

The Caribbean Court of Justice (“the CCJ”): Who Stands to Gain*

By The Hon. Mr. Justice Duke E.E. Pollard

1. Introduction

1.1 As a sitting judge of the Caribbean Court of Justice (“the CCJ”), I find myself in the invidious position of being requested by MIND to make a determination about the CCJ which inevitably engages a value judgment. In the present submission, however, inasmuch as such a determination is likely to impact one way or another on the choices available to nationals of the Caribbean Community whose countries have not yet submitted to the appellate jurisdiction of the CCJ, a value judgment about the positive or negative attributes of the Court should be left to such nationals whose right to life, liberty, property and other civil rights may, in the ultimate analysis, be determined by this judicial institution.

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1.2 More importantly, the time for tendentious advocacy based on an indeterminable evaluation of the Court’s attributes has long passed. The CCJ has been up and running for more than three years, which, admittedly, is a short time in the history of judicial institutions in terms of evaluating the relevance, perceptiveness, viability and sustainability of their determinations. Despite this, however, interested critics on both sides of the issue must be presumed to have the required acumen to venture meaningful perceptions about the composition and independence of the Court, both professional and institutional, and to entertain tentative opinions about the quality of determinations delivered by its judges.

1.3 In the premises, I shall confine my observations to aspects of the CCJ which admit of dispassionate verification leaving indeterminable value judgments about delinking from or retaining the jurisdiction of the Judicial Committee of the Privy Council (“the JCPC”) to be essayed by nationals of uncommitted Caricom States. Nevertheless, on the basis of an informed analysis of existing judicial institutions, both municipal and international, it is possible to take solace in the awareness that the CCJ appears to be a unique judicial institution in terms of the expectations of competent decision-makers regarding its role in the regional economic integration process, its jurisdictional reach, and its prospects for advancing in the various countries of the Caribbean Community (“Caricom”) good governance based on the rule of law.

1.4 The uniqueness of the Caribbean Court of Justice (CCJ) as an international judicial institution determines in large measure who stands to gain from its operations. As an institution possessing both an appellate municipal jurisdiction and an original international jurisdiction the CCJ differs from other judicial institutions which possess both original and appellate municipal law jurisdictions like the Judicial Committee of the Privy Council, the United States Supreme Court[†] and the Supreme Court of Ghana. In terms of its composition the CCJ is allowed to include on its Bench judges from both common law and civil law jurisdictions[‡] even though the overriding majority of judges currently sitting on the Bench belong to the common law system. Consequently, the determinations of the Court in the exercise of its original jurisdiction are likely to be influenced and enriched by common law and civil law concepts as well as monist and dualist perceptions of the law.

1.5 Although it is not known whether the composition of the Bench of the Court is determinative in this particular there is emerging a consensus among the judges sitting on the bench that even though unincorporated treaties *per se* (of which there are numerous in Caricom) form no part of their common law, these instruments are not without their influence on the municipal law of dualist jurisdictions. Thus, unincorporated treaties may be employed as aids to

[†] See Article 111 of the United States Constitution which reads in part:

“In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction.”

[‡] (Article IV(10)) of the Agreement Establishing the CCJ

construing legislative enactments since Parliament is presumed not to legislate contrary to relevant treaty provisions; furthermore, as established by Pollard JCCJ in **Attorney-General v Joseph & Boyce (2006) 69 WIR p. 106** unincorporated treaties may even engender treaty-compliant conduct capable of generating substantive legitimate expectations which are progressively being assimilated to the status of legally binding principles in public law.[§]

2. The CCJ and Regional Economic Integration

Status of the Caribbean Community

- 2.1 From the earliest days when the Organization of Commonwealth Caribbean Bar Associations (OCCBA) was canvassing proposals to delink from the JCPC, in 1972, consideration was being given to an indigenous institution which would simultaneously serve as a municipal court of last resort in substitution for the JCPC as well as an international tribunal to adjudicate disputes among Member States of the Caribbean Community relating to one or another international economic integration instrument. The hybrid jurisdiction of the proposed court was endorsed without qualification by the West Indian Commission established by the Caricom Heads of Government in 1989 at Grand Anse to advise on an economic integration instrumentality appropriate for the region in the coming millennium. However, in order to appreciate the role of the CCJ envisaged by competent regional decision-makers in the proposed regional economic

[§] See Pollard, D.E.E. (2007) Unincorporated Treaties and Small States, Commonwealth Law Bulletin 33:3, 389-421.

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- dispensation it is necessary to evaluate the institutional antecedents of the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the Caricom Single Market and Economy (CSME).
- 2.2 Following the collapse of the federal experiment in 1962 the Commonwealth Caribbean was fragmented into a multiplicity of independent states whose economies were too effete to ensure their survival as viable political entities. Consequently, early attempts to integrate their economies resulted in the Caribbean Free Trade Association (CARIFTA) 1968 which was patterned on the European Free trade Association (EFTA). Following CARIFTA, competent decision-makers agreed to enhance the economic integration process and established the Caribbean Community and Common Market by concluding the Treaty of Chaguaramas (1973). Although this institution was more a trading arrangement than an economic integration initiative, the movement managed to survive and even register modest growth behind the protective barriers of European preference and the political rampart of democratic capitalism made possible by the Cold War and the Cuban Revolution of 1959.
- 2.3 During the closing decades of the 20th Century, however, unforeseen developments conspired to shock the Caribbean Community out of its economic complacency. The oil price rise of 1973 sent the fragile economies of Caricom into a tail spin which was later aggravated by the termination of LOME I and the emergence of the European Union (1992) at the Treaty of Maastricht, as well as

the end of the Cold War with the collapse of the Berlin Wall. The Heads of Government of Caricom, meeting in Grand Anse in 1989 were coerced by developing forces of globalization and liberalization to recognize the need for a new dispensation to take the regional movement into the 21st Century and set up the West Indian Commission (WIC) for the purpose. In its defining report “Time for Action” the WIC made two significant recommendations which were adopted and implemented by the Heads of Government. Firstly, it was recommended that the Caribbean Community and Common Market should be transformed into a Caricom Single Market & Economy and the Caribbean Supreme Court be established with two jurisdictions – an appellate jurisdiction to replace the JCPC and an original jurisdiction to interpret and apply the Revised Treaty of Chaguaramas establishing the Caribbean Community including the Caricom Single Market & Economy.

2.4 In the conceptualisation of the of the West Indies Commission, the Caribbean Community in the new dispensation would continue to be an association of sovereign states, carrying the regional economic integration movement forward by a pooling rather than a compromise of sovereignties.** But given that the overriding majority of Caricom States subscribe to dualism, advancement of the regional economic integration process would be hampered by the inability of

** See, for example, *Time for Action – Report of the West Indian Commission*, Black Rock, Christ Church, Barbados, 1992, pp. 465-6. The late 20th C also witnessed the proliferation of regional economic integration movements – African Union (AU); Association of South East Asian Nations (ASEAN); Andean Community of Nations (CAN); Caribbean Community (CARICOM); Central American Integration System (SICA); Commonwealth of Independent States (CIS); Economic Community of West African States (ECOWAS); European Union (EU); Gulf Cooperation Council (GCC); Pacific Islands Forum (PIF); South Asian Association for Regional Cooperation (SAARC); Southern African Development Community (SADC); Southern Common market (Mercosur).

institutions at the centre to implement Community decisions without the intervention of Parliament. In this context consider Article 240(1) of the Revised Treaty. In effect, organs of the Caribbean Community possessed no attributes of supranationality and were incapable of generating legal instruments with direct effect in the jurisdictions of Caricom states. Contrast in this context, the groundbreaking judgment of the European Court of Justice in **Costa v ENEL**.^{††}

2.5 In the premises, rights and obligations set out in the Revised Treaty or issuing from competent organs of the Community, like the Conference of Heads of Government, must be incorporated to have legal incidence for private entities. When this happens, however, the legal incidence of enactments may differ among Caricom jurisdictions thereby creating uncertainty in the applicable law and an unstable investment climate. Such an eventuality is hardly likely to commend itself to competent decision-makers since the economies of Caricom States are heavily dependent on foreign direct investment, as discussed in paragraph 4.16 below.

2.6 Consistently with their perception of Caricom as an association or community of dualist sovereign states, competent decision-makers were not prepared to accord private entities *locus standi* in proceedings before the CCJ except in special circumstances.^{‡‡} As objects of international law private entities are required to have their grievances espoused by the state of nationality which is deemed to be

^{††} No. 6/64, 1964 CMLR 425.

^{‡‡} Consider in this context Article 34 of the Statute of the ICJ; also See Article 222 of the Revised Treaty.

the party aggrieved in traditional international law. This denial of automatic access to the Court as of right in the event of a wrong inuring to a private entity, stands in sharp contrast to the practice of the European Court of Justice and the Andean Court of Justice both of which accorded to private entities *locus standi* in proceedings. Consider in this context Article 230 of the EEC Treaty which accords private entities *locus standi* to bring actions for annulment of decisions of Community organs. In the CCJ access is accorded only by special leave of the Court on the satisfaction of specified conditions as set out in Article 222 of the Revised Treaty. In effect relevant provisions of the Revised Treaty emphasized the principle of sovereignty as an imperative of state interaction in Caricom. Consider in this context the provisions of Article 28(1) of the Revised Treaty.

The CCJ as a Catalyst for Regional Economic Development

- 2.7 The CCJ is probably one of the most critical institutions in the proposed scheme of arrangements for transforming the so-called Community of sovereign states into a single market and, considerably more challenging, into a single economy. Such a transformation is intended to create a seamless economic space for the unimpeded movement of factors thereby facilitating economic synergies production integration and scale economies, in the absence of which internationally competitive production of goods and services would be infeasible. The emergence of globalization and liberalization as dominant imperatives of international trade, and more importantly, as stimuli for internationally competitive production of goods and services, has constrained competent

decision-makers to devise institutional and economic arrangements at the national plane to optimize exploitation of their natural resources by way of sustainable and efficient production. An important institutional arrangement in this context is the central role accorded the CCJ in establishing the required legal infrastructure perceived to be indispensable for an attractive investment climate and the competitive production of goods and services. As a prelude to the following analysis it may be useful to reflect on the role of law in national economic development. Foreign investment promotion is a critical aspect of development policy!

- 2.8 The law plays an indispensable role in national economic development. Law is required to import certainty in the national investment climate by establishing and maintaining the permissible parameters of political, economic and social interaction. For Caricom, a largely capital importing region, an attractive investment climate is of seminal importance. As was pertinently observed, “*FDI promotion policy is a critical part of development strategy which must be integrated into the overall economic policy framework for the Region’s transformation into a dynamic growth pole.*”^{§§} In 1997, FDI flows into Caricom were **US \$1,986 millions**, in 2001 **US \$2,349 millions**, and in 2004 **US \$2,470 millions**.^{***} In 2004 Trinidad and Tobago’s share was **US \$1 billion**, Jamaica’s **US \$650 millions** and Bahamas **US 206 millions**. After 2005 FDI flows into Trinidad and Tobago are likely to increase significantly due to the

^{§§} Caribbean Trade & Investment Report, Caricom Secretariat, 2005 at p. 146.

^{***} Idem at p. 134.

investments in the natural gas sector and energy intensive industries like aluminum. During the past five years Trinidad and Tobago attracted approximately US \$6 billion in foreign direct investment.^{†††} The majority of FDI flows into Caricom is in the form of equity capital and reinvested earnings. The origin of these FDI flows is largely United States, Canada and U.K.^{‡‡‡} FDI also originates in Europe and some developing countries like Malaysia and Columbia. The most attractive sectors for foreign direct investment flows are mining, tourism and forestry. 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.

- 2.9 Outcome predictability in the operational environment is normally a function of certainty of the applicable rules of law, efficiency of the justice sector in the delivery of judicial services 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. Consider in this

^{†††} *Newsday Business Day*, 1-11-2007 at p. 8.

^{‡‡‡} Recently, the Peoples Republic of China (P.R.C.) has shown much interest in investing in the mining and renewable energy sectors of Guyana.

context the caustic *dicta* of Lord Hoffman where the trial judge took five years to deliver his judgment:

“The judgment as delivered offers the parties no explanation for the delay and their Lordships understand that the judge is no longer serving in the British Virgin Islands. But their Lordships feel bound to observe that such delays are completely unacceptable. Besides being a violation of the constitutional right of the parties to a determination of their dispute within a reasonable time, they are likely to be detrimental to the interests of the British Virgin Islands as a financial centre which can offer investors efficient and impartial justice.”^{§§§}

2.10 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 positive dimension to the investment climate.

2.11 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.

^{§§§} Citco Banking Corporation N.V. Pusser’s Limited v Charles S. Tobis, Privy Council No. 55 of 2005.

The Dualistic Dilemma

2.12 The regime established by the Revised Treaty 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 the treaty enforceable in our courts unless the treaty becomes part of the municipal law of this country and provides for the subject acquire certain specified rights thereunder.”**** Similarly Lord Hoffman averred “unincorporated treaties cannot change the law of the land. They have no effect upon the rights and duties of citizens in common or statute law.”†††

2.13 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 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.

**** *Laker Airways v Department of Trade* (1977) 1QB at 717-18.

††† *John Junior Higgs v Minister of National Security* [2002] 2 AC 228.

2.14 Rights and obligations arising from and under those instruments 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.⁺⁺⁺ They may look at them, however, in order to determine compliance by states with international obligations. Caricom States subscribing to dualism and incorporating the Revised Treaty have all provided in their enactments that the provisions of the instrument shall have the force of law.⁺⁺⁺⁺

The CCJ as an Integrating Instrument

2.15 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 Establishing the CCJ Agreement are replicated in the Revised Treaty of Chaguaramas for the purpose of ensuring that whatever ruling

⁺⁺⁺ *Malone v Metropolitan Police Commissioner* (1979) 2 WLR 700.

⁺⁺⁺⁺ Consider in this context section 3 of the Caribbean Community Act of Antigua and Barbuda – No. 9 of 2004 dated 17th September 2004; Section 3(1) of the Barbadian Caribbean Community 2003-8 dated 24th April, 2003; Section 3(1) of the Caribbean Community Act of Belize 2004, No. 17 of 2007 dated 17th August, 2004; Section 3(1) of the Guyana Community Act No. 8 dated 29th March, 2006; Section 3(1) of the Jamaica Caribbean Community Act No. 15 dated 25th March, 2004; Section 3(1) of Saint Lucia Caribbean Community Act No. 12 dated 04th August, 2004; Section 3(1) of the St. Vincent and the Grenadines Caribbean Community Act No. 5 dated 16th March, 2005 and section 3(1) of the Caribbean Community Act dated 17th February, 2005.

may emerge from the Judicial Committee of the Privy Council about the Court, 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.

2.16 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. Similarly, in accordance with Article 212 only the CCJ may deliver advisory opinions on the Treaty. It is interesting to note, however, that Article 211 of the Treaty also makes the jurisdiction of the Court compulsory.

2.17 Since, however, sovereign states are not subject to the jurisdiction of international tribunals in the absence of their consent, Article XVI of the Agreement (Article 216 of the Treaty) provides 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 remain unresolved. Article 212 gives the

Court exclusive jurisdiction to deliver advisory opinions on the interpretation and application of the Treaty. This shuts out the jurisdiction of other judicial institutions. Municipal courts of member states of the Community are shut out by the rule excluding justiciability of treaties: **Malone v Metropolitan Police Commissioner**.^{*****} In this connexion, it is interesting to note that Article XXII(2) of the Agreement (Article 217(2) of the Treaty) precludes the Court from declining to make a determination on the ground that the applicable law is obscure.

2.18 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(3) of the Agreement (Article 217(3) of the Treaty) which empowers the Court to decide a dispute *ex aequo et bono* where the parties so agree.

2.19 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 constitute legally binding*

^{*****} See footnote 51 below

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.*”^{†††††} 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. More importantly this provision established the vertical, hierarchical and multilateral relationship between the CCJ and national courts.

2.20 This bold statement by competent decision-makers of the doctrine of precedent, which was intended to ensure consistency and uniformity in the applicable norms (see Article 217(1) of the Revised treaty) demonstrated a distinctive approach to the issue of normative cohesion. Competent decision-makers of the European Union relied on preliminary references to achieve this result. Consider in this context the provisions of Article 177(3) of the Revised Treaty of Rome (Article 234(3) of Maastricht). Consistently with this approach, the European Court of Justice has developed a doctrine of precedent beginning with **Da Costa en Schaake NY 28-30/62** where the ECJ held that national courts may rely on points of law decided by the Court to obviate the need for references.

^{†††††} Trendtext Trading Corporation v Central Bank of Nigeria (1977) QB 529 at pp 553-4.

2.21 In the judgment of the ECJ “...the authority of interpretation under Article 177 already given by the Court may deprive the obligation (set out in Article 177(3) / 234(3) of its purpose and thus empty it of its substance.” The doctrine of precedent initiated here was developed in **Sri CILFIT 283/81** where the Court clarified the doctrine of *acte claire* and modified the horizontal/bilateral relationship previously existing between the ECJ and national courts into a vertical relationship. Similarly, the International Chemical Corporation Case (ICC case) 66/80 where it was held that Article 177 sought to ensure **uniformity and certainty** in the applicable law. But the fact that the ECJ has already pronounced on an issue does not preclude a national court from referring it since other aspects of the matter may be involved. In effect precedent in this sense does not mean *res judicata*.

2.22 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 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.

2.23 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) (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 cohesion 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**^{****}: “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.”^{*****}

Competent decision-makers of Caricom determined that Article XIV of the Agreement (214 of the Revised Treaty) would play a similar cohesive and integrating role in the CSME as it was credited with achieving in the European Union.

^{****} (1974) 2 ALL ER 1226.

^{*****} See D. E. Pollard, *opcit* at p. 175.

2.24 The Caricom Single Market and Economy appears to be an interesting sortie into regional 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 monetary and 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.

2.25 There is an informal agreement to achieve convergence in various economic and economic and financial areas. But the agreement is not legally binding nor accompanied by sanctions; and there is no credible machinery for monitoring and enforcing compliance. In the premises, it is not possible to entertain any plausible expectations in the near future about a single currency in Caricom or even compulsory convertibility of national currencies at fixed official exchange rates. Indeed, although the relevant provisions of the Treaty of Chaguaramas (1973) ***** 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. Consequently, transaction costs are prohibitive in the Community and the movement of capital

***** Article 43(3)(a).

restrictive. However, the arrangements for judicial settlement of disputes appear to be quite credible especially as concerns the independence of the Court from central control or direction and its administrative autonomy based on generally acceptable financial arrangements as discussed above. Unlike the states of the European Union, however, the Member States of Caricom have displayed a visceral reluctance to resort to judicial settlement of disputes arising from the operation of the Revised Treaty. This development is explained in paragraph 3.6 below.

3. Jurisdictional Reach of the CCJ

3.1 The CCJ performs the functions of both an appellate municipal court of last resort and an international court of first instance in respect of issues concerning the interpretation and application of the constituent instrument of the Community, to wit, the Revised Treaty of Chaguaramas establishing the Caribbean Community including the Caricom Single Market and Economy. As an appellate municipal court of last resort designed to replace the JCPC, the CCJ enjoys a distinct advantage in terms of enhancing access to justice. This is achieved in the first place by drastically reducing the cost of appealing to the court of last resort and by facilitating appeals *in forma pauperis*. It is common ground that even in criminal appeals in death penalty cases where counsel’s representation is *pro bono*, the State bears the cost of representation by regional counsel and counsel in London. On the other hand, appeals to the JCPC in civil cases ordinarily are out

of the reach of the relatively indigent. An interesting case in point is the ground-breaking Jamaican case of **Wills v Wills (2003) 64 WIR 176**.

3.2 An examination of the cases coming before the CCJ between 2005 and 2008 would confirm that the CCJ has been seised with twenty-three appeals, twenty of which were civil appeals and three criminal appeals. At no time in the history of regional litigation in the JCPC did civil appeals outnumber criminal appeals. Of the civil appeals ten were *in forma pauperis* and of these three were granted; two are still pending and five were dismissed. I have no statistics on the issue but I doubt whether in the last century there were ten successful civil applications *in forma pauperis* to the JCPC. Further, the CCJ has conducted at least six Case Management conferences by teleconferencing during the past two years and it is envisaged that many more matters will be heard by this medium when the required infrastructure is put in place in Guyana and Barbados. Currently, the CCJ is equipped to conduct cases by video-conferencing and is promoting the establishment of similar infrastructure in Guyana and Barbados. On the basis of current developments it does appear that persons aggrieved in the Commonwealth Caribbean have been accorded greater access to justice by the CCJ than the JCPC without venturing an evaluation about the quality of justice to be secured from either judicial institution. In the area of administration of criminal justice only three cases have so far come before the CCJ compared to twenty cases in the civil administration. This appears to be a significant development in the recorded history of litigation before a court of last resort in the region.

3.3 The CCJ has not so far been seised of any cases in its original jurisdiction where it is required to discharge functions of an international tribunal employing such applicable rules of international law as may be applicable^{†††††} in respect of issues touching on the interpretation and application of the Revised Treaty. The history of several economic integration courts appears to confirm that matters falling to be heard before them tend to be few in the early stages of their operation. Such a rationalization would appear to lack credibility in relation to the functioning of the CCJ. In this connexion, several other factors suggest themselves for consideration. Such factors would include the absence of any strong tradition in the teaching of international law in the relevant faculties of regional universities and the consequential diffidence of regional counsel, judicial officers and other competent personnel in familiarizing themselves with the rules of international law. This probably also explains the hesitancy of regional counsel to espouse causes for clients in the original jurisdiction of the CCJ. More importantly is the perception that the original jurisdiction of the CCJ is largely concerned with disputes among states parties of the Caribbean Community concerning the interpretation and application of the Revised Treaty. This perception is probably reinforced by the provisions of Article 211 of the Revised Treaty. Article 222 leaves the CCJ with the discretion to accord private entities *locus standi* in proceedings before the Court as an international tribunal in exceptional circumstances only.

^{†††††} See Article 217(1) of the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the Caricom Single Market and Economy (“the Revised Treaty”).

3.4 Other considerations may be adduced in explaining the lack of resort to the CCJ’s original jurisdiction. Article 214 of the Revised Treaty, not unlike the provisions of Article 177 of the Rome Treaty and Article 234 of the Maastricht Treaty, make provision for municipal court judges to refer issues concerning the interpretation and application of the Revised Treaty to the CCJ for determination. Unfortunately, the provisions of the Revised Treaty are not well known by regional counsel and Community nationals are not generally aware of their rights under the Revised Treaty. Equally important, there is good reason to believe that few municipal court judges in national jurisdictions are familiar with applicable rules of international law such that they would be confident in making references to the CCJ as an international tribunal. However, references to the European Court of Justice from national courts were so frequent that the Court of First Instance (CFI) had to be established in order to deal with commercial cases. In this connexion it is important to bear in mind that Article 214 of the Revised Treaty accords the CCJ considerably more power than Articles 177 of the Rome Treaty or Article 234 of the Maastricht Treaty accords to the European Court of justice inasmuch as the CCJ in the event of a reference both *interprets and applies* the provision referred to it. The curtailment of the power of the ECJ in this connection was clearly demonstrated in *Arsenal Football Club v Reed*.^{#####} In the premises the incentive to utilize the CCJ in its original jurisdiction is lacking.

^{#####} [2003] All ER (EC) 1.

3.5 In the dualist member states of the Caribbean Community nationals, natural and juridical, do not benefit directly from rights set out in international treaties, nor are they accorded *locus standi* in proceedings before international tribunals. Consequently, rights and obligations set out in international instruments, like the Revised Treaty, are normally referable to the states parties concerned only. Where private entities are aggrieved by injury at the international plane the state of nationality in traditional international law, is deemed to have suffered the injury and, as such, entitled to espouse a claim for redress before a competent international tribunal. To date, no private entity entitled to a benefit under the Revised Treaty is known to have approached its state of nationality to espouse a claim on its behalf before the CCJ as an international tribunal. Similarly, no state entity has indicated a disposition to avail itself of the services of the CCJ as an international tribunal in contentious or advisory proceedings.

3.6 The diffidence of states parties to the Revised Treaty in approaching the CCJ in its original jurisdiction may be ascribed in part to the hybrid character of the Revised Treaty in terms of disputes resolution procedures. Chapter Nine of the Revised Treaty which addresses disputes settlement identifies a range of disputes settlement modes, including good offices, mediation, consultation, conciliation, arbitration and judicial settlement. In effect, the regime created by the Revised Treaty is not exclusively nor primarily a rules-based regime. Provision is made for the settlement of disputes by diplomacy and various other disputes settlement

modes which do not necessarily involve the engagement of legal rules. For example, in recent times some member states of Caricom have had serious disagreements in respect of various commodities entitled to area origin treatment like rice, cement and natural gas; but no member state claiming to be aggrieved by non-compliance with relevant provisions of the Revised Treaty was prepared to refer the matter to the CCJ either by way of contentious proceedings pursuant to Article 211 or advisory opinions pursuant to Article 212. All of these matters, without exception, were resolved by consultations in the margins of meetings convened by the Council for Trade and Economic Development (COTED). Consider in this context article 193(1) which requires member states to enter consultations upon the request of another member state alleging a breach of a treaty obligation by the requesting member state. Resort to other disputes settlement modes, however, is subject to member states first employing their best endeavours to settle the disputes (Article 193(6)). An important maritime border dispute between Guyana and Suriname was settled by arbitration in accordance with the UNCLOS Agreement after abject failure to resolve the dispute by consultations pursuant to the relevant provision of Article 60 of the Revised Treaty.

- 3.7 Notwithstanding the obstacles which dualism as a juridical construct places in the way of private entities wishing to enjoy rights accorded them in international instruments and in terms of accessing international tribunals in order to espouse their rights and secure satisfaction of their claims, the Caribbean Court of Justice

appears to be conveniently placed to moderate the seriousness of these impediments by according a liberal interpretation to Article 222 of the Revised Treaty in order to facilitate access to the Court in exercising its original jurisdiction. Since, however, the Court has not yet had occasion to interpret this provisions of the Revised Treaty, it would be both unnecessarily intrusive and inopportune to address the issue of its interpretation at this stage.

3.8 The Revised Treaty confers numerous rights on nationals of the Community. Unless these rights are to be rendered illusory, it is necessary to have a tribunal or some other judicial institution like the CCJ to interpret and apply the relevant provisions of the Treaty and, in the process, to establish a sustainable investment environment based on legal certainty. Such rights relate in particular to establishment, provision of services, movement of skilled persons and movement of capital. Rights related to the general movement of labour are considered more restricted given the historical aversion to immigration and the obligations devolving on host states in terms of expanding and providing access to relevant social infrastructure in the area of education, health and social welfare. This issue is expected to be addressed in the Protocol to be elaborated on “rights contingent on establishment, provision of service and movement of capital in the Community (Article 239(e))”. Indeed, it is not fully appreciated, even in informed circles, that the Revised Treaty constitutes the most ambitious and farreaching attempt by competent Caricom decision-makers at social and economic reengineering whose success depends in large measure on the effective and efficient functioning of

CCJ, particularly in the exercise of its original jurisdiction. In the characterization of the former Prime Minister of Barbados, Mr. Owen Arthur, who, until recently, had responsibility for the Caricom Single Market & Economy (CSME) in the Community’s quasi-cabinet:

“(t)he creation of a Caribbean Single Market and Economy will unquestionably be the most complex, the most ambitious and the most difficult enterprise ever contemplated in our region. And in a region, which, as Phillip Sherlock has observed, division is the heritage, contrast is the keynote and competition is the dominant theme. Economic integration requiring cooperation on the scale of the depth envisioned by the CSME will be substantially more difficult to attain than integration on the political plane ...”

4. The CCJ and the Rule of Law

4.1 The CCJ is probably one of the most outstanding examples of individual and collective independence accorded to a judicial institution for the promotion and maintenance of good governance based on the rule of law. Indeed, the CCJ is the only known example of an international judicial institution whose judges are not appointed either directly or indirectly by the competent relevant political directorate. Outstanding cases in point are the International Court of Justice (ICJ), the International Court of First Instance (CFI), the Andean Court of Justice (ACJ),

the Central American Court of Justice (CACJ), the European Court of Justice (ECJ), the Court of Justice of the Economic Community of West African States, (ECOWAS) and the Court of Justice of the Community for Eastern and Southern Africa (COMESA). The judges of all these multinational judicial institutions are selected or elected, as the case may require, by political representatives of Government.

Personal and Institutional Independence

- 4.2 Exceptionally, however, the situation is radically different in the CCJ where the selection of judges is by open competition among diverse candidates. Aspirants for positions on the Bench of the CCJ, according to the applicable provisions of the Agreement Establishing the CCJ, must be or must have been:

“(a) ... for a period or periods amounting in the aggregate to not less than five years, a Judge of a court of unlimited jurisdiction in civil and criminal matters in the territory of a Contracting Party or in some part of the Commonwealth, or in a State exercising civil law jurisprudence common to Contracting Parties, or a court having jurisdiction in appeals from any such court and who, in the opinion of the Commission, has distinguished himself or herself or in that office; or

(b) ... engaged in the practice or teaching of law for a period or periods amounting in the aggregate to not less than fifteen years in a Member State of the Caribbean Community or in a Contracting Party or some part of the Commonwealth, or in a State exercising civil law jurisprudence common to Contracting parties, and has distinguished himself or herself in the legal profession.”

Paragraph 11 of the said Article V also requires candidates for the Bench of the CCJ to be persons of “high moral character, intellectual and analytical ability, sound judgment, integrity and understanding of people and society.” It is not known what weight, if any, the competent authority accords to these criteria of selection.

4.3 Appointments to the Bench of the CCJ are made by the Regional Judicial and Legal Services Commission, the greater part of whose membership hail from the regional legal fraternity, whose members are not known to be beholden of the regional political directorate. Paradoxically, the most formidable and persistent detractors of the CCJ are to be found among the regional legal fraternity many of whom have expressed themselves to be comfortable about retaining the existing relationship with the JCPC – the retentionists. Although before appointing a judge the Commission is required “to consult with associations representative of the legal profession and with other bodies and individuals that it considers appropriate”, it is not known whether consultations are in fact conducted and how

extensive and penetrative these consultations might have been. In the premises, it is difficult to ascertain whether in any given case the relevant criteria set out in the provisions of the Agreement Establishing the CCJ have been satisfied. In particular, it is difficult to discern whether one or another judge elevated to the Bench is vulnerable to direction or control of any of the political directorates of the region!

- 4.4 In the context of identifying benefits to be derived from the CCJ, an important area suggesting itself for consideration is the independence of judges of the Court. From the perspective of personal independence, it may be argued that the provisions of the Agreement Establishing the CCJ (“the Agreement”) relating to the appointment of and removal of its judges, demonstrate a commendable attempt to ensure the security of tenure of these judicial officials. In this context, legitimate concerns have been expressed that the Agreement does not go far enough! Indeed the JCPC in its decision of **Independent Jamaica Council for Human Rights Limited v Honourable Syringa Marshall-Burnett & Attorney General of Jamaica (2005) LII CPC 3** determined, in effect, that judges of the CCJ did not enjoy the same security of tenure as judges of higher Jamaican constitutional courts and struck down the relevant legislation for unconstitutionality. What is generally expressed to be required in this context is the entrenchment of the CCJ in the constitutions of Caricom States. Such an arrangement is envisaged in the preamble of the Agreement Establishing the CCJ.

4.5 To the best of my knowledge, however, no proposal has yet emerged about the manner of securing this objective. In this connexion, one possible approach may be to require that any amendment of the provisions of the Agreement touching on the security of tenure of the judges of the CCJ or any other sensitive issue must be authorized by the legislature by a qualified majority of the Lower House or both Houses of Parliament, as the case may require. Where this condition is satisfied the states concerned can legitimately invoke their domestic law as a bar to the implementation of relevant provisions of the Agreement, in accordance with Article 46 of the Vienna Convention on the Law of Treaties. This would act as a constraint on the exercise of prerogative powers by the executive at the international plane.

4.6 Personal independence of the judge from control or direction of the executive is critical for the overall autonomy of decision of the judiciary and the maintenance of the rule of law based on the separation of powers principle. Equally important is the perception that personal independence of a judge is required for dynamic stability in the evolving normative framework of the modern state which is constantly impacted by innovations in science technology. In the characterization of Aaron Barack, former president of the Supreme Court of Israel:

“In democracy, the judge is in fact required to give expression to the values and principles of his legal system. The values and principles

referred to are not those that may be deemed to be the “mood of the day”. They represent the values principles and social consensus which reflect the deeply imbedded convictions of the democratic society; rather than succumbing to the hysteria of recent events, the judge should reflect his people’s history. It is precisely the judge’s very independence which endows him with the unique capacity to reflect the democratic system’s basic values even when those do not correspond to the “shifting winds” of public opinion.”§§§§§§

4.7 On the other hand, it is considerably easier to essay a dispassionate evaluation of the collective or institutional independence of the CCJ. Such institutional independence may not easily be divorced from the separation of powers principle which shall be discussed below and which is generally considered as providing the constitutional basis of the rule of law. Max Weber, the 19th Century German sociologist, with his customary intellectual acumen discerned the relationship between an independent judiciary, the rule of law and national economic development. Granting the validity of this perception, it does appear to be axiomatic that the autonomy of decision of the CCJ, which is a function of the institutional independence of the Court, is likely to impact positively on the economic development of the region – a circumstance from which all Caricom nationals, natural and juridical, stand to gain!

§§§§§§ A. Barak (2006) The Role of the Judge in a democracy, Justice in the World Magazine, Available at www.justiceintheworld.org/info/nj at p. 2.

4.8 Collective or institutional independence of the judiciary addresses the autonomy of the judiciary as a whole, that is, as a corporate body and is measured by the degree of administrative independence or autonomy of decision in institutional and administrative relationships with the executive and legislative branches of government.***** At the centre of institutional independence is financial independence. Although expenditure relating to the salaries and allowances of judges is normally a charge on the consolidated fund and not subject to Parliamentary approval, day-to-day running of the judiciary, must be approved by Parliament. Regional attorneys-general or ministers of legal affairs, more often than not, interfere in the internal administration of the courts on the ground, that in the ultimate analysis, they are accountable to Parliament for expenditure associated with the day-to-day administration of the Courts and not the judiciary. Such interference is not unknown to take the form of approving the travel abroad and attendance by judges at professional conferences and similar activities which are generally perceived as falling appropriately within the remit of the heads of judiciaries. In the result, relations between the judiciary and executive sometimes become strained, and may even eventuate in ugly confrontations similar to that which occurred in Trinidad and Tobago between the Chief Justice and the Honourable Attorney-General, finally terminating in the setting up of a commission of inquiry by the Attorney-General and one by the Law Association of Trinidad and Tobago to investigate the matter.†††††† In one submission, the

***** Per Le Dain J in *Valente v the Queen* [1985] 12 SCR 673.

†††††† A Commission of Inquiry into the Administration of Justice was set up by the Government under the chairmanship of Lord Mackay (2000) and another was set up by the Law Association Trinidad and Tobago under the Chairmanship of retired Justice Telford Georges (2000).

conditions under which the judiciary may seek to obtain its allocation of public moneys are very important to their independence.*****

4.9 In light of relevant developments and highly informed perceptions, the CCJ must be seen to enjoy an enviable position among judicial institutions, national and international, in terms of its administrative autonomy. In this context, it should be pointed out that the CCJ was designed to function on a financially sustainable basis with moneys provided by governments participating in the regime set up by the Agreement. This Agreement was designed to relieve the Court of financial dependence on the regional political directorate. Caricom states have a dismal record in contributing to the funding of regional institutions. Competent decision-makers were aware that if the determinations of the CCJ were to have any credibility, the institution had to be perceived as free from the political control or direction of competent stakeholders and to manage its internal affairs without undue interference from national Parliaments or the regional executive

4.10 This arrangement was made possible through the creation of a Trust Fund. Capital of the Fund amounting to US \$100 million was raised initially by the Caribbean Development Bank in international financial markets and on-lent to participating governments which agreed to have the funds transferred by the CDB to the trustees of the Fund. The amount so transferred will be managed by the Fund and the proceeds made available on an as-needed basis to the Court to defray its expenses. This method of funding the CCJ has aroused such interest

***** Hon. Justice King, Minimum Standards of Judicial Independence, 58 Australian Law Journal 340.

world-wide that the European Court of justice is alleged to be examining this arrangement to avoid informal pressure from some stakeholders and the participating states of ECOWAS have indicated their intention to pursue a similar course. As a result of these innovative arrangements in place for financing the CCJ on a sustainable economic basis, this institution can probably lay a claim to be the most administratively autonomous judicial institution ever established.

The CCJ and Governance

4.11 Despite occasional lapses in the legitimate exercise of executive power in the region, especially those which paraded behind the presumption of constitutionality during an earlier period, Caricom states for the greater part have a sound claim to good governance based on the supremacy of the constitution exemplifying the rule of law. Governance based on the rule of law is generally conceived as incorporating some primordial constitutional principles like the separation of powers and independence of the judiciary in terms of both individual and institutional independence. On the basis of these criteria, the CCJ will be seen to have made an exemplary contribution to good governance predicated on the rule of law during its brief existence.

4.12 Notwithstanding its brief sojourn on the judicial institutional landscape the CCJ has made what may in time come to be recognized as a significant contribution to an indigenous Caribbean jurisprudence in terms of challenging and terminating two misconceived juridical heresies which could have impacted negatively on the

quality of governance in the Caribbean Community. The first is to be found in the Trinidad and Tobago case of **Thomas v Baptiste (2000) 2 AC 1**. In this case, the JCPC consistently with its alleged doctrinal position regarding the death penalty held that the executive “by ratifying a treaty which provides individual access to an international body, the Government made that process for the time being part of the domestic criminal justice system and thereby temporarily at least extended the scope of the due process clause in the Constitution”

- 4.13 Viewed from my perspective this determination must be regarded as brazenly espousing a doctrine of judicial supremacy which must be seen as juridical heresy, given that the constitutions in Caricom States, including that of Trinidad and Tobago, are generally perceived as incorporating their supreme law. In effect, just as the jurisdictions of Caricom States do not and cannot subscribe to the doctrine of Parliamentary supremacy, so too they must reject as anathema to the rule of law as practised in their jurisdictions any doctrine of judicial supremacy, however appointed in disingenuous juridical finery. The ratio of **Thomas v Baptiste** was followed in **Neville Lewis v AG of Jamaica (2000) 57 WIR 275** and presented the CCJ with its first important constitutional challenge. For, if the executive could in effect legislate at the municipal plane to change the provisions of the Constitution, the supreme law, through the exercise of prerogative powers legitimately employed at the international plane, then separation of powers principle would be irretrievably compromised and the region would have to bid farewell to good governance based on the rule of law.

4.14 In the result, the CCJ resolved the constitutional dilemma created by the JCPC by determining that **Neville Lewis v Attorney-General of Jamaica** serendipitously arrived at the right conclusion for the wrong reasons. Painfully aware of the importance of sustaining and reinforcing the juridical principle of procedural fairness, one judge of the CCJ determined that treaty-compliant conduct at the municipal plane engendered a legitimate expectation at the municipal plane which could not be arbitrarily terminated thereby preserving the essential attribute of dualism which serves as a prophylactic juridical principle in our common law jurisdictions.^{§§§§§§§§}

4.15 The Caribbean Court of Justice in another extremely important but little publicized judgment determined that the concept of a fair trial is amenable to interpretation thereby rejecting out of hand another juridical heresy introduced into Caricom jurisprudence by the JCPC. The importance of this determination must be appreciated not only in the context of retentionist jurisdictions which permeate Caricom, but also from the perspective of good governance which exalts the rule of law as exemplified in the constitutional requirement for a fair trial of an accused. At the material time, the applicable law on the subject was to be found in **Joseph v State of Dominica (1988) 36 WIR 216** and cited with approval in **Frater v R (1981) 1 WIR 1468**. In the Joseph case the JCPC determined that “*the question whether a case has received ‘a fair hearing’ ... is*

^{§§§§§§§§} See D.E. Pollard, Unincorporated Treaties and Small States, Commonwealth Law Bulletin, 2007 Vol. 33 No. 3.

not a question of interpretation ... It is a question of the application of these words to the facts of the particular case.” What the CCJ was required to determine in **Mitchell Lewis v AG of Barbados CCJ Appeal No. CR 1 of 2006** was whether the Barbados Court of Appeal, in reaching a determination, engaged in an interpretation of the constitution thereby entitling the accused to an appeal as of right to the CCJ in accordance with Article 18(1) of the Barbados Constitution.

- 4.16 The CCJ in effect determined that it was infeasible to apply a provision of a legal instrument in the absence of its prior interpretation. Moreover, Pollard JCCJ in a separate judgment was of the view that given the relevant learning on the issue and the applicable principles developed over time, it was quite likely that courts required to construe the concept of a fair trial would, more often than not, engage in the employment of relevant principles already judicially determined rather than formulate new principles thereby engaging an interpretation of the relevant instrument. In the ultimate analysis, however, what was important is the requirement for the competent tribunal to apply relevant principles, whether judicially predetermined or not, in construing relevant constitutional provisions.



Hon. Mr. Justice Duke E.E. Pollard
Date: 13th March, 2008