THE CARIBBEAN COURT OF JUSTICE:
SOME ASPECTS OF ITS ORIGINAL JURISDICTION

Cuthbert Joseph

Introduction

The original Treaty of Chaguaramas 1973 was very deficient in its provisions for dispute settlement. The three main objectives of the Treaty were:

1. the economic integration of member states by the establishment of a common market regime
2. functional co-operation within the Caribbean Community in the promotion of certain economic, social and cultural activities for the benefit of the Caribbean People
3. the co-ordination of the foreign policies of member states.¹

Both Article 4 of the Treaty and Article 3 of the Annex to the Treaty elaborated on the modalities and rationale of these three Treaty objectives in the following terms:

1. the strengthening, co-ordination, and regulation of the economic and trade relations among member states in order to promote their accelerated harmonious and balanced development
2. the sustained expansion and continuing integration of economic activities, the benefits of which were to be equally shared among member states, taking into special account the needs of the Less Developed Countries (LDCs)
3. the achievement of a greater measure of economic independence of member states in dealing with extra-regional states, groups of states, and other entities.

Member states were required to carry out several obligations under the Treaty in order to advance its objectives. These included:

1. taking legal and public policy measures, within their respective jurisdictions, to ensure the execution of Treaty commitments and Common Market decisions²

---

¹ Article 4 of the Treaty.
² Art. 5 of the Treaty & Art. 4 of the Annex to the Treaty.
2. granting, under their respective municipal laws, the most extensive legal capacity to the organs and institutions of the Community and the Common Market.

3. harmonising regional legislation affecting fiscal incentives to industry, agriculture, and tourism as well as in other areas critical to the establishment and operation of the Common Market.

The procedures for the settlement of interstate disputes within the Common Market involved a reference of the matter to the Council of Ministers. The Council was empowered to adopt one or two courses for settlement. Either to refer the matter to an ad hoc Arbitration Tribunal and/or, by majority decision, to make recommendations to the offending State to remedy the situation. The sanction against the offending State for failure to comply with such recommendations was the Council’s authorization for the plaintiff State to suspend its Common Market obligations to the offending State. As far as I understand the arbitral procedure was never invoked. In addition, the Heads of Government Conference was empowered to make decisions by unanimous vote which were binding on each member state to which they were directed. The Treaty provided no legal sanction for non-compliance with such decisions. Disputes were generally considered to be ‘political differences’ requiring diplomatic or non-legal means of settlement. This defect in the structure of the Original Treaty was subsequently cited as one of the main reasons for the non-implementation of its provisions. (Time for Action 1992: 462).

The fundamental legal norm of the Treaty has been and still is 'the concept of CARICOM as a Community of Sovereign States' (ibid.:468; The Rose Hall Declaration 2003). Adherence to this norm is considered as a defence against any tendency towards a creeping political federation. Another jurisprudential construction is associated with this legal position. The Caribbean Community is an example of Commonwealth cooperation in the Caribbean sub-region. Following Commonwealth legal tradition, the treaty relations between sovereign Caribbean states may be conceived to have assumed a constitutional rather than a strictly international legal character. For according to the traditional inter se doctrine as expounded by Jennings, “relations between countries of the Commonwealth are not international relations but sui generis...; and that in so far as these relations are governed by law it is Commonwealth constitutional law; and that international law is to a more or less extent inappropriate and perhaps even inapplicable” (Jennings 1953: 320). In this context, we may

---


4  E.g. Companies, Trade marks, Patents, Designs and Copyrights, Industrial standards, Plant and animal quarantine restrictions, labeling of food and drugs, dumping and subsidisation of exports, restrictive business practices.

5  Arts. 40 & 42 of the Annex.

6  Art. 11 of the Annex.
recall Dicey’s distinction between the Law of the Constitution e.g. statutes, enacted by Parliament and enforceable by the Courts, and Conventions of the Constitution which were not court-enforceable, but which nevertheless were considered to be binding rules of political morality to guide the conduct of officials in the management of public affairs (Dicey 1953: 23-24).

After twenty years of frustration with the original Treaty of Chaguaramas, a watershed came with the publication of the Ramphal Report in 1992. The Protocol of Port of Spain 1992, which emanated from the Heads Conference of that year, resolved to hasten the integration process through the establishment of a Single Market and Economy (CSME) and the restructuring of Community Institutions. In the decade following, the Treaty was revised through the incorporation into it of nine new Protocols covering public policy and legal norms relating to Establishment, Services, Capital, Industry, Trade, Agriculture, Transport, Competition, Consumer Protection, Dumping, Subsidies, Disadvantaged countries and sectors, and Disputes Settlement. The Protocol on Disputes Settlement took the form of an Agreement establishing the Caribbean Court of Justice.

In spite of all the good intentions and declaring, more than a decade ago, that it was "Time for Action", the establishment of a Caribbean Single Market and Economy is still in the planning and preparatory stages. The enactment of the necessary legislation in several member states of the Caribbean Community to bring the CSME on stream is still a far way off. The exercise of restructuring the regional institutions of integration to manage and develop the CSME is still in progress. These preparations must now be accelerated. Time is of the essence; we are swimming against the tide.

Jurisdiction of the Caribbean Court of Justice

By the Agreement of its establishment, the Court is endowed with two distinct spheres of jurisdiction. First, an original and exclusive jurisdiction to determine issues relating to the interpretation and application of the CARICOM Treaty; and, secondly, an appellate jurisdiction from the decisions of the Courts of Appeal of Contracting Parties on certain matters falling within the jurisdiction of their appellate courts.

1. Original Jurisdiction

According to the Treaty, in the exercise of its original jurisdiction, the Court is obliged to ‘apply such rules of international law as may be applicable’ with respect to two categories of disputes: first, disputes between contracting states and the organs of the Community; and secondly, cases involving referrals from national
courts and tribunals to the Caribbean Court on matters relating to the interpretation or application of the Treaty. 11

A. Procedural Provisions

The provisions in the Agreement relating to the original jurisdiction of the Caribbean Court are fairly straightforward. They turn on the nature of that jurisdiction being ‘exclusive’ within the Community. Nevertheless, as far as procedures of disputes settlement are concerned, Article XXIII of the Agreement makes provision for alternative dispute resolution in the following terms:

1. “Each Contracting Party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes” (Emphasis mine).

2. To this end, each Contracting Party shall provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes.”

In incorporating these disputes settlement provisions in the Revised Treaty, the draftsman took great licence. The Revised Treaty contains elaborate provisions in twelve articles for alternative procedures in the settlement of all types of disputes. 12 Such disputes are not restricted to ‘international commercial disputes’; they cover all categories of disputes and differences — ranging from the legal to the political. Among the modes of disputes settlement specified in the Revised Treaty are ‘good offices, mediation, consultations, conciliation, arbitration and adjudication’. 13 Moreover, the provisions seem to avoid any priority of choice in the modes of disputes settlement. 14 Provisions are made for the establishment and operation of Conciliation Commissions 15 and Arbitral Tribunals 16 on the instance of litigant states. It is quite obvious that these provisions create a minefield for litigation as far as procedures for disputes settlement are concerned.

---

11 Art. XII & XVII. Of the Agreement.
12 Art. 188-210 of the Revised Treaty.
13 Art. 188.1 of the Revised Treaty.
14 See Art. 188.2, 189, 191.2, 192.2.
15 Art. 196—203.
16 Art. 204—210.
B. Substantive Provisions

Article 217 of the Revised Treaty places the Court under an obligation in all contentious proceedings to 'apply such rules of international law as may be applicable'. This stipulation has led some authors to conceive of the role of the Caribbean Court in the exercise of its original jurisdiction as comparable to that of an international court operating in the international community and being primarily concerned with the settlement of disputes between states on the basis of international law. But the regime of international law applicable in integration systems like CARICOM is sui generis; it is Community Law. The European Court of Justice enunciated the unique character of this brand of international law in the celebrated Van Gend en Loos Case in 1963 as follows:

"The objective of the Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that the Treaty is more than an agreement which merely creates mutual obligations between the contracting states... The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which [legal order] comprise not only Member States but also their nationals. Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage."19

This teaching, which is known as the doctrine of 'direct effect' in Community Law, provides a point of departure from international law. For in traditional international law, only states are considered as the subjects of the law — capable of enjoying rights and of bearing obligations. But in Community Law, individuals — natural and juridical persons — also enjoy rights and bear obligations.

In this context, Article 222 of the Revised Treaty which provides for granting 'private entities' locus standi before the Caribbean Court needs revisiting. Natural or juridical persons may be allowed to appear as parties in proceedings before the Court only by special leave of the Court. One of the conditions for granting such leave is that 'the Contracting State entitled to espouse the claim has' either 'omitted or declined to espouse the claim, or expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party so entitled'.20

This provision is consistent with the traditional doctrine of diplomatic protection which asserts that only States have substantive

17 Art. 211 & 217 of the Revised Treaty.


20 Art. 222 ©.
and procedural rights to espouse legal claims on the plane of international law. This provision is thus contrary to an important tenet of Community Law; it should therefore be expunged from the Revised Treaty.

C. Status and Constitutional Role of the Court

The status and the constitutional role of the Court in the exercise of its original jurisdiction are not clearly stated within the terms of the Treaty. Probably the first jurisprudential challenge of the Court will be to define its pivotal role as custodian and guardian of the rule of law in the legal order of the Caribbean Community. As the Revised Treaty now stands, it does not expressly state that the Caribbean Court of Justice is an organ of the Community. Nor does the Revised Treaty place the role of the Court beyond dispute as is provided for in Article 220 of the European Community Treaty which states that “The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed” (Emphasis mine).

This jurisprudential challenge is likely to be greater, particularly if the Charter of Civil Society is formally incorporated into the Revised Treaty of Chaguaramas. For the Charter of Civil Society is an Agreement that binds Caribbean Contracting Parties to observe the internationally accepted ideals and values of democratic societies as guiding principles for the operation of the Caribbean Community. These values include respect for all the fundamental human rights and freedoms—civil, political, economic, social and cultural.

2. Appellate Jurisdiction

The debate on replacing the Judicial Committee of the Privy Council by a Caribbean Court of Appeal as the highest appellate forum for Caribbean States began over forty years ago—even before Jamaica and Trinidad and Tobago became independent. It will be futile in this paper to enter into the pros and cons of this debate. It will be sufficient merely to cite one authority in defining the fundamental role of a Highest Appellate Court in democratic societies such as those in the English-speaking Caribbean. Speaking on this subject recently in Trinidad, Lord Hoffman, a member of the Judicial Committee of the Privy Council, asserted that “the main function of a court of final appeal is not to decide individual cases but to interpret the law ... and by far the most important questions of law are those which concern the interpretation of the Constitution”, particularly the sections which deal with human rights. And all the member states of the Caribbean Community do have constitutions with entrenched human rights clauses. It is particularly in this area of exercise of the Court’s appellate jurisdiction that there are likely to be significant junctions in the jurisprudence emanating from the exercise of its original jurisdiction.


3. Jurisprudential Confluence of the Two Jurisdictions

It is well known that the principal sources of Community Law are (1) the provisions in the treaties constituting the Community and in those treaties between the Community and third States; (2) Community legislation effected by the legislative institutions of the Community (i.e. legally binding decisions processed through the collaboration of the Heads Conference/the Council of Ministers, the Commission and the Secretariat); and (3) the decisions and jurisprudence emanating from the Court of Justice. The first two sources involve largely the interpretation by the Caribbean Court of International Law and Community Law respectively. But in developing the third source of Community Law, the Court must rely heavily on the general principles of law emanating from member states including the human rights provisions in their respective Constitutions. (Brown and Kennedy 2000: 357-363).

Hauer v. Rheinland-Pfalz23 was a Case referred by the German Court to the European Court of Justice for a preliminary ruling as to the validity of a European Council Regulation under Community Law. The Regulation purported to prohibit the appropriation of land for wine growing. The German court contended that the Regulation would be inapplicable in Germany since its provision was incompatible with fundamental rights guaranteed under the German Constitution particularly those concerning the individual’s right to property and the right freely to pursue trade and professional activities.

In considering whether the German contention should prevail, the European Court enquired whether there were constitutional provisions in the nine member states of the European Community that would empower the State to impair the right of an individual to the enjoyment of his property in accordance with the general interest. The Court found that the restriction imposed upon the use of property by the European Council Regulation was justified by the objectives of the general interest pursued by the Community with respect to the production and marketing of wine. The Regulation, although inconsistent with the right of the individual to the peaceful enjoyment of his property under the German Constitution, did not infringe the substance of the right to property in the form in which it is recognized and protected in the legal order of the Community.

In enunciating the judgment in this Case, the European Court re-iterated the ratio deciden
di in an earlier case. The Court declared:

...the question of a possible infringement of fundamental rights by a measure of the Community institutions can only be judged in the light of Community law itself. The introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular member state would, by damaging the substantive unity and efficacy of Community Law, lead inevitably to the destruction of the Common Market and the
jeopardizing of the cohesion of the Community.\textsuperscript{24}

Relying on a judgment in yet another case, the Court maintained "that fundamental rights form an integral part of the general principles of the law, the observance of which it ensures; that in safeguarding those rights, the Court is bound to draw inspiration from constitutional traditions common to the member states, so that measures which are incompatible with the fundamental rights recognized by the constitutions of those States are unacceptable in the Community; and that, similarly, international treaties for the protection of human rights on which Member States have collaborated and of which they are signatories, can supply guidelines which should be followed within the framework of Community law."\textsuperscript{25}

In this regard, the European Court of Justice has, in several cases, confirmed its adherence to the rights protected under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR). For example in Regina v. Kirk (a 1983 case i.e. before the enactment of the U.K. Human Rights Act 1998), criminal proceedings were brought against Kirk, the captain of a Danish fishing vessel for fishing in British waters. A European Community Regulation made such an act a criminal offence after the fact. The principle of non-retroactivity of penal measures, enshrined in Article 7 of the ECHR, was invoked by the European Court of Justice and applied in Captain Kirk’s favour. The EC Regulation, which would have legitimized the British rules under which Captain Kirk was charged, could not be applied to penalise him retrospectively.\textsuperscript{26}

Consideration of these issues naturally leads to the jurisprudential question of the reception of international law by the legal order of the Caribbean Community. A distinction must here be made between the monist and the dualist doctrines of the reception of international law into the national legal systems of states, particularly as this concerns treaty law.

Under the monist doctrine, the provisions in international treaties as well as the provisions of Community legislation are received automatically into the national legal system of a State; this is the doctrine which will be applicable in the civil law states: Suriname and Haiti. On the other hand, the dualist doctrine will apply in

---

\textsuperscript{24} Case 11/70: Internationale Handelsgesellschaft v. Einfuhr-und Vorratsstelle GdTreide [1970] ECR 1125; [1972] C.M.L.R. 225. In this Case the issue was: If there is a conflict between a Community Regulation and the German Constitution, which law should prevail? The ECJ ruling was that the legality of a Community act cannot be judged in the light of national law. See Weatherill, \textit{Cases and Materials on EC Law}, 3\textsuperscript{rd} ed., p.53.

\textsuperscript{25} Case 4/73: Nold v. Commission [1974] ECR 491. In this Case, J. Nold KG, a coal wholesaler, was seeking to challenge a decision taken under the ECSC as being in breach of the company’s fundamental right to the free pursuit of business activity. The Court did not find for the company on the merits of the Case, but it asserted its strongest commitment to fundamental rights as forming an integral part of the general principles of Community law, the observance of which it is committed constitutionally to ensure. See Steiner & Woods 2003: 157.

\textsuperscript{26} \textit{Ibid.}
the common law member states which all follow United Kingdom practice. The provisions of international treaties and the provisions of Community legislation are received as law within the respective jurisdictions of these common law states only through an Act of Parliament of the respective states. In this scenario, there can be great differences in the content of Community law recognized by the legal systems of the different member states. The logical way out of this difficulty is the uniform application of Community law in all member states of the Caribbean Community through the enunciation by the Caribbean Court of the supremacy doctrine. In the European context, this doctrine was enunciated, as early as 1964, in the seminal case of Costa v. ENEL as follows:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply...

By creating a Community... having its own institutions, its own personality..., the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.....

...[T]he law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provision, ...without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.27

A comparable enunciation by the Caribbean Court of Justice will put this question beyond dispute.

Consolidation of the doctrine of the supremacy of Community Law with judicial activism in the application of the general principles of law recognized by the legal systems of member states as a source of Community Law presents a unique opportunity for the development of a distinct Caribbean jurisprudence.

Professor Albert Fiadjoe, in his seminal work Commonwealth Caribbean Public Law (1999), has highlighted the recent expansion in the legal and non-legal remedies available to individuals who suffer wrongs at the hands of ‘public authorities’ in the member states of the Commonwealth Caribbean. Among the legal means of redress are constitutional motions seeking to remedy breaches or threats to breaches of fundamental rights governed by the Constitution28 or by international human rights


conventions; applications to the Courts for judicial review of administrative acts (Fiadjoe 1999: 23-59, 82-95); measures to obtain a judicial declaration of legislative unconstitutionality (ibid.: 139-143).

Whether in the exercise of its original jurisdiction as the custodian of the rule of law in the Caribbean Community or as the final arbiter in interpreting the provisions of the Constitutions of the states and territories of the Commonwealth Caribbean, the Caribbean Court of Justice is ideally positioned to add new jurisprudential dimensions to the juridical self-determination of the Caribbean people. What is more: this confluence will naturally enrich the jurisprudence flowing in both streams of jurisdiction.

Conclusion

As we close this discourse, it is imperative for the People of the Caribbean to fully appreciate the enormous tide that is flowing against them. The fulfillment of the thirty-year quest to form a Caribbean Single Market and Economy is urgent. The year 2005 was scheduled to mark significant developments in integration systems globally. The Free Trade Area of the Americas comes on stream in January 2005; before the end of 2004, the membership of the European Union will expand from 15 to 25 member states.

CARICOM is the smallest integration system in the world. We have already seen the sad international fortune of the Caribbean Banana Industry. We face similar threats for sugar, rum, citrus, coffee, cocoa. Daily we stare in the face the growing international offshore activities in banking, insurance, tertiary education, fishing, tourism and drug trafficking. With the increasing penetration of the FTAA, backed by the liberalized regime of the World Trade Organisation, more and more we will be facing fierce international competition right here on our doorsteps. What are our defences? Greater competitiveness through integration. Integration, not federation; integration, not fragmentation.

For those of us who were troubled by the recent quest of the Barbados Government to seek a peaceful solution, on the basis of international law, over differences relating to the respective rights of the two States in Caribbean maritime space, I think we should study the saga of the Factortame Cases which involved the claim of Spanish fishing interests to share in the maritime rights accorded to Britain after the establishment of a Single Market and Economy in Fisheries and Fishing in the European Community.

Those cases went before the national courts of the United Kingdom at all levels including the House of Lords. In the process, there were several referrals by the British Courts to the


European Court of Justice on very important jurisprudential questions. These included the relationship between National law and Community law, the scope of Community law in the face of interlocutory orders of national courts, and the basis of awarding damages to individuals whose Community rights are violated by a national authority. The litigation saga spanned over an entire decade.

If any lesson is to be learnt from this episode arising from the maritime claims of the two States and the subsequent licensing regime, imposed by Barbados under the Revised Treaty, on certain Trinidad and Tobago goods entering the Barbados market, it is this. We need urgently a Caribbean Court of Justice to adjudicate on disputes arising within the Caribbean Community. We need urgently this judicial forum whether the litigants are two or more States, an individual and a ‘public authority’, two or more individuals, or a State and a Community organ. The Caribbean Single Market and Economy, when it is established, will create a new legal order within the space attributed to the member states of CARICOM. This new order must be founded on respect for democratic values and the rule of law if the Caribbean People are to remain faithful to the cornerstone of their respective constitutions. In this new enterprise, the Caribbean Court of Justice has a pivotal role to play.

Bibliography

I CASES

EEC

C221/89 [1991] ECR I-3905,

PCIJ


ICJ


U.K.

Factortame Ltd. v. Secretary of State for Transport

West Indian

Bradshaw v. AG of Barbados, Privy Council Appeal Nos 36 & 40
of 1993.
Maharaj v. AG (No.2) [1978] 2 WLR 902.
Thornhill v. AG of Trinidad and Tobago (1980) 2 WIR 510.

II DOCUMENTS

The Rose Hall Declaration, 24th Conference of Heads, Montego Bay, Jamaica, July 2003.

III TREATIES

CARICOM Charter of Civil Society 1998.

IV ARTICLES, BOOKS & PAPERS


