The Concept of Referrals

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Madam Chief Justice

Colleagues

Ladies and Gentlemen

We have arrived at start of the substantive Workshop on the Referral Process, and we make that start by considering, "The concept of referrals".

First, let us consider the context. The Caribbean Court of Justice ("CCJ") sits in two jurisdictions: its appellate jurisdiction and its original jurisdiction. The CCJ's appellate jurisdiction is intended to replace the Judicial Committee of the Privy Council; at present Belize and 3 other CARICOM States (Barbados, Guyana, and Dominica) have accepted the appellate jurisdiction; St Lucia is about to join that elite band of 4.

In this intervention, we are here concerned with the other jurisdiction, the original jurisdiction. The Agreement Establishing the Caribbean Court of Justice ("CCJ Agreement"), as well as the Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy ("RTC"), both state that the CCJ has compulsory and exclusive original jurisdiction to hear and determine issues concerning the interpretation and application of the RTC. This jurisdiction is commonly referred to as the original jurisdiction or, as I prefer to call it, the international jurisdiction.

According to Article 211 of the RTC, issues concerning the interpretation and application of that Treaty may arise between CARICOM Member States, between CARICOM Member States and the Caribbean Community, from applications by persons per Article 222 of the RTC, or through a referral as per Article 214 of the RTC and Article XIV of the Agreement Establishing the CCJ.

So, the referral is only one of the avenues by which original jurisdiction may be triggered. We will come back to the referral concept in a moment, but let's emphasize at this point, the international law nature of the original jurisdiction. In the exercise of its original jurisdiction, the CCJ sits as an international court to adjudicate on the international trade disputes coming before the Court. The Court applies International Law to resolve these disputes. There is no appeal from a decision of the Court in the original jurisdiction. For these reasons, the CCJ Agreement provides that the judges must be equipped with knowledge of the principles of international law and international trade law, to be able to adjudicate on original jurisdiction matters. So, that the original jurisdiction is, **really**, an international law jurisdiction.

In the exercise of its original jurisdiction, then, the CCJ (as it stated in the *Shanique Myrie v Barbados* case), the "the Guardian of the RTC."[1] and must ensure that the Community and Member States are guided by the RTC and apply CARICOM law in a uniform manner. This central harmonizing role of the Court prevents chaos in the regional legal order and promotes the orderly development of Caribbean jurisprudence.

The mechanism of the original jurisdiction of the CCJ on which we will focus over the next two days, is the referral process. This provokes several questions: What is it? Why is it important? When can it be employed? What are the steps involved in its application? How does it work in practice?

The referral is the method by which a national court or tribunal may seek the assistance of the CCJ to provide interpretation or application of provisions of the RTC that arise in national proceedings. In the words of Article 214 of the RTC:

> "Where a national court or tribunal of a Member State is seised of an issue whose resolution involves a question concerning the interpretation or application of this Treaty, the court or tribunal concerned shall, if it considers that a decision on the question is necessary to enable it to deliver judgment, refer the question to the Court for determination before delivering judgment."

[1] [2013] CCJ 3 (OJ) at [68].

So, the referral process is to be utilized where a claim is filed in the domestic court of a CARICOM Member State and an issue as to the interpretation and application of the RTC arises (or, indeed, where an issue as to the validity of a decision of a CARICOM organ arises). When this occurs, the presiding judicial officer must refer the matter/cause the matter to be referred to the CCJ in its original jurisdiction so that a ruling can be made on the point of CARICOM law. The CCJ will provide the requested interpretation or application, and then the national court or tribunal will apply to ruling to resolve the case before it. These are the steps in the referral process. Details on the mechanics of how the referral process works will be provided during this Workshop.

The referral therefore provides the basis (as well as the institutional structure) for collaboration and coordination between national courts and the regional court. Equally importantly, it ensures consistent and harmonious application of Community Law throughout the national legal systems of member States. It would obviously be inimical to the cohesiveness of Community Law if each Member State was able to apply its own interpretation of the RTC. There would potentially be as twelve (12) different interpretations adopted in the 12 different Member States, thereby undermining the confidence of Community nationals and foreign investors alike. It is therefore essential that the Treaty receives the same interpretation in all the Member States, and that is what the referral process attempts to do, hence the importance of the referral function.

The referral process is not unique to CARICOM; rather it is present in several regional trade agreements and serves a similar purpose. In the European Union the referral process is called the 'preliminary reference' procedure. Any court or tribunal in a Member State of the EU, if it considers that a question of Community Law is necessary to enable it to give judgment, may request the Court of Justice to give an interpretation on the matter of Community Law. The 'preliminary reference' has been a fruitful source for the ECJ to develop EU jurisprudence including its famous rulings that EU law has "direct effect" in Member States and of the "supremacy of Community law" over national law. There have been many thousands of preliminary references. In 2020, alone, 556 references for preliminary rulings were made to the Court of Justice of the European Union. This accounted for 75% of all cases brought before the Court in 2020.[2] In 2021, the number of references for preliminary rulings increased to 587.[3]

[2] Annual Report of the Court of Justice of the European Union (2020) < https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-04/ra_jud_2020_en.pdf>
[3] CJEU: Judicial Statistics 2021 < https://eucrim.eu/news/cjeu-judicial-statistics-2021/>

These matters concerned the rule of law, the environment, protection of personal data, social protection, the fight against violence against women and consumer protection.

In our hemisphere, the Court of Justice of the Andean Community has reported that from 1984 to June 2015, the thousands of references from national courts constituted approximately 94% of the cases before the Court.[4]

By way of sharp contrast, the stark reality is that in the 17 years of the existence of the CCJ there has not yet been a single referral. There may be good reasons for this, but it does remain a curiously odd fact. The Court itself has reminded courts and tribunals in Member States of the referral obligation in several cases. For example, in *Hummingbird Rice Mills Ltd v. Suriname and the Caribbean Community* [2012] CCJ 1, this Court said at paragraph 26:

> "[26] … the Court wishes to use this opportunity to remind national courts and tribunals of their obligations under Article 214 of the Revised Treaty which states that where resolution of an issue involves a question concerning the interpretation or application of the Treaty, that court or tribunal hearing the matter must refer the question to this Court for determination before delivering judgment, if such a court or tribunal "considers that a decision on the question is necessary to enable it to deliver judgment". A national court or tribunal has, of course, a measure of discretion in considering the necessity of a referral but that discretion is a limited one."

The possibility of referral has been raised in a few cases in national courts, where judges have come close to referring. The judges have either lamented that the legal circumstances did not allow the referral, and/or commented favourably on the referral function. In the interest of time, I mention just three.

The first is *Lennox Linton v Attorney General of Antigua and Barbuda.*[5] Here the Claimant from Dominica sought to rely on the RTC to support his claim to work as a skilled CARICOM national in Antigua. He argued that the revocation of his permission to work in Antigua and his deportation back to Dominica were in clear breach of the RTC provisions on the movement of skilled nationals. Since Mr. Linton had relied heavily on the RTC to buttress his case, the court was of the preliminary view that it could well have benefited from the CCJ's interpretation of the relevant provisions. The court expressed itself mindful of the mandatory requirement of the RTC for domestic courts to refer issues relating to the interpretation and application to the RTC to the CCJ. The court stated:

[4] The Andean Tribunal of Justice: Reality and Perspectives < https://eftacourt.int/wp-content/uploads/2019/01/Andean_Court_Presentation__Read-Only___Compatibility_Mode_.pdf>
[5] ANUHCV 354 of 2007.

> "[71] The court, on several occasions, granted both learned Counsel indulgences in order for them to address whether, as a point of law, matters arose requiring the court's referral to the CCJ. There was a bit of hesitancy by both Counsel to address this issue. The court nevertheless formed the view that issues of international law could well have arisen. The court was mindful of the mandatory requirement of the RTC for domestic courts to refer any issue relating to the interpretation and application to the RTC to the CCJ."

In the end, however, there was no referral. This was because the court decided that the Caribbean Community Act (Cap. No.9 of 2004), which purported to implement the RTC, had not entered into force. This meant that the RTC had not been made effective in the local law of Antigua and therefore that the matter could not be referred to the CCJ under the terms of the Community Act or the RTC.

There was another close call in the 2019 case of *Hadeed v. Attorney General of Trinidad and Tobago.*[6] The Claimant was Ms Hadeed, a Grenadian by birth but who had acquired St Lucian nationality. She alleged that she was being deprived of an opportunity to practise law in Trinidad and Tobago based on a restriction on non-nationals prescribed in section 15(1A) of the Legal Profession Act Chapter 90:03. By that section, despite her having the required qualifications to be admitted to practise law in Trinidad and Tobago, she was denied admission because she was a non-national. Ms Hadeed alleged that this restriction, raised in extant constitutional law proceedings before High Court, breached her rights to, *inter alia*, free movement and non-discrimination under the RTC. She made an application for the matter to be referred to the CCJ.

Although it recognised the importance of the referral process, the court denied Ms Hadeed's application. The court saw the application as an impermissible enlargement of the grounds of her claim for constitutional relief without a fair opportunity for the Defendant to deal with them properly in the substantive proceedings. The court also held that the suggested referral would not be determinative of the issues of constitutionality, since even if there was a referral to the CCJ, the national court would still retain jurisdiction to determine whether there had been a breach of constitutional rights. Finally, the court was of the view that the use of the referral mechanism in the middle of the management of these constitutional law proceedings, where no amendment had been sought, to include such aspects of Community Law into the claim

[6] TT 2019 HC 230.

would be disproportionate, inconsistent with the overriding objective and an abuse of process. The presiding judge, Justice Kokaram stated:

> [69] It is unfair to the Defendant therefore to launch on the eve of the trial what is in fact a new case of alleged breaches of several articles of the RTC. Relevant in answer to such a case would include the Defendant's evidence that it has not breached the provisions of the RTC or the extent to which it has sought to comply with it or other regional instruments. A referral is simply unworkable if the parties have not had a fair opportunity to advance their full case.
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> [70] Ms. Hadeed has presented for this Court simply to determine the question whether section 15(1A) has breached her right not to be deprived of property and liberty except by due process of law; the right to equality before the law; the right to equality of treatment before any public authority. There is nothing in her motion to suggest that her right to protection of the law was buttressed upon a breach of any international or regional obligations of the RTC. Insofar as her constitutional right of equal treatment is concerned, our Courts have already established an uncontroversial proposition, consistent with Community law."

The most recent example is *DCP Successors Limited v The Trade Administrator (of Jamaica)*[7] decided by Staple J (Acting). In this matter, the Applicant, DCP Successors Limited ("DCP"), a company duly incorporated under the laws of Dominica, and therefore a national of Dominica, made an application for special leave to bring an action against the Respondents, various agencies of the State of Jamaica. DCP manufactured various soap products using a process called saponification to make generic soap noodles which could then be scented and moulded. DCP contended that as a soap manufacturer operating in a CARICOM Member State, its products originated in the Community and were eligible for Community treatment under Articles 1 and 84 RTC. In this regard, DCP relied on a Certificate of Origin issued by the Government of Dominica.

In 2018, it was allegedly discovered that Jamaican soap producers import soap noodles from Indonesia and Malaysia and classify it under the wrong tariff heading and Jamaican authorities had allowed this to happen. The Jamaican Trade Administrator and Trade Board Limited were also issuing Certificates of Origin to Jamaican soap producers although the imported soap noodles were not eligible for Community treatment.

DCP alleged that it was prejudiced as the Common External Tariff facilitated competition with soap producers from larger non-CARICOM manufacturers and because (1) its ability to compete depended on CARICOM Member States restricting the issuance of CARICOM

[7] In the Supreme Court of Jamaica Claim No. SU2021CV02773; [2022] JMSC Civ. 62.

Certificates of Origin to goods which qualify for Community treatment and (2) that the State of Jamaica breached the RTC by waiving the 40% CET on imported soap noodles and (3) by issuing Certificates of Origin for products manufactured outside of the Community. DCP commenced a claim in the Supreme Court of Jamaica and applied for the issues to be referred to the CCJ for determination.

This application was refused earlier this year, on 10 May 2022 to be precise, as the trial judge held that the matter, which was still at the case management stage, was not yet ripe for referral. However, the judge laid out the following steps to be considered in making a referral. The Judge said:

> "[18] … to decide whether or not to refer a question on an issue to the CCJ for determination, the Court/Tribunal in Jamaica must first determine the following two factors:
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> 1. Whether the Court is seised of the issue; and
> 2. Whether the resolution of the issue involves a question on the interpretation/application of the RTC or the validity, meaning or application of instruments made under the Treaty.
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> [19] Once the Court/Tribunal determines that the issue meets the tests in [18] above, it must then go on to consider and determine the third factor – whether a decision on the question in (2) is necessary to enable it to deliver judgment. All three factors must be satisfied before the Court can make the referral."

From this handful of cases a few observations may be made. *First*, the referral process is becoming known and increasingly asserted in litigation. This is clearly a good thing. The greater the knowledge of the referral the greater the likelihood it will be used and that the purpose behind its inclusion in the RTC and the CCJ Agreement will be realized.

Secondly, except for the *Linton* case, it is the parties who consider that they would benefit from a referral who have been the ones to raise the issue. They made applications requesting referrals. However, the fact is that Article 214 of the RTC places the responsibility of the referral squarely on the shoulders of the court. It is for the initiative of the court, if it considers the issue involving Community law to be necessary to decide the case before it, to refer the question to the CCJ.

Thirdly, it is the responsibility of counsel to assist the court in carrying out its statutory duty. Urging the court to make the referral through launching an application is certainly one way of doing this. But to carry out this responsibility counsel must be familiar with the broad swath

of Community Law and related legislation. For example, in the *Lennox Linton* case, counsel did not bring to the attention of the Court that the CCJ Agreement, which contains the same referral obligation as the RTC, had been accepted by Antigua and had been domesticated by the Caribbean Community Act (Cap. No.9 of 2004) which was in force at the time of the trial. This might have been an alternative basis on which to seek the views of the CCJ on the RTC provisions in question.

Fourthly, the judicial comments made in these cases are encouraging in that they illustrate that national judges are ready and willing to assume their collaborative role in effective and uniformed implementation of the RTC. Justice Kokaram said it very well when in the *Hadeed* case he stated that:

> "[5] The referral jurisdiction of the CCJ under Article 214 of the RTC and section 5(1) of the Caribbean Community Act Chapter 81:11 (the CARICOM Act) underpins the exclusive jurisdiction of the CCJ over these questions of Caribbean Community law and obliges the national courts to refer such questions to the CCJ. To this extent, both national courts and the CCJ are enjoined in a co-operative exercise of working out in a uniform manner community rights important for the functioning of the Caribbean Community. Such a referral mechanism recognises the need for dialogue between the national court and the CCJ to ensure a uniform approach to issues of Community law. To this extent, the expertise of the CCJ in Community law will become an invaluable resource for national courts.
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> [11] There has been no reported case of a referral to the CCJ by a national court of the Caribbean Community. However, this should not diminish the value of such referrals to the CCJ. In certain cases, it is important and if not essential to obtain the opinion of the CCJ on matters concerning Community law so that domestic courts can begin the process of harmonising our Caribbean jurisprudence, if not entering into a dialogue with the CCJ on the articulation of Community rights on the national landscape."

With these sentiments I entirely concur! Thank you.