendon Press 1998, p. 557; Wade Phillips Constitutional law, 8th edn. (1977) and Mann Studies in International Law (1975) p. 328.

[13] Malone v Metropolitan Police Commissioner (1979) 2 WLR 700.

In **Littrell v USA (No. 2)**[14]**,** Lord Hoffmann cited with approval the dictum of Lord Kingdom in **Secretary of State in Council of India v Kamachee Boye Sahaba (1859) 13 Moo PCC 22 at 75** where he asserted: *"The transactions of independent states are governed by other laws than those which municipal courts administer: such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make"*. In short, unincorporated treaties cannot create rights and obligations for citizens of Caricom. In the absence of incorporation, treaties are not justiciable in the municipal courts of Caricom countries[15]. And where treaties are incorporated they lose their status as international law instruments and become, *ipso facto*, municipal law instruments subject to the ordinary rules of statutory interpretation.[16]

Since unincorporated treaties are not self-executing in the dualist jurisdictions of Caricom states, they have to be enacted to have legal incidence for private entities.[17] Incorporation of a treaty may be by direct or indirect enactment. Where direct enactment is employed by the draftsman the instrument in the *dictum* of Lord Diplock is *"couched in conventional … legislative idiom … designed to be construed exclusively by … judges"*.[18] However, direct enactment yields no plausible guarantee of the uniform application of a treaty which has many parties since drafting styles are vulnerable to the well-known aphorism *"quot homines tot sententiae"*.

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[14] 1995 1WLR
[15] Malone v Metropolitan Police Commissioner; J.H. Rayner (Mincing Lane) Ltd. v Department of Trade and Industry; Mattadeen v Pointu (1999) 1 AC 98.
[16] Fothergill v Monarch Airlines (1950) 3 WLR 209.
[17] Fothergill v Monarch Airlines Ltd. (1981) 251 at 271; Laker Airways v Department of Trade (1977) QB 643 at 674 and Pan American World Airways v Department of Trade (1976) 1 Lloyd's Reports 257.
[18] Fothergill Monarch Airlines Ltd. (1981) AC 251 at 281-7.

Indirect enactment does not involve the draftsman in attempting to cast in more exacting legislative idiom the looser provisions of a treaty. All the drafter is required to do is to expressly provide in the enacting instrument that the treaty shall have the force of law in the relevant jurisdiction. In the characterization of Francis Bennion, *"(w)ith indirect enactment, instead of the substantive legislation taking the well-known form of an Act of parliament, it has the form of a treaty. In other words, the form and language found suitable for embodying an international agreement become, at the stroke of a pen,, also the form and language of a municipal legislative instrument."*[19] But where indirect incorporation is employed, *"(i)t is not the treaty but the statute which forms part of English law. And English courts will not (unless the statute expressly so provides) be bound to give effect to interpretations of the treaty by an international court, even though the United Kingdom is bound by international law to do so":* per Lord Hoffman in **Regina v Lyons and Others**[20]**.** This statement of the law applies, *mutatis mutandis*, to the Caricom dualist jurisdictions. But incorporation of a treaty by indirect enactment even though, *stricto juris*, subjects the instrument to the ordinary rules of statutory interpretation, facilitates interpretation of its terms *"unconstrained by technical rules"* and by reference to *"broad principles of general acceptation"* per Lord Wilberforce in **James Buchanan & Co. Ltd. v Babco Forwarding and Shipping (UK) Ltd.**[21] Such principles of general acceptation are to be found in Articles 31-2 of the Vienna Convention on the Law of Treaties.

[19] Statutory Interpretation, 4th edition, Butterworths, London, 2002 at pp. 580-1.
[20] (2003) 1 AC 976 at 992.
[21] (1978) AC 141 at p. 152

Nearly all the states of Caricom have incorporated by indirect enactment the Revised Treaty and the Agreement Establishing the Caribbean Court of Justice. Such incorporation means that, in the absence of legislative provisions to the contrary, these instruments would be subject to as many interpretations as there are national jurisdictions in the Caribbean Community. Such a scenario would be a prescription for uncertainty in the CSME and constitute a formidable disincentive to foreign direct investment. And it is in this context it is necessary to evaluate the role of the CCJ in the CSME.

An examination of the relevant provisions of the Agreement Establishing the Caribbean Court of Justice would confirm that the entire thrust of its provisions dealing with the original jurisdiction is geared towards ensuring that the law applicable to the interpretation and application of this instrument is uniform. The relevant articles of the CCJ Agreement are replicated in the Revised Treaty of Chaguaramas for the purpose of ensuring that whatever ruling may emerge from the Judicial Committee of the Privy Council about the status of the Court as a municipal institution, its status as an international organization competent to interpret and apply the Revised Treaty through the employment of rules of international law would remain unimpaired. Consider in this connexion Articles 211 to 222 of the Revised Treaty.

In this connexion it may be apposite to note that incorporation of the Agreement Establishing the Caribbean Court of Justice does not operate to affect its status as an international organization.[22] In this case Lord Lowry endorsed the following remarks of Lord Templeman in **J.H. Rayner (Mincing Lane) Ltd. v Department of Trade (1990)**

[22] Arab Monetary Fund v Hashim (1991) 2 AC 114.

2 AC 418 at 478, a case concerned with the International Tin Council created by a group of sovereign states in an international agreement. *"Consistently with the treaty, the UK could not convert the ITC into a UK organization. In order to clothe the ITC in the UK with legal personality in accordance with the treaty, Parliament conferred on the ITC the legal capacities of a body corporate. The courts of the UK became bound by the Order of 1972 to treat the activities of the ITC as if those activities had been carried out by a body incorporated under the laws of the UK"*.

Lord Lowry continued by endorsing the comment of Binghain J (as he then was) at (1991) 2 AC 114 at 140 to the effect *"that it would not be acceptable for one sovereign state, party to an international treaty, to hijack an organization to which it and other states had given birth and subject it (contrary to the treaty terms) to its own domestic jurisdiction ... Neither the 1972 Order nor the decree (of the UAE) created a domestic corporation but each was effective to confer legal personality in its respective municipal law on a body which would otherwise have lacked it"*. The aforementioned *dicta* applied, *mutatis mutandis*, to various enactments of Caricom Member States incorporating the Agreement Establishing the Caribbean Court of Justice, must be seen to support the conclusion that these instruments do not transform the CCJ into a municipal court thereby brining it within the determinations of the Judicial Committee of the Privy Council handed down in **Moses Hinds v the Queen.**[23] and **Jamaica Independent Council of Human Rights v Syringa Marshall-Burnett and the Attorney-General of Jamaica.**[24]

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[23] (1977) AC 915

[24] (2005) UK PC 3.

In order to achieve certainty and uniformity in the applicable norms, the scheme of drafting of the relevant articles proceeded as follows: Article XII of the Agreement Establishing the Caribbean Court of Justice (***"the Agreement"***) and Article 211 of the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the Caricom Single Market and Economy (***"the Treaty"***) invests the Court with exclusive jurisdiction to hear and deliver judgment on various disputes concerning the interpretation and application of the Treaty. It is interesting to note, however, that Article 211 of the Treaty also makes the jurisdiction of the Court compulsory. Since, however, sovereign states are not subject to the jurisdiction of international tribunals in the absence of their consent, Articles XVI of the Agreement and Article 216 of the Treaty provide that the Member States of Caricom recognize as compulsory, *ipso facto*, and without special agreement the original jurisdiction of the Court. The jurisdiction conferred on the Court by these provisions will operate to ensure that disputes will not be unresolved. In this connexion, it is interesting to note that Article XXII(2) of the Agreement and Article 217(2) of the Treaty preclude the Court from declining to make a determination on the ground that the applicable law is obscure.

In the exercise of its original jurisdiction, the Court is required to apply *"such rules of international law as may be applicable"*. Since states with civil law jurisdictions are also governed at the international plane by applicable rules of international law, both Haiti and Suriname encountered no difficulties in participating in the CCJ as an international tribunal interpreting and applying the Treaty to which they are both parties. This stricture on the mandate of the Court, however, is relaxed by Article XVII(2) of the Agreement

(Article 217(2)of the Treaty) which empowers the Court to decide a dispute *ex aequo et bono* where the parties so agree.

Consistently with the scheme of drafting to ensure certainty in applicable norms to be employed in determining disputes concerning the interpretation and application of the Treaty, Article XXII of the Agreement (Article 221 of the Treaty) provides that *"judgments of the Court shall be legally binding precedents for parties in proceedings before the Court unless such judgments have been revised …"*. This provision must be seen as an important innovation in international law. In the *dictum* of Lord Denning: *"(i)nternational law knows no rule of stare decisis. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to change – and apply the change in our English Law – without waiting for the House of Lords to do it."*[25] Introduction of this principle into the norms applicable for employment in resolving disputes among Member States was intended to secure certainty in the law and to enhance predictability in the regional economic environment with a view to enhancing the quality of the investment climate.

However, the jury is still out regarding how the CCJ in the exercise of its original jurisdiction will construe and apply the doctrine of *stare decisis*. For example, will the Court regard the doctrine as a shackle to bind or as a guide to lead? Given that neither the House of Lords nor the Judicial Committee of the Privy Council regard themselves as being bound by precedent especially when the liberty of the subject is involved, will the CCJ be guided by their determinations or will the Court consider to be determinative the

[25] Trendtext Trading Corporation v Central Bank of Nigeria (1977) QB 529 at pp 553-4.

fact that in the exercise of its original jurisdiction the liberty of the subject is not likely to be involved? These are all important issues to be deliberated and determined when the Court is called upon to exercise its jurisdiction as an international tribunal.

Article XIV of the Agreement (214 of the Treaty) addresses the important issue of referrals to the Court. Similar provisions are to be found in Article 177 of the Rome Treaty (1957) and Article 234 of the Maastricht Treaty (1992). These referral provisions appearing in the instruments of the European Union, and which were intended to secure uniformity in the applicable norms, have been credited with catalytic significance in achieving a remarkable measure of economic and social coherence in the European Union. In one submission the referral procedure *"allows the European Court of Justice to insinuate itself in important aspects of national law to ensure convergence of the applicable norms of national law and Community law."* In the submission of Lord Denning, M.R. in **H.P. Bulmer v Bollinger SA**[26]**:** *"When it comes to matters of a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back. Parliament has decreed that the Treaty is henceforth to be a part of our law. It is equal in force to any statute. Any rights or obligations created by the Treaty are to be given legal effect in England without more ado."*[27] Competent decision-makers of Caricom determined that Article XIV of the Agreement would play a similar cohesive and integrating role in the CSME as it was credited with achieving in the European Union.

[26] (1974) 2 ALL ER 1226.
[27] See D. E. Pollard, opcit at p. 175

In this context, questions have been raised whether the referral provision constitutes an encroachment on the jurisdiction of the constitutional courts or an infringement of the separation of powers principle. Lord Hoffman in addressing this issue opined: "*Parliament may pass a law which mirrors the terms of the treaty and in that sense incorporates the treaty into English law. But even then, the metaphor of incorporating may be misleading. It is not the treaty but the statute which forms part of English law. And English courts will not (unless the statute expressly so provides) be bound to give effect to interpretations of the treaty by an international court.*" To achieve uniformity in the applicable law Article XIV of the Agreement (214 of the Treaty) requires national courts or tribunals to refer issues of interpretation of the Treaty to the CCJ. Does this constitute an infringement of the existing jurisdiction of national constitutional courts? Certainly not! The jurisdiction to be conferred by the CCJ Act on national courts in respect of the Treaty as incorporated, is a new jurisdiction whose parameters are circumscribed by the requirement to be governed by the interpretation of the Treaty by the CCJ. In the premises, the CCJ Acts of Member States are not subject to the strictures enunciated by the JCPC in the **Moses Hinds** case and the **Jamaica Independent Council of Human Rights** case mentioned herein.

In its anxiety to ensure that the CCJ Act (No. 170 of 2005) enacted by it to incorporate the Agreement Establishing the Caribbean Court of Justice in its original jurisdiction did not offend relevant provisions of the Constitution, the Government of Jamaica provided in Section 7 as follows:

> *"7(1) Where a court or tribunal is seized of an issue whose resolution involves a question concerning the interpretation or application of the Treaty, the Court or tribunal concerned may, before delivery of its judgment in the matter in writing request the designated authority to refer the question to the Court for an advisory opinion to be given.*
>
> *(2) In this section-*
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> *"designated authority" means the public officer or authority designated by the Minister responsible for justice, for the purpose of making referrals under this section."*

Quite apart from being egregiously misconceived, juridically, in terms of offending the separation of powers principle, this provision unquestionably places Jamaica in breach of its treaty obligations and is likely to engage that country's international responsibility. As stated above, the learning on the issue is very clear. Incorporation of the Act Establishing the Caribbean Court of Justice does not operate to transform the CCJ into a municipal court. The status of the Court remains that of an international organization with an international law jurisdiction which does not collide with the municipal law jurisdiction of the constitutional courts of Jamaica. In construing the provisions of the Treaty as incorporated the courts of Jamaica are not bound to accept interpretations of the CCJ unless so provided. Indeed, the requirement to refer is conditional and only arises where a court or tribunal considers such a referral necessary to deliver judgment. The test is subjective and even after a referral is made the municipal court is still not required, *stricto juris,* to follow the interpretation of the CCJ although the requirement for

uniformity in the applicable law would appear to make compliance the subject of an ineluctable inference.

Conclusion

The Caricom Single Market and Economy appears to be an interesting sortie into economic and social engineering. Achievement of the goals required to make this experiment a reality is not easily secured. A single market requires, among other things, the unimpeded movement of labour. However, Article 45 of the Treaty treats the free movement of labour as a goal to be realized in the undetermined future. Similarly, a single economy requires a single currency (or free convertibility of national currencies at fixed exchange rates) a central bank, a unified capital market, convergence of macro-economic policies including fiscal policies and national economic planning. So far there appears to be no political will among competent decision-makers to bite the bullet. There is an agreement to achieve convergence in various financial areas. But the agreement is not accompanied by sanctions and there is no credible machinery for monitoring and maintaining compliance. In the premises, it is not possible to entertain any plausible expectations about a single currency in Caricom or even compulsory convertibility of national currencies at fixed exchange rates. Indeed, although the relevant provisions of the Treaty (1973)[28] expressly provide for convertibility of Caricom currencies at official exchange rates with no chargeable commissions, this treaty obligation is not known to have been implemented by any Caricom Member State. However, the arrangements for judicial settlement of disputes appear to be quite credible especially as concerns the

[28] Article 43(3)(a).

independence of the Court from central control or direction and its administrative autonomy based on generally acceptable financial arrangements.