The Role of the Caribbean Court of Justice in the CARICOM Single Market and Economy

The Right Honourable Mr Justice Michael de la Bastide, President of the Caribbean Court of Justice

The Annual Dinner at the Rotary Club of Georgetown

Le Meridien Pegasus Hotel
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The Rotary Club of Georgetown Guyana was first constituted on May 20, 1959. Dr B.B.G Nehaul the then Government Pathologist and Bacteriologist of British Guiana, who conceived the idea of establishing a service club in Guyana, chose the Rotary. According to the Constitution of Rotary, Dr Nehaul needed men who satisfied the Classification Rule: that they were in separate and distinct businesses and professional services rendered to the community: That, basically, their job descriptions "most accurately described the principal and recognized activities", of their organizations or undertakings.

Remarks

By

The Right Honourable Mr Justice Michael de la Bastide, President of the Caribbean Court of Justice,

on the occasion of

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I want to thank you for having invited me to address you at this, the annual dinner held by the Georgetown Rotary Club to celebrate World Understanding month. I am honoured by your invitation. I thank you also for your hospitality and fellowship this evening.

I would suggest that the promotion of international understanding and goodwill which is the theme of this celebration, should begin with ourselves and our Caribbean neighbours. I trust; therefore, it will not be thought inappropriate that I have chosen to speak to you to-night on the role and function of the Caribbean Court of Justice in the context of the CARICOM Single Market and Economy. Before I turn my attention to this topic, however, permit me a personal digression which is not totally unrelated to my topic or to-night's theme.

It has been said that personal contact is an important precursor of regional integration. Personal contact in CARICOM is difficult to achieve without the free movement of people within the region. It strikes me that in this matter of free movement of people within the Commonwealth Caribbean, we are now seeking to recover ground which was lost after Independence. We have reached the stage now where under the Revised Treaty of Chaguaramas and certain protocols subsequently entered into, specified categories of persons have been given the right to seek employment in any

Member State, but subject to that, the free movement of nationals of Member States within the Community is nothing more than a goal to which Member States have committed themselves (see Article 45 of the Treaty). I am old enough, however, to remember a time in the pre-Independence era when free movement of people within this region was not a goal but a reality. Let me cite some examples of people I knew who moved from one Caribbean colony to another with highly satisfactory results.

I wonder how many of you know that the national anthem of Trinidad and Tobago was composed by a Guianese, that is, a man who was born in British Guiana of Guianese parents and was taken to Trinidad by his family as a small child. His name was Pat Castagne and he happened to be my brother-in-law, having married my eldest sister.

Again, when I was a very young boy going to prep school at St. Mary's College in Port of Spain, I admired from a distance an older schoolmate who was an excellent athlete with special prowess in swimming. I soon lost track of him but many years later discovered that he was making his contribution in politics, sports administration and other fields in Guyana. You know him well. His name is Kit Nascimento.

When I was a little older, about 11 or 12, I started entering the national Junior Tennis Tournaments in Port-of-Spain. There was an older boy who won the boys' singles event for several years. He always beat the same opponent **(**who I should mention was not me**)** in the final by exactly the same score each year: 6-0, 6-0. The brutal margin of those victories was in sharp contrast to the sensitivity which the young tennis champion later displayed when he blossomed as a poet and novelist amid the natural beauty of rural Guyana. I refer of course to Ian Mac Donald.

Finally, as we anticipate with mounting excitement the start of the Cricket World Cup, I think of the late Sir Clyde Walcott. I cannot claim to have played cricket with Sir Clyde, but the invaluable contribution which he made to Guyanese cricket during the many years when he lived and coached in British Guiana, is well known and appreciated. In fact, he even represented British Guiana at cricket, while remaining a hero and an icon in his native Barbados.

We are told that it makes good economic sense to provide for the free movement of the factors of production within the single economic space created by the CSME. It would seem a great pity if a degree of chauvinism and xenophobia which was unknown before Independence, should prove an obstacle to the free movement of one of these factors, namely, people.

In the Revised Treaty of Chaguaramas, the Member States affirm that the original jurisdiction of the CCJ is essential to the successful operation of the CSME. Why is this so? The reason is that the Court in its original jurisdiction is required to perform three essentials functions. The first is to interpret the Treaty, which is a long and complex document comprising 240 articles. The second is to enforce by its judgments and orders the rights and obligations conferred and imposed on Member States by the Treaty. The third function is to resolve with finality disputes that arise between Member States.

Two striking features of the Court's original jurisdiction are that it is compulsory and exclusive. It is compulsory in the sense that Member States have submitted in advance to the Court's jurisdiction by signing and ratifying the Agreement.

An important reinforcement of the exclusivity of the Court's jurisdiction is the requirement for referral by the national courts of Member States to the CCJ of any question or issue arising in proceedings before those courts which involve the interpretation or application of the Treaty. The

wording of the relevant provision would seem to make it mandatory for the national Court (a) to make the referral in the specified circumstances and (b) to accept and act on the answer which the CCJ provides to the question referred to it.

The underlying purpose of this provision is to ensure that there is a uniform interpretation of the Treaty throughout CARICOM and to eliminate the risk of different national courts giving different interpretations of the same provision of the Treaty. It is obviously crucial to investor confidence that there should be legal certainty with regard to the rules governing the CSME and this can only be achieved if there is a single, authoritative voice interpreting and applying the Treaty.

Another feature of the Court's jurisdiction is that it is final. There is no appeal from the Court's decisions, although there is power given to the CCJ to revise its own judgments if some crucial fact is discovered after judgment has been given.

Judgments of the CCJ are also binding and enforceable. Article 215 of the Treaty provides:

> "The Member States, Organs, Bodies of the Community, entities or persons to whom a judgment of the Court applies, shall comply with that judgment promptly".

In order to give the CCJ judgments teeth, Member States undertook in Article XXVI of the Agreement "to take all the necessary steps, including the enactment of legislation to ensure" that the judgments of the CCJ are enforced as if they were judgments of a local superior court. Unfortunately, I do not think that the legislation passed by any of the Member States to date has achieved that objective. What has been done is simply to reproduce Article XXVI in the local Act and so incorporate in the domestic law the obligation to pass the necessary legislation, without actually passing it. Hopefully, the Parliamentary Counsel concerned will recognise and take steps to correct this mistake.

But what are the disputes that the Court has jurisdiction over? An important limitation is that these disputes must concern the interpretation or application of the Treaty. If, therefore, there is a fishing dispute between Member States which has nothing to do with the Treaty but depends on the application of the international Law of the Sea, then the Court's jurisdiction cannot be invoked.

On the other hand, there is a very important provision which gives private entities such as companies, and individuals, access to the CCJ. Normally, treaties only confer rights and impose obligations on States and not on companies or individuals, and indeed the core jurisdiction of the CCJ is over disputes between Member States or between a Member State and the Community. But the right to bring proceedings in the Court, however, has been extended to "nationals of a Contracting Party" according to the Agreement (Article XXIV) and to "persons, natural or juridical, of a Contracting Party" according to the Treaty (Article 222). It is clear from the wording of the Treaty that 'persons' in this context includes companies and I will use 'person' in that extended sense. To bring proceedings in the Court a person, as opposed to a Member State, must satisfy the Court, firstly, that he has been prejudiced in his enjoyment of a right or benefit which though conferred by or under the Treaty on a Member State, was intended to ensure to his benefit directly. Secondly, that the Member State in whom that right is vested, is not itself pursuing a claim. And, thirdly, that the interest of justice requires that the person be allowed to 'espouse the claim'.

When one considers such provisions of the Treaty as the general prohibition in Article 7 against discrimination on the ground of nationality alone and those designed to eradicate anti-competition business conduct within the region, one might well conclude that the breach by a Member State of virtually any provisions of the Treaty could give an individual or a company the right to bring

proceedings in the Court. I have a nagging doubt, however, whether this possibility is fully appreciated by lawyers within CARICOM, not to mention the clients whom they advise.

There are two other sources from which matters may come to the Court. The first of which I have already spoken, is by way of the referral of a question by a national court. The other source is by way of a request for an advisory opinion. The Court is given exclusive jurisdiction to deliver advisory opinions concerning the interpretation and application of the Treaty. But advisory opinions may be requested only by a Member State or by the Community. For Member States who are in dispute, proceeding by way of a request for an advisory opinion may be an attractive option since it is both less expensive and less adversarial than litigation.

I think many people in the region harbour the unspoken fear that the CSME might like the ill-fated West Indies Federation, become another over-ambitious project that skidded off a road paved with good intentions. The CCJ clearly can play an important role in preventing this from happening. The Court has the responsibility to assist by its judgments in transforming the commendable aspirations of the Treaty into reality without sending out shock waves that might threaten the fragile structure of the CSME.

I can illustrate the difficulties and hazards of the Court's function by referring to a ticklish issue which is likely to arise sooner or later for the Court's decision. It is this. What happens if there is in place in a Member State a statute or regulation which conflicts with a Treaty obligation of that Member State, or if a Member State has failed to pass the necessary legislation to implement some provision of the Treaty? In other words, what is to happen if there is an inconsistency between the domestic law of a Member State and the Treaty, bearing in mind that under the dualist system (as it is called) which obtains in all the English-speaking members of CARICOM, the provisions of an international treaty, though binding at international law, form no part of the domestic law of a

State Party unless expressly incorporated by statute into that law. This is a complex issue which it would be inappropriate for me to explore to-night in any depth. The European Court of Justice has held that the E.E.C. Treaty created its own legal order which was directly applicable both to Member States and to their nationals, but this, the Court held, was the result of a partial transfer of sovereignty from the Members States to the Community. Consequently, a subsequent unilateral law which was incompatible with the aims of the Community, was held to be of no effect. But the European Court recognised that the partial transfer of sovereignty was a feature of the E.E.C. Treaty that distinguishes it from other international treaties.

In Guyana, the problem may have been made less intractable by the Caribbean Community Act, 2006. This Act gives the Treaty the force of law in Guyana and contains in section 8(1) the following provision:

> "In the event of any inconsistency between the provisions of this Act and the operation of any other law other than the Constitution, the provisions of this Act shall prevail to the extent of the inconsistency."

Unfortunately, a similar provision is not to be found in corresponding Acts passed in some of the other Member States e.g., Barbados, Belize, Antigua and Barbuda.

I am very conscious of the heavy responsibility which the Court has to discharge in the exercise of its original jurisdiction. But we are by no means daunted by it. The Court faces the challenges ahead with a confidence and an optimism which I respectfully suggest ought to be shared by the people of CARICOM. I say so for a number of reasons. Firstly, it is to the credit of the Heads of Government that the provisions in the Agreement and the Treaty relating to the Court provide the

Court with greater protection against political or any other form of interference than that afforded to any other court of which I am aware. Every precaution has been taken to ensure the independence of the Judges of the CCJ.

They are appointed by the Regional Judicial and Legal Services Commission, a body on which no politician or political nominee or officeholder, has a seat. The Commissioners are expressly enjoined by the Agreement not to seek or receive instructions from anybody or person external to the Commission (Article V para. 1).

The Commission was fortunate to have had as its founder members a group of dedicated and distinguished Caribbean men and women which included the Chief Justice of Barbados, Sir David Simmons, a former Chancellor of Guyana, Professor Aubrey Bishop, and a former Chief Justice of the OECS, the Right Honourable Sir Vincent Floissac.

The President of the Court is appointed by the CARICOM Heads of Government, but no one can be appointed by them unless he or she is recommended for appointment by the Commission (Article IV para. 6).

The President and the Judges also enjoy security of tenure and cannot be removed from office before they reach the retirement age of 72, unless a tribunal comprising three persons who hold or have held high judicial office, advise that they ought to be removed because of inability to perform their functions for misbehaviour. The only flaw that the Privy Council was able to find in the arrangements made for the protection of the CCJ Judges, was the possibility that they might be changed by an amendment of the Agreement. Given that for such an amendment to be effective, it would have to be ratified by all the parties to the Agreement, I would regard the risk of that happening, as "fanciful". The Privy Council said that 'it is to be hoped' that it is fanciful.

One form of protection given to the Court, which is unique, is the creation of a Trust Fund to provide funding for the Court in perpetuity. Rather than have the Court dependent for its financing on annual subventions from the participating countries, a loan of US $100,000,000 was raised by the Caribbean Development Bank on the international market, on terms that the money to repay the loan with interest would be provided in agreed proportions by the participating countries. The capital sum of US $100,000,000 was then placed on trust in the hands of an independent Board of Trustees who have the responsibility of investing the Fund and providing the Court from time to time with the money needed for its biennial budget. This arrangement, which as far as I am aware, has never been adopted for any other court or tribunal in the world, serves to ensure the administrative autonomy of the Court and hopefully, its longevity.

My confidence and optimism are also based on the experience I have had over the last 18 months or so, of working with the six (6) Judges who have so far been appointed by the Commission. They come from a variety of backgrounds and bring to the Court expertise and experience in different branches of the law. I have found it stimulating to work with colleagues of such exceptional competence.

I am also heartened and encouraged by the quality of the administrative and technical staff who have been recruited by the Commission to provide the support services that are so crucial to the efficiency of a modern-day court. Within the limits imposed by the need for prudential spending, we have sought to use the available technology to best effect and have placed great emphasis on making the CCJ accessible and user-friendly. The Guyanese attorneys who have appeared before us in our appellate jurisdiction will no doubt have formed their own impressions of how successful we have been in achieving these objectives.

I have one final message I would like to leave with you to-night. A good deal of money has been invested in the establishment of the CCJ. More than that, a huge amount of human effort and personal sacrifice have also been expended on setting up this institution. The effort and sacrifices would be difficult to value but many of those who expended the effort and made the sacrifices, and I would specifically mention here the Commissioners and the Trustees neither expected nor received compensation on a commercial scale. Furthermore, the expectations of the people of the region have been raised by the prospect of having as a permanent institution their own regional court with its twin jurisdictions. Finally, what I would perhaps immodestly describe as a quality court, has been established.

In all these circumstances it would be a tragedy of mammoth proportions if the CCJ was not allowed for whatever reason to realise its full potential and the region lost an opportunity which may not come again for several generations.

I have sought to describe the jurisdiction of the Court and how well the Court has been equipped to exercise it, but in the final analysis the Court's jurisdiction is dormant until and unless some person or entity who has the right to access it, chooses to do so. The experience of most newly established courts is that during the first few years of their existence, business tends to be very slow. It is still too early to be concerned over the fact that the CCJ has not yet been called upon to exercise its original jurisdiction. What is of greater concern to me is the possibility that persons with a right of access to the Court, may not recognise, when they occur, the circumstances in which that right could be used to their advantage. It is not my purpose to stir up litigation, but I sense that a greater awareness by the private sectors of what the CCJ has to offer, is needed if the CCJ is to play its part in deepening regional integration and making a success of the CSME.