

**CONTEXTUALIZING THE CARIBBEAN COMMUNITY  
AND THE CARICOM SINGLE MARKET AND ECONOMY:  
DESIGN AND ARCHITECTURE**

by

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In this paper I propose first to sketch the developments in international trade that forced change upon the Caribbean and gave birth to the Revised Treaty of Chaguaramas in 2001 (signed July 5, 2001, Bahamas) ("the Revised Treaty"). The revised design is laid out in two parts: the Single Market and the Single Economy, which is not yet in force.

I next examine the governance design of the Caribbean Community and analyse important elements of the Single Market and the Single Economy. In 2003, the Heads of Government expressed some dissatisfaction with the current design, but have not taken any action to reconfigure the basic design. Since a CARICOM building has been erected, important features of the architecture are discussed. Finally, I reflect on the role the Caribbean Court of Justice ("the CCJ") must play in advancing the Caribbean Community and CARICOM Single Market and Economy ("CSME").

In the 1980's Washington-based institutions such as the International Monetary Fund ("IMF"), World Bank and US Treasury Department prescribed certain remedies for the faltering economies of Latin America and the Caribbean, which included: moderate marginal tax rates; liberalization of imports; deregulation and privatization of state enterprises. This prescription came to be known as "the Washington Consensus", a term coined in 1989 by Professor John Williamson for the ten-point standard reform package administered by the IMF and the World Bank to developing countries in economic crisis.<sup>1</sup>

In the 1990's the challenges facing the Caribbean were enormous. The North American Free Trade Area involving the U.S.A, Canada and Mexico had been created. The hemispheric Free Trade Area of the Americas ("FTAA") was in its early stages. Trade preferences which had given the Caribbean guaranteed markets for its raw materials in Europe had to be dismantled. The Marrakesh Agreement that would establish the World Trade Organization ("WTO") was being discussed and was eventually signed in 1994.

It was in 1989 that the West Indian Commission was appointed to search for a role for the concatenation of territories abandoned in the Caribbean Sea by Britain, France, Spain and the Netherlands. The genesis of the West Indian Commission is recorded for posterity at pages 3 and 4 of "Time for Action: The Report of the West Indian Commission", (2<sup>nd</sup> ed. The Press-University of the West Indies, Jamaica, 1993):

*" 'The West Indies Beyond 1992' pointed out that across the world the central reality is that restructuring of a fundamental nature is in progress. It drew particular attention to the (already) historic changes in the Soviet Union, the far-reaching implications of the formation of a Single European Market in 1992, and the birth of a Free Trade Area between Canada and the United States of America. The paper concluded that:*

*"against this background of historic change and historic appraisal, the Caribbean could be in danger of becoming a backwater, separated from the main current of human advance into the twenty-first century..."*

It also summoned attention to the dramatic changes in the international environment and their implications for the Caribbean.

A.N.R. Robinson<sup>2</sup> in that paper "The West Indies Beyond 1992" proposed a West Indian Commission ("the Commission") to help the people of the Caribbean to prepare for the twenty-first century. The CARICOM Heads of Government adopted this proposal in the Grand Anse Declaration

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<sup>1</sup> Williamson, John (ed.): Latin American Readjustment: How Much has Happened, Washington: Institute for International Economics 1989

<sup>2</sup> Prime Minister of Trinidad and Tobago in 1989 when the paper was presented.

and Work Programme for the Advancement of the Integration Movement, 1989 and mandated the Commission to report to the Heads by July 1992.

In July 1991, the Commission submitted a Progress Report entitled, "Towards a Vision of the Future" to the Heads of Government which identified certain matters for immediate action. Those matters concerned:

1. Travelling in the Region;
2. Free movement of skills;
3. Steps towards a common currency;
4. Enlarging investment;
5. Creating the CARICOM Single Market; and
6. Mobilizing for international negotiations.

The fifth matter was framed as follows:

"Complete as a matter of urgency – and setting aside all delaying argument – the CARICOM Single Market with its three principal instruments: The Common External Tariff, the Harmonised Scheme of Fiscal Incentives, and the Rules of Origin."<sup>3</sup>

I quote the following recommendations from "Time for Action" in 1992 to give an idea of the slow progress towards regional integration:

1. *"That the deepening process [sc.of integration between Member States under a Revised Treaty of Chaguaramas] aim at establishing a Single Market and Economy (already agreed by CARICOM Heads) within the shortest possible time, and enlarging the range of functional cooperation within the Community.*
2. *That the essential reform of the CARICOM structure required to achieve these goals be the creation of an executive authority – the CARICOM Commission – with competence to initiate proposals, update consensus, mobilize action and secure the implementation of CARICOM decisions in an expeditious and informed manner."*
3. *That, as a necessary element of deepened integration, there be a CARICOM Supreme Court, with original jurisdiction in matters arising under the Revised Treaty of Chaguaramas, including authority to issue orders enforcing the implementation of CARICOM decisions; and with an appellate jurisdiction from Courts of Member States. The Court's jurisdiction should be designed to assist the evolution of CARICOM law and its uniform enforcement."*<sup>4</sup>

Another recommendation of the West Indian Commission was that CARICOM should leave open the possibility of membership for Suriname and re-affirm its solidarity with the people of Haiti<sup>5</sup>.

Suriname became independent in 1975. Even after independence its economy was geared towards the mother country, Holland, exclusively. Although geographically part of South America, Suriname had few ties with its neighbours. After the period 1980 – 1988 when it was under military rule, Suriname pursued a policy of expanding relations with its neighbours. It joined the FTAA. It pursued a policy of regional integration. It expanded relations with the Caribbean Forum of African, Caribbean and Pacific States (CARIFORUM) countries and with the Association of Caribbean States (ACS). Eventually on July 4, 1995 Suriname joined the Caribbean Community and Common Market.

The widening of CARICOM was taken a step further when Haiti signed the Treaty of Chaguaramas on July 3, 1997. Following the ouster of President Jean-Bertrand Aristide Haiti was suspended, but was welcomed back into the Caribbean Community when Haiti ratified the Revised Treaty on October 3, 2007.

Before one goes to the Revised Treaty of Chaguaramas it is important to place the CARICOM economic integration within an increasing world trend towards regionalism. This trend has been encouraged by Article XXIV (5) of the General Agreement on Tariffs and Trade (GATT), 1947 as

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<sup>3</sup> "Time for Action: The Report of the West Indian Commission", (2<sup>nd</sup> ed. The Press- University of the West Indies, Jamaica, 1993) p. 14

<sup>4</sup> Supra, pp. 506-508.

<sup>5</sup> Supra, p. 457.

amended, the purpose of which is to authorize the formation of regional trade agreements subject to paragraphs (4) to (9). The somewhat narrow reference to “formation” says nothing about the operation of regional trade agreements. Nonetheless, regional trade agreements have mushroomed.

Countries have come together to promote economic co-operation and improve economic development within their region. Such regional groupings are to be seen in the Sistema de Integración Centromericana (El SICA) (1993), the European Union (EU) (1993), the North American Free Trade Association (NAFTA) (1994), the African Union (AU) (2002), the Andean Community (la Comunidad Andina) (1969) comprising Bolivia, Colombia, Ecuador and Peru, a market of 98 million, Mercado Comun del Sur (MERCOSUR) established in 1991 (Brazil, Paraguay, Uruguay and Argentina) and the Association of Southeast Asian Nations (ASEAN) (1967). Regional trading blocs such as CARICOM are therefore part of a world-wide trend.

It was in the context of globalization, trade liberalization, the WTO and encircling regionalization that, as a delayed reaction to the cri de coeur of Prime Minister Robinson at Grand Anse in 1989 that the Revised Treaty of Chaguaramas was signed on July 5, 2001 in the Bahamas.

### **THE REVISED TREATY**

The Revised Treaty was an attempt to re-invigorate a faltering economic integration movement by moving to a new phase of integration, a single market and economy. A common market exists where states undertake to remove market barriers, but the borders remain. By contrast a “single market” is frontierless. It consists of a single economic space in which goods, services, capital and labour move freely. It involves the complete removal of physical barriers and measures having the effect of creating barriers.

The Revised Treaty also aims to establish a single economy. Such an economy requires unified economic and monetary policies within the single economic space. Chapter Four of the Revised Treaty deals with policies of sectoral development such as industrial policy and agricultural policy. Chapter Five deals with trade policy with special reference to trade liberalization, subsidies and dumping. The remaining chapters envisage a common transport policy, a regional policy for disadvantaged countries, regions and sectors, a competition policy and consumer protection. A dispute resolution régime is envisaged, which includes adjudication by the Caribbean Court of Justice.

The Preamble of the Revised Treaty is well focused on the goal of a single market. The Preamble contains the economic manifesto of the CARICOM Single Market and Economy. The first clause of the Preamble sets out the goal of deepening regional economic integration through the CSME in order to achieve sustained economic development based on international competitiveness, co-ordinated economic and foreign policies, functional co-operation and enhanced trade and economic relations with third States.

In the next clause the leaders of the Caribbean recognize the impact of globalization and trade liberalization and international competitiveness, and express their determination to make efficient their decision-making and implementation processes.

The leaders assert that optimal production by economic enterprises requires “the structured integration of production in the Region”<sup>6</sup> and particularly, the unrestricted movement of capital, labour and technology. Equally important is the pooling of the collective resources of the Region on a non-discriminatory basis.

They declare and state their goal as “a fully integrated and liberalised internal market”<sup>7</sup> which will create favourable conditions for sustained market-led production of goods and services on an internationally competitive basis.

They realize that these goals are only attainable if the new thrust is supported by an improved institutional framework and region-wide sectoral policies, the achievement of international standards, the protection of competition and a credible system of dispute resolution.

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<sup>6</sup> Sixth clause of the Preamble to the Revised Treaty of Chaguaramas, signed July 5, 2001, Bahamas.

<sup>7</sup> Supra, ninth clause of the Preamble.

In the road map laid out in the Preamble there is a clear commitment to a single internal market. However, in Article 6 of the Revised Treaty the objective of the Community merely repeats the three pillars of the previous Common Market:

- (1) The phrase "economic integration" is replaced by desiderata of good economic performance such as full employment, expansion of trade and international competitiveness;
- (2) Enhanced co-ordination of foreign and economic policies; and
- (3) Enhanced functional co-operation.

What is lacking is the focus of the Single European Act (SEA) signed in 1986, (February 17, 1986, Luxembourg). Article 14(1) of the Treaty Establishing the European Community, 1958 (EC) states precisely the aim of "progressively establishing the internal market over a period expiring on 31 December 1992..." Article 14(2) defines the internal market as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured..." By contrast, what is contemplated in the Revised Treaty is removal of barriers to trade on a country by country basis over time. In short, the operative provisions of the Revised Treaty do not match the rhetoric of the Preamble.

## **THE SINGLE MARKET**

Essential to a Single Market is the free movement of the factors of production: goods, services, people and capital.

### **Free movement of goods: Article 79**

The CARICOM Secretariat's statistics on regional trade reflect a gloomy picture. Over the period 2001 – 2006 intra-regional exports amounted to only 17.2% on average of total regional exports, having declined from 20% in 2001 to 16.3% in 2006.

While it is true that intra-regional trade has not expanded sufficiently, more alarming is the lack of concrete action on production integration. Professor Kenneth Hall in a Public Lecture for the Ninth Annual Ordinary Meeting of the CARICOM Legal Affairs Committee (March 28, 2006, Kingston, Jamaica) referred to the "well-known proposition that the main benefits from integration are derived not so much from freeing of trade as from the development of complementary structures of production and demand." In short, so far CARICOM has not seized the opportunity to create and innovate a new Caribbean economy and to discard our inherited colonial plantation economy.

### **Free movement of services: Article 37**

In respect of the regional market for services outside employment there does not appear to be any legislation in the Member States abolishing, pursuant to Article 37, discriminatory restrictions on the provision of services within the Community in respect of Community nationals. Issues such as non-discriminatory access of Community nationals to land, buildings and other property in a host jurisdiction have not been tested.

### **The right of establishment: Article 34**

The kindred right of establishment includes the right to provide services as an independent contractor and to establish and manage economic enterprises other than in the home jurisdiction. In this respect the Member States have not succeeded in eliminating restrictive business and professional practices, which could frustrate the right of establishment. Contingent rights for spouses and children and access to land, buildings and other property in the host country need to be legislated.<sup>8</sup>

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<sup>8</sup> A Press Release from the CARICOM Secretariat stated that work is proceeding on a Protocol on Contingent Rights linked to Free Movement within the CSME (Press Release 346/2008; November 18, 2008)

### **Free movement of persons: Articles 45 and 46**

The Member States merely commit themselves to “the goal of free movement of their nationals within the Community”<sup>9</sup>. The wording of the Article 45 is puzzling and perhaps deliberately ambiguous. The architects of the Revised Treaty have made a concession that university graduates with a skills certificate, media persons, sportspersons, artistes and musicians have the right to free movement within the Community. Although all Member States have enacted legislation to provide for this limited degree of free movement, procedures for accreditation and immigration requirements vary from Member State to Member State.

In *Lennox Linton v AG for Antigua and Barbuda CV 2007/0354* (unreported) the issue was whether a Dominican media worker with a Dominican skills certificate was lawfully deported from Antigua before the end of his permitted stay. This question turned ultimately on whether the Revised Treaty (enacted as the Caribbean Community Act No. 9 of 2004) was in force at the date of the deportation. Blenman J said: “Incorporation, as Professor Anderson points out, must include the bringing into force of the incorporating legislation as part of domestic law”<sup>10</sup>. In fact the Act had been passed but not proclaimed. The deportation could therefore not be referred to the CCJ, but was eventually held to be unlawful by the learned judge.

At the meeting of the Heads of Government in Guyana in July 2009 it was decided to grant free movement under the Revised Treaty to a new category of skilled workers – household domestics who have obtained a Caribbean Vocational Qualification or its equivalent as from January 1, 2010.

### **Free movement of capital: Articles 39 – 42, 44**

As far as the writer knows, no Member State has enacted legislation to remove restrictions on the free movement of capital. There is a dual exchange rate system, with some countries having floating exchange rates, while others have fixed exchange rates. At present, the currencies of Member States are not freely convertible. Ultimately there will have to be a unified stock exchange.<sup>11</sup> Exchange control among Member States will have to be abolished. Disparate rules as to the modes in which capital moves, e.g. in banks, insurance and securities will have to be harmonized. At present, however, the unrestricted movement of capital within a single internal market is a long way off.<sup>12</sup>

### **Common External Tariff: Articles 82 and 83**

As was the case with the Common Market, the Common External Tariff (“CET”) is “a fundamental pillar in the establishment of a Caribbean Single Market and Economy.”<sup>13</sup> The CET has been plagued by the ready grant of derogations from it. Recently the CCJ laid down guidelines for application for authorization to suspend the CET. The Court emphasized that even when authority to suspend the CET was granted, Member States should always ascertain that regional supplies are not available before importing goods from outside the region: see *TCL v The Caribbean Community* [2009] CCJ 4 (OJ) and *TCL and TCL Guyana Incorporated v The State of the Co-Operative Republic of Guyana* [2009] CCJ 5 (OJ).

### **The single economy**

The Single Economy is not yet in force. The Revised Treaty, as indicated above, has set out the sectors of the economy in which regional policies will have to be developed. To date there is no blueprint for what regional agricultural, industrial or transport policy would be like. There is little evidence of the reconfiguration of national economies into a single Caribbean economy.

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<sup>9</sup> Article 45 of the Revised Treaty of Chaguaramas, signed July 5, 2001, Bahamas.

<sup>10</sup> *Lennox Linton v AG for Antigua and Barbuda CV 2007/0354* (unreported) at [79].

<sup>11</sup> Critical issues are jurisdiction and conflict of laws. As regards jurisdiction, in the absence of harmonized financial legislation, there is opportunity for “regulatory arbitrage”. As regards conflict of laws, the Takeover Code kicks in at 25% (Barbados), 50% (Jamaica), 30% (Trinidad and Tobago), 35% (Guyana)

<sup>12</sup> One has to recognize that there are significant intra-regional capital flows; a regional bond market based in Trinidad and Tobago exists; cross-listing of shares on existing national stock-exchanges has taken place in the region (at least in respect of 13 such shares).

<sup>13</sup> *TCL v The Caribbean Community* [2009] CCJ 4 (OJ) at [46].

There has been some attempt at the harmonization of laws, but there is considerable lack of uniformity even when Member States purport to be following a Model Bill e.g the Model Companies Bill, or incorporating a treaty such as the Agreement Establishing the Caribbean Court of Justice (February 14, 2001) ("the CCJ Agreement").

The gains to be made by a single internal market could well be frustrated by anti-competitive behaviour or by lack of consumer protection. A Regional Competition Commission has been set up in Suriname to deal with cross-border infringement of the rules of competition, whereas national Fair Trading Commissions have been established by statute in some Member States<sup>14</sup>. Another important aspect of the Single Economy is monetary union.<sup>15</sup> However, the Committee of Central Bank Governors has advised the Council for Finance and Planning that a monetary union of all Member States should be a long-term goal but is not now feasible<sup>16</sup>. Nor is the issue of a single currency being currently pursued.

### **The governance design of the Caribbean Community**

In "Time for Action" the West Indian Commission attributed the progress of the European Community towards economic integration to the creation of the European Commission, which was charged with implementing that process<sup>17</sup>. After rejecting any idea of political federation the Commission stated as follows:

*"Our proposals are rooted instead in the concept of CARICOM as a Community of sovereign states who by treaty agree to the pooling of certain of their sovereignties and to exercising them collectively in very specific respects. It is the sharing of the exercise of sovereignty, not a transfer of it, that is involved in the integration process. Sovereignty for Caribbean countries is admittedly less than substantial."*<sup>18</sup>

The drafters of the Revised Treaty designed the Caribbean Community including the CSME so as to strip the Secretariat of any executive or legislative power and, relying on the doctrine of dualism rendered even the collective decisions of the Heads of Government meaningless in the domestic jurisdictions where the single market exists unless they are incorporated into municipal law. In creating such a structure they failed to understand that what was advocated by the West Indian Commission was not a surrender of sovereignty but a devolution of aspects of it.

### **I now briefly survey the existing structure:**

Article 10(1) of the Revised Treaty creates two Principal Organs:

- (1) The Conference of Heads of Government; and
- (2) The Community Council of Ministers.

Article 10(2) provides for four organs to assist the Principal Organs:

- (a) The Council for Finance and Planning (COFAP);
- (b) The Council for Trade and Economic Development (COTED);
- (c) The Council for Foreign and Community Relations (COFCOR); and
- (d) The Council for Human and Social Development (COHSOD).

Article 21 describes the Institutions of the Community; Article 22 identifies the Associate Institutions.

The Conference of Heads of Government ("the Conference") is the "supreme Organ of the Community": Article 12(1). It has power to determine policy for the Community, enter into treaties, establish Organs and Bodies and to make decisions with regard to the financial affairs of the Community. In the Conference, binding decisions are created only by unanimous vote: Article

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<sup>14</sup> See for example Fair Trading Commission Act, Cap. 326 B (Barbados).

<sup>15</sup> Two of its main characteristics are: a common currency; a regional central bank supervising a common monetary policy.

<sup>16</sup> COFAP at its 5<sup>th</sup> meeting accepted this recommendation.

<sup>17</sup> "Time for Action: The Report of the West Indian Commission", (2<sup>nd</sup> ed. The Press- University of the West Indies, Jamaica, 1993) p. 465.

<sup>18</sup> Supra, p. 466.

28(1). By Article 12(11) “the Bureau, consisting of the current and immediately outgoing and incoming Chairmen of the Conference”, is set up with an advisory role.

The second highest Organ is the Community Council of Ministers. The main functions of the Council of Ministers is strategic planning and co-ordinating the three pillars of the Community – economic integration, functional co-operation and external relations: Article 13(2).

The Ministerial Councils (COFAP, COTED, COFCOR and COHSOD) comprise the Ministers of Member States responsible for those portfolios. Voting in the Community Council and the Ministerial Councils is by qualified majority i.e an affirmative vote of no less than 75% of all the Member States<sup>19</sup>.

The Bodies of the Community are the Legal Affairs Committee, the Budget Committee and the Committee of Central Bank Governors. Community Institutions include the Assembly of Caribbean Community Parliamentarians (ACCP) and the Caribbean Centre for Developmental Administration (CARICAD). Recently in *Doreen Johnson v CARICAD* [2009] CCJ 3 (OJ) the CCJ held that CARICAD, an institution, did not act for the Community and was not its alter ego, with the result that it had no jurisdiction.<sup>20</sup>

Associate Institutions include the University of Guyana and the University of the West Indies: Article 22.

The difficulty with the structure of Organs and Bodies is that they are staffed by elected officials who are subject to frequent change and whose primary loyalty is not to the Community but to their domestic constituencies.

There is no doubt that the Revised Treaty restricted the unanimity rule to the Conference in an effort to promote decision-making. However, the institutional structure still lacks an organization with power to implement decisions.

### **Reconsidering the governance design**

On July 4, 2003 the Heads of Government issued the Rose Hall Declaration on Regional Governance and Integrated Development (adopted on the Occasion of the Thirtieth Anniversary of CARICOM, at the Twenty-Fourth Meeting of the Conference of Heads of Government of CARICOM, July 2-5, 2003, Montego Bay, Jamaica) in which they envisaged *inter alia* the establishment of a CARICOM Commission. In the light of the Declaration Professor Girvan in consultation with the CARICOM Secretariat and a Special Task Force produced a Report entitled “Towards a Single Development Vision and the Role of the Single Economy” (approved by the Twenty-Eighth Meeting of the Conference of Heads of Government of CARICOM, July 1-4, 2007, Needham’s Point, Barbados). That Report proposed adoption of the recommendations of the Technical Working Group on Governance including:

- (1) Automatic application of decisions of the Conference at the national level;
- (2) Creation of a CARICOM Commission with executive authority to implement decisions of the Heads of Government or other Organs of the Community so that they have the force of law throughout the region;
- (3) Automatic financing of regional institutions;
- (4) The strengthening of the role of the Assembly of Caribbean Community Parliamentarians.

The Conference agreed that Single Economy should be fully operational by 2015 and requisitioned the preparation of a Strategic Development Plan based on the Revised Report to be completed by June 2008. No action has yet been implemented to alter the existing design of governance.

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<sup>19</sup> See Article 29 of the Revised Treaty of Chaguaramas, signed July 5, 2001, Bahamas.

<sup>20</sup> Contrast Case 294/83 *Parti Écologiste “Les Verts” v European Parliament* [1986] ECR 1339 where the ECJ held it had jurisdiction to review a measure adopted by the European Parliament even though the European Parliament was not an institution whose acts were open to review under Article 173 EC.

## **The Economic Partnership Agreement (“EPA”) with the European Union**

The EPA is an agreement between the CARIFORUM States and the several Member States of the European Union (“EU”) and the European Community. The CARIFORUM States include the Bahamas, which is not a member of the CSME, and the Dominican Republic and the Member States of CARICOM. The EPA is as much an agreement between the CARICOM States, the Bahamas and the Dominican Republic *inter se* as it is an agreement between the collectivity of the CARIFORUM States and the Member States of the EU and the European Community. This fact has important consequences.

In many areas concerned with the Single Economy – competition policy, public procurement, industrial and agricultural policy, trade policy and trade liberalization – the EPA contains very detailed provisions. It is submitted that these provisions bind CARICOM States *inter se* and as a unit *vis-à-vis* the European Member States and the European Community. The CARICOM provisions with regard to the areas listed above are yet to be worked out or are not specific. Accordingly it would seem that the effect of the EPA is to pre-empt the working out of specifically Caribbean solutions in these policy areas.

Under the RTC, implementation of the decisions of the Conference of the Heads of Government, although stated to be binding (Article 28(1)) is left to the discretion of national governments. By contrast, pursuant to Article 229(2), decisions of the Joint CARIFORUM–EC Council are binding on the parties to the EPA. The Joint CARIFORUM–EC Council has the duty to implement, monitor and enforce the decisions of the Council. The question arises as to which agreement is to prevail where the RTC and the EPA cover the same ground.

The real impact of the EPA on the CSME is that it opens up the Caribbean Single Market to the chill winds of globalization and trade liberalization before the CSME is able to nurture its own industries to strength and to international competitiveness. By Article 238 (2) of the EPA the CARIFORUM states agreed to accord to one another any trading preference granted to an EU country. Therefore, when this provision takes effect in two years time, CARICOM's 1998 agreement with the Dominican Republic exempting the OECS states and Belize from having to grant duty-free access to certain goods must be terminated. That agreement sought to take into account differences in the level of development between the Dominican Republic and the CARICOM LDC's. Only time will tell whether CARICOM can withstand the weight of the contiguous structure that is the EPA.

### **SOME FEATURES OF THE ARCHITECTURE OF THE RTC**

#### **Dispute settlement and enforcement: Articles 187-224**

Article 188 provides some six modes of dispute settlement, good offices, mediation, consultations, conciliation, arbitration and adjudication. Disputes may also be resolved where a Member State or the Community requests an advisory opinion of the CCJ: Article 212.

Under the Revised Treaty adjudication is reserved for the CCJ: see Article 216. That jurisdiction is compulsory, *ipso facto* and without special agreement. There are some aspects of this mode of dispute settlement that merit discussion. They are: locus standi of private entities and individuals, referrals from a national court or tribunal, the applicable law, enforcement and judicial precedent.

#### **Locus standi of private entities and individuals: Article 222**

On the international plane where a state is responsible for loss or damage to a national of another state, the state of the injured party may present a claim on the national's behalf.<sup>21</sup> However, individuals have been given procedural capacity for presentation of claims even against their own States<sup>22</sup>. Article 222 of the Revised Treaty provides that private entities may apply to the CCJ for special leave to be allowed to appear as parties in proceedings before the CCJ.

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<sup>21</sup> Ian Brownlie, *Principles of Public International Law* (6<sup>th</sup> ed, Oxford University Press, 2003) pp 497-498.

<sup>22</sup> See the Arbitral Tribunal of Upper Silesia set up by the German-Polish Convention Relating to Upper Silesia of May 15, 1922, especially Articles 16-24 thereof.

An applicant under Article 222 must be a person, natural or juridical, of a Contracting Party to the CCJ Agreement. In the special leave proceedings in *TCL and TCL Guyana Incorporated v The State of the Co-Operative Republic of Guyana*, [2009] CCJ 1 (OJ) the CCJ ruled that registration or incorporation in a Contracting Party was sufficient to bring a company within Article 222, despite the fact that the majority shareholding was held by a non-national resident outside that Contracting Party.<sup>23</sup>

Applicants for special leave pursuant to Article 222 must show (a) that the Treaty intended “that a right or benefit conferred by or under this Treaty on a Contracting Party shall enure to the benefit of such persons directly” and (b) that they “have been prejudiced in respect of the enjoyment of the right or benefit”. At this special leave stage the applicant need only make out an arguable case that these conditions can or will be satisfied at the substantive hearing. At the substantive hearing the applicant must show that the private entity or individual has “satisfied fully the relevant provisions of Article 222”: see *TCL v The Caribbean Community* [2009] CCJ 4 (OJ) at [18].

As regards “prejudice”, in the special leave proceedings the Court held that the obligation of Member States to maintain the Common External Tariff was “of potential benefit to all legal and natural persons carrying on business in the Community having to do with any such goods. Equally the failure by any particular Member State to fulfil this obligation is of potential prejudice to all such persons.”<sup>24</sup>

An applicant for special leave must also show pursuant to Article 222(c) that the Contracting Party, i.e the State, which would normally in international law have locus standi on behalf of a national, has omitted or declined to espouse the claim or has expressly agreed that the applicant should “espouse the claim” instead of the Contracting Party.

The Court held in *TCL and TCL Guyana Incorporated v The State of the Co-Operative Republic of Guyana*<sup>25</sup> that Article 222(c) does not apply where the State against which the proceedings are to be brought is the Contracting Party of the private entity seeking to institute such proceedings. In such a case, the private entity is not required to comply with Article 222(c). The end result was that a private entity could sue its own state. See also the special leave proceedings in *TCL v The Caribbean Community*,<sup>26</sup> where the State manifested indifference to the private entity’s claim.

Finally the Court must in all the circumstances consider it to be in the interests of justice that special leave be granted in the particular case<sup>27</sup> pursuant to Article 222(d).

#### **Referrals under Article 214**

Article 214 provides that a national court or tribunal may seek a preliminary ruling by the CCJ on a matter involving the interpretation or application of the Revised Treaty if the court or tribunal considers that such a ruling is necessary in order to enable it to deliver judgment. By this route individuals and companies have indirect access to the Court if the national court considers a ruling on the matter is necessary before it gives judgment.

It may very well be that since an application under the two-stage procedure of Article 222 goes to jurisdiction (see *The Caribbean Community case* [2009] CCJ 4(OJ) at [18]) it may be safer for private entities to approach the CCJ by this route rather than by way of special leave.

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<sup>23</sup> *TCL and TCL Guyana Incorporated v The State of the Co-Operative Republic of Guyana*, [2009] CCJ 1 (OJ) at [28].

<sup>24</sup> *TCL and TCL Guyana Incorporated v The State of the Co-operative Republic of Guyana* (application for special leave) [2009] CCJ 1 (OJ) at [34] and at [34] of the special leave ruling in the *TCL v The Caribbean Community* [2009] CCJ 2 (OJ).

<sup>25</sup> [2009] CCJ 1, (OJ) at [43].

<sup>26</sup> [2009] CCJ 2 (OJ) at [38].

<sup>27</sup> *TCL and TCL Guyana Incorporated v The State of the Co-Operative Republic of Guyana*, [2009] CCJ 1 (OJ) at [45].

All the countries which are parties to the CSME have now made the Revised Treaty part of their law; therefore the Revised Treaty has the force of law in those jurisdictions. Thus, jurisdiction has now been granted (at least in the common law jurisdictions) to domestic courts to construe an international treaty. In *JH Rayner Ltd v Department of Trade and Industry* [1990] 2 AC 418, 476-7 Lord Templeman said:

*"Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual."*

However, that jurisdiction is immediately taken away by the incorporated equivalent of Article 211 which gives "compulsory and exclusive jurisdiction" over such matters to the CCJ.

In Jamaica, the Privy Council struck down legislation transferring its final appellate jurisdiction to the CCJ because constitutional principle required such transfer to be made only to a court whose judges' tenure was protected by the specially entrenched provisions of the Jamaican Constitution<sup>28</sup>. Accordingly, the Jamaican Parliament was reluctant to provide for referral proceedings to the CCJ and modified the equivalent of Article 214 to require an authority designated by the Minister responsible for justice to seek "an advisory opinion" from the CCJ (see section 7 of the Caribbean Court of Justice (Original Jurisdiction) Act No. 17 of 2005).<sup>29</sup> However by section 6(1) (b) of the same Act and by Article 212 of the Revised Treaty advisory opinions may only be sought by Member States parties to a dispute or the Community. An authority designated by the Minister has no such entitlement. The definition of "Agreement" in Section 2 of the same Act also incorporates in the Schedule to the Act Article XIII (2) of the CCJ Agreement, which is in terms similar to Article 212 of the Revised Treaty. The situation is further complicated by section 3 of the Jamaican Act, which stipulates that the provisions of the CCJ Agreement other than *inter alia*, referrals provided for in Article XII para. 1(c), shall have the force of law in Jamaica.

### **The applicable principles of law**

In the special leave proceedings of *TCL v The Caribbean Community* [2009] CCJ 2 (OJ) at [41] the Court noted that Article 217 of the Revised Treaty mandated that the route to discovering the proper interpretation and application of the Revised Treaty was via "such rules of International law as may be applicable". The Court referred to Article 38(1) of the Statute of the International Court of Justice, which is generally regarded as having authoritatively stated the sources of international law as:

- (a) International conventions, whether general or particular, establishing rules recognized by the contracting parties;
- (b) International custom, as evidence of a general practice accepted as law;
- (c) General principles of law recognized by civilized nations;
- (d) Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law.<sup>30</sup>

Tridimas in "The General Principles of EU Law" (2<sup>nd</sup> ed., Oxford University Press, 2006) in discussing general principles of law as a source of law states that:

*"Among the sources of Community law, they occupy a distinct position. They are unwritten principles extrapolated by the Court from the laws of Member States by a process similar to that of the development of the common law by the English courts. They derive from legal systems of the Member States but their content as sources of Community law is determined by the distinct features of the Community polity. Thus, the Court may recognize a general principle as part of Community law although it is not recognized in the*

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<sup>28</sup> *Independent Jamaica Council for Human Rights (1998) Ltd v Marshall-Burnett* [2005] 2 AC 356 (P.C).

<sup>29</sup> For a more detailed analysis see "The Role of the Caribbean Court of Justice: An Overview" by The Honourable Mr. Justice Hayton, JCCJ at [www.caribbeancourtofjustice.org](http://www.caribbeancourtofjustice.org).

<sup>30</sup> See Anthony Aust, *Handbook of International Law*, (Cambridge University Press, 2005) p.6.

*laws of all Member States. Also, the scope of a principle as applied by the Court may differ from that which it has in the law of a Member State*<sup>31</sup>.

This statement of the relevant EU law is similar to the statement of principle set out at [41] of *TCL v The Caribbean Community*,<sup>32</sup> where the CCJ discusses the role of general principles of law in Caribbean Community law.

### **Enforcement**

In the CARICOM system there is no Commission charged with the implementation of decisions and building economic integration. Further, in the Revised Treaty there is no provision for the enforcement of judgments of the CCJ. However, Article XXVI of the CCJ Agreement states that "the Contracting Parties agree to take all the necessary steps, including the enactment of legislation to ensure that:

- a) *"all authorities of a Contracting Party act in aid of the Court, and that any judgment, decree, order or sentence of the Court given in the exercise of its jurisdiction shall be enforced by all courts and authorities in any territory of the Contracting Parties as if it were a judgment, decree, order or sentence of a superior court of that Contracting Party."*

In order to transpose a CCJ judgment into the municipal system of enforcement of judgments there must be domestic legislation (at least in dualist countries). The present writer is unaware of any enforcement legislation passed within the municipal jurisdiction of any of the Member States.<sup>33</sup> It might, however, be possible to bring proceedings in a national court based on the final judgment of the Caribbean Court of Justice.

### **Judicial precedent: Article 221**

Another article that merits study is Article 221 which states:

*"Judgments of the Court shall constitute legally binding precedents for parties in proceedings before the Court unless such judgments have been revised in accordance with Article 219."*

There is a sense in which one may treat Article 221 as being addressed to the wrong quarter. In a forensic situation it is the court that is bound by earlier precedent, regardless of the wishes of the parties before the court. Parties are bound by decisions arrived at by a court after adjudication. The principle that is relevant for parties to the proceedings is *res judicata*. *Stare decisis* is a principle which compels a court to follow in a later case between different parties the principles of law laid down in a previous case if the material facts of the later case are the same or similar, or the material facts in the later case do not prevent the court from applying the principles of the previous case.

In my submission Article 221 is phrased in terms that are relevant to *res judicata*. To contend that Article 221 means "legally binding precedents for any parties in later proceedings before the Court" would be too wide a proposition. For it is the judges who must decide whether they are bound by an earlier decision. Indeed in jurisdictions where the doctrine of precedent applies, judges of final courts often have to decide whether to depart from earlier decisions if on a considered view they were wrong or decided *per incuriam*.

Article XXII of the CCJ Agreement is in terms almost identical to Article 221 of the RTC. These Articles in turn bear some similarity to the even more specific Article 59 of the Statute of the International Court of Justice ("the ICJ Statute") which provides:

*"The decision of the Court has no binding force except between the parties and in respect of that particular case".*

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<sup>31</sup> Takis Tridimas, *The General Principles of EU Law* (2<sup>nd</sup> ed., Oxford University Press, 2006) p. 5-6

<sup>32</sup> [2009] CCJ 2 (OJ).

<sup>33</sup> It is not thought that the enactment of a provision that gives the CCJ Agreement "the force of law" without more provides for enforcement and execution of a judgment of the CCJ.

Brownlie<sup>34</sup> states, and I respectfully agree with him, that, "...the debate in the committee of jurists responsible for the Statute indicates clearly that Article 59 was not intended merely to express the principle of *res judicata* but to rule out a system of binding precedent<sup>35</sup>. Thus in one judgment the Court said: 'The object of [Article 59] is simply to prevent legal principles accepted by the Court in a particular case from being binding on other States or in other disputes'".

The similarity in the wording of Article 221 and Article 59 of the ICJ Statute suggests a similar interpretation i.e that a system of binding judicial precedent is not thereby created. It is doubtful that the heading "Judgment of the Court to Constitute Stare Decisis" can lead to the opposite conclusion.

Yet one would expect the CCJ to be guided by the practice of the ICJ in this regard. In the words of Brownlie, "Strictly speaking, the Court does not observe a doctrine of precedent, but strives nevertheless to maintain judicial consistency."<sup>36</sup>

### **Conclusion**

The dismantling of the trade preferences on which the Caribbean plantation economy was built precipitated an urgent crisis. Caribbean leaders led by Sir Shridath Ramphal plotted a new course and proposed a new design.

The design and the architecture proposed was that the Caribbean should pool its resources and create from it a new indigenous economy competitive internationally. The new economy was to share one single economic space in which Caribbean territories would pool certain of their sovereignties for this purpose.

The Revised Treaty has produced a different design with the same goal of a single economic space. The structure is not cross-tied and questions remain whether it should be.

The CCJ appears to be the one link between the elements of the structure. Although the Court was designed to provide for consistency in decision-making, it contains an element of supranationality that has the potential to hold the CSME together. Indeed the Preamble to the Revised Treaty affirms that the original jurisdiction of the CCJ is essential for the successful operation of the CSME. However, even with regard to the jurisdiction of the CCJ there may be need for shoring up elements of the structure.

October 26, 2009  
Rolston F. Nelson

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<sup>34</sup> Ian Brownlie, *Principles of Public International Law* (6<sup>th</sup> ed, Oxford University Press, 2003) pp 20-21.

<sup>35</sup> The doctrine of precedent does not normally apply in international law.

<sup>36</sup> *Supra*, p. 21.