

**SYMPOSIUM**

**Establishment of the Caribbean Court of Justice:  
The Effect on Intellectual Property and International Trade**

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**THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS  
AND  
THE CARIBBEAN COURT OF JUSTICE**

**PAPER BY**

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**Almost twenty (20) years ago, as a student at Georgetown University Law School in the LL.M. Programme for International and Comparative Law, I had occasion to write a paper entitled: “Transfer of Technology, A Third World Perspective”. At that time, there was only a nascent realization that we had come to the end of the “Industrial Age” and had entered upon the “Information Age”, and that what were more commonly then referred to as “Industrial Property Rights” were of crucial importance to modern World commerce and economic development. There was, at the time of the height of the discussion about North-South issues, and questions of the New International Economic Order, an emerging debate about a proposed United Nations Conference on Trade and Development, Draft Code on the Transfer of Technology. But even then, the importance of intellectual property was recognized as it had been estimated that in Great Britain, for example, licensing of know-how formed one part of the trade in knowledge which then accounted for between 12 and 13 per cent of British Trade annually.**

At the time of writing that paper, one critical resource which I found very useful, was a paper on the issue of Transfer of Technology by the present Prime Minister of Barbados, written in 1979 when he worked as an economist in Jamaica, and in which he reviewed some seventy-one (71) licensing agreements, primarily dealing with trademarks, and 407 patents registered in Jamaica between 1971 and 1976. Interestingly, Arthur found empirical evidence to indicate that there was a direct relationship between an increase in licensing agreements and a decrease in private foreign direct investment. That should come as no surprise. It is widely accepted as conventional wisdom, that the transfer of knowledge is the most crucial component of economic development, certainly as important and sometimes even more so, than foreign direct capital investment.

I have thought it useful in speaking to the topic: “The Enforcement of Intellectual Property Rights and the Caribbean Court of Justice” to start by placing my thoughts in the context of the importance of knowledge in the process of economic development. Indeed, the subject of the Role of the Caribbean Court of Justice in Regional Economic Development has already been the subject of a learned paper by the Legal Consultant and advisor to

the Caricom Legislative Drafting Facility.<sup>1</sup> It is generally accepted that a court such as this is an indispensable instrument within the context of the efforts towards the establishment of the Caribbean Single Market and Economy under the Revised Treaty of Chaguaramas.

My own previous experience as a representative of an investment promotion service in the United States and subsequently as an adviser to the Eastern Caribbean Investment Promotion Service (ECIPS) has demonstrated empirically that certainty in the investment environment and in particular, the legal environment, is a sine qua non of an attractive investment climate. For it is within the context of legal predictability that long term planning can take place. I shall look at the role of the court in its bifurcated jurisdiction to try to determine how this will contribute to certainty and predictability, an ideal set out as one of the guiding principles of its establishment.

The Preamble to the Agreement Establishing the CCJ notes four foundation principles upon which the need for the CCJ rests. One of those recognizes that:

“the establishment of the Court is a further step in the deepening of the regional integration process”.<sup>2</sup>

Implicit in this understanding of the need for a deepening of the regional integration process, is the recognition that the issue of development in the Caribbean, is one which is only capable of being dealt with within the regional context. As we are all aware, the Community which is heading towards the realization of a “single economic space” in the CSME, consists of a number of sovereign states, with municipal court systems with the potential to produce differing results in relation to the same issues under the revised Treaty of Chaguaramas. It is clear that a Court which had the jurisdiction to adjudicate upon all issues dealing with that treaty would be an important institution in the scheme of attempting to ensure certainty in how matters were dealt with within the single economic space represented by the community.

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<sup>1</sup> The Caribbean Court of Justice in Regional Economic Development by Duke Pollard.

<sup>2</sup> Preamble to the Agreement Establishing the Caribbean Court of Justice.

The Court has both an Original and an Appellate jurisdiction.<sup>3</sup> Under the terms of the CCJ Agreement, “The Court, in the exercise of its original jurisdiction, shall be duly constituted if it consists of not less than three judges being an uneven number of judges”.<sup>4</sup> In its original jurisdiction, the CCJ shall also have the exclusive jurisdiction to hear and determine:

(a) disputes between Contracting Parties to this Agreement;

(b) disputes between any Contracting Parties to this Agreement and the Community;

(c) referrals from national courts or tribunals of Contracting Parties to this Agreement;

(d) applications by nationals in accordance with Article XXIV, concerning the interpretation and application of the Treaty.<sup>5</sup>

What is of importance also, is that where any “national” court has before it, a matter which concerns the interpretation of the Treaty of Chaguaramas, it must refer such matter to the CCJ for its determination.<sup>6</sup> The exclusivity provision is of particular importance for in its absence the municipal courts of the region might have sought to claim a concurrent jurisdiction, and this would have been detrimental to the certainty which the Court is intended to ensure. This requirement, therefore, has the beneficial effect of ensuring to the extent necessary, that there is consistency and certainty in the interpretation of the provisions of the Treaty. I again agree with Pollard,<sup>7</sup> where he concludes that: “In this way, uniformity of applicable norms is ensured with positive effects on legal certainty and the stability of the investment climate”. Also of further interest, is the fact that where there is a question as to whether a particular matter is within the jurisdiction of the CCJ, such a question is to be determined by the Court itself.

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<sup>3</sup> See Part 11 and Part 111 of the CCJ Agreement

<sup>4</sup> CCJ Agreement Part 11 Article XI Para 1.

<sup>5</sup> Article XII.I

<sup>6</sup> Article XIV.

<sup>7</sup> See the article referred to at my note 1 above

It should also be noted that in terms of the very Constitution of the make-up of the Court, the Agreement requires that at least three of the nine members shall have expertise in international law and particularly international trade law.<sup>8</sup> That provision gives the Court the potential to have adjudicating serious issues of compliance with international trade law, including matters dealing with the World Trade Organization, (WTO), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Annex 1C of the Marrakesh Agreement Establishing the WTO), and WIPO, persons who will bring the requisite level of skill and knowledge to these deliberations. So that by virtue of its very composition, the Court seems designed to enhance enforcement, not only of the intellectual property rights of persons within the CSME, but of prospective investors who may have rights that they are anxious to protect on making capital investments in the region. There should be no doubt that the Court, structured as it is, has the competence to deal with these issues in a satisfactory manner.

The Court also has the exclusive jurisdiction to issue advisory opinions as provided for in Article X111. That article provides as follows:

1. The Court shall have exclusive jurisdiction to deliver advisory opinions concerning the interpretation and application of the Treaty.
2. Advisory opinions shall be delivered only at the request of Contracting Parties or the Community.

In the exercise of its original jurisdiction, the Agreement establishing the CCJ provides, in Article XVII, that:

The Court, in exercising its original jurisdiction under Article XII (b) and (c), shall apply such rules of international law as may be applicable.<sup>9</sup> The most important consequence of this is that the parties appearing before the Court would normally be “State Parties”, that is the contracting states themselves. It would seem, however, that precisely because of the need to have the pronouncements of the Court produce the greatest possible effects of

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<sup>8</sup> Article IV of the CCJ Agreement

<sup>9</sup> Article XVII.I

enforceability and certainty, the Agreement provides for other persons to have the right to be heard and have their concerns adjudicated. Thus, Article XVIII provides that:

Should a Member State, the Community or a person consider that it has a substantial interest of a legal nature which may be affected by a decision of the Court in the exercise of its original jurisdiction, it may apply to the Court to intervene and it shall be for the Court to decide on the application.

Whenever the construction of a convention to which Member States and persons (other than those concerned in the case as parties) is in question, the Registrar shall notify all such States and persons forthwith. Every State or person so notified has the right to intervene in the proceedings; but if the right is exercised, the construction given by the judgment will be equally binding on all parties. Article XXIV also provides for nationals of contracting states to be allowed to appear before the court in its original jurisdiction. That Article provides that:

Nationals of a Contracting Party may, with the special leave of the Court, be allowed to appear as parties in proceedings before the Court where:

- (a) The Court has determined in any particular case that the Treaty intended that a right conferred by or under the Treaty on a Contracting Party shall enure to the benefit of such persons directly; and
- (b) The persons concerned have established that such persons have been prejudiced in respect of the enjoyment of the benefit mentioned in sub-para (a) of this Article; and
- (c) The Contracting Party entitled to espouse the claim in proceedings before the Court has:
  - (i) Omitted or declined to espouse the claim, or
  - (ii) Expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party so entitled; and
- (d) The Court has found that the interest of justice requires that the persons be allowed to espouse the claim.

It seems to me that these latter provisions are of particular significance in relation to the issue of Intellectual Property Rights. All the members of the CARICOM and member states of the Court have, as far as I am aware acceded to the WTO and TRIPS Agreements. All have in the recent years been directing consistent and focussed attention on the economic benefits to be derived from the protection and exploitation of intellectual property rights of their citizens. To the extent that all the State Parties of the Court are also members of the WTO and subscribers to the TRIPS Agreement, under the terms of the CCJ Agreement, any rights which may be at stake in any action before the CCJ, are to be protected pursuant to the rules of those institutions consistent with the principles of International Law. What is more, any state party and indeed it would seem any natural person, who fears that a right conferred under those institutions is threatened has a right to be heard in any such action.<sup>10</sup> By the same token, as noted en passant above, having been allowed to participate in any such action, they are then going to be bound by any decision at which the Court may arrive.

I should also note in passing, that in or around 1997 or 1998, I took part in a UNDP funded survey of the attempts in the English Speaking Caribbean of what the respective territories were doing in relation to updating their Intellectual Property legislation to ensure TRIPS compliance. It was found that all the countries surveyed, were making every effort to make their domestic legislation TRIPS compliant, and had in fact updated and or otherwise modernised their legislation, which in many cases dated from the Nineteenth Century. It was also found that they were all engaged in establishing Intellectual Property Offices and promoting public education programmes to sensitise the populace to the importance of those rights.

If one needs to be convinced as to the seriousness with which the member states of CARICOM have been viewing Intellectual Property Rights in the last decade or so, one has but to look at the Country Reports of the various country participants at the meeting organized by the World Intellectual

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<sup>10</sup> Article XVIII. Para 3

Property Organization in Paramaribo, Suriname, in June of 2002. Those reports all indicate that the member states have all been actively pursuing the efforts at promoting the protection of those rights. Thus, for example, Jamaica passed a new Copyright Act in 1993 and has had two substantive amendments to the Act since then; has passed new Trade Mark and Service Mark Legislation; has introduced legislation dealing with Geographical indicators; is in the process of updating its patent legislation and has set up an Intellectual Property Office to administer its Intellectual Property Laws and rights given thereunder.

The Court has, as well, an Appellate Jurisdiction, as the final court of appeal from the national courts of the subscribing parties.<sup>11</sup> Pursuant to the terms of Article XXV, the Appellate Jurisdiction of the CCJ will either be limited by the CCJ Agreement or the Constitutions of the Contracting Party from which the appeal arises; or the right to commence such appeal may be given by the domestic law of a Contracting Party, and appeals may lie to the CCJ either as of right, by leave of the Court of Appeal of the respective Contracting Party, or with the special leave of the CCJ from any decision of the Supreme Court or Court of Appeal of the respective Contracting Party. Appeals will lie as of right in any civil case in which the amount at stake is in excess of Twenty-Five Thousand Eastern Caribbean Dollars (EC\$25,000.00), or where the appeal involves directly or indirectly a claim or a question respecting property or a right of the aforesaid value. I would hazard a guess that there would be few cases involving the claim to rights in Intellectual Property which would not qualify for hearing as of right by the CCJ. I envisage that most appeals to that body will lie as of right, for the stakes are likely to be large.

As the CSME becomes more of a single economic space, the potential for suits across national borders on the issue of intellectual property will undoubtedly increase. For it is in the nature of the integration process that goods and services will move more freely between the member states. There is a well-known penchant among performing artists in our region to copy the

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<sup>11</sup> Part 111 Article XXV.

works of others, to make minor changes and then to put it out as their own composition. There is also a thriving industry that is involved in compiling recordings of various artists and putting them together in either audiotapes or compact discs. There are also numerous promoters of fetes, who feel no compunction in using the music of artistes without compensating them for their rights in the works they use.

Already, in my own court in Jamaica, I have seen an increase of actions in relation to Intellectual Property. I have had two cases dealing with injunctions to prevent the holding of major "Carnival Fetes", where the promoters had failed to make the appropriate arrangement with the agency representing the performing artistes (JACAP). I believe that in Trinidad also, in 2003, there was for a while, a fear that major Carnival concerts may have had to be cancelled because of the concern over the breach of rights of artistes. I have also had suits in relation to breaches of trade marks where the destruction of counterfeit products has been ordered. Interestingly, in these latter cases, the claimants were overseas companies, in one case Italian, while the infringers were local Jamaican companies. Now it seems clear that in this new era of heightened awareness about Intellectual Property, the nationals of the CSME will be more willing, able and indeed anxious to protect their rights. What I found particularly interesting was that the defendants in each of the trade mark cases, acknowledged that they had been duped and cooperated fully in the progress of the suit through the courts

Notwithstanding what jurisdiction has been placed in the hands of the CCJ however, it would be of no use if there were not provisions to ensure the enforcement of its decisions, It is, after all, this which will give effect to the principle enunciated in the preamble, referred to above, for the need to realize certainty in the legal and investment environment. Thus the Agreement provides:

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 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.

(b) The Court has power to make any order for the purpose of securing the attendance of any person, the discovery or production of any document, or the investigation or punishment of any contempt of court that any superior court of a Contracting Party has power to make as respects the area within its jurisdiction.<sup>12</sup>

The importance of the provisions which give exclusive jurisdiction to the CCJ (Article XII) or allow for mandatory referral from municipal courts to the CCJ once the condition adverted to is fulfilled (Article XIV), (the municipal court considers that a decision on the question is necessary to enable it to deliver judgment) cannot be overstated within the context of the acknowledged role of the Court to provide certainty and stability in the legal environment. Further in this respect, the fact that the Members are also parties to the TRIPS, and the Court in determining the rights of a person or party must have regard to the obligations undertaken thereunder in applying International Law, adds to the capacity to ensure enforceability and thus certainty. Thus, for example, the principle of “National Treatment” which is mandated by the TRIPS Agreement,<sup>13</sup> must find expression in any suit between a songwriter from Jamaica, and a Trinidadian artist who has made a “cover” of the song written by the Jamaican. Moreover, that Agreement also provides:

With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member:

- a) Deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property;

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<sup>12</sup> Article XXVI

<sup>13</sup> Article 3.1 of the TRIPS Agreement

There are some other exceptions but the provision cited should make it clear that in applying international law, the Court will often be required to take cognisance of other agreements to which the Members subscribe. In addition, TRIPS permits judicial authorities to “order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed”<sup>14</sup>. It would seem to be correct to conclude that wherever the Court is called upon to make a determination in relation to intellectual property rights, it will be able to call in aid all the other enforcement provisions which are allowed under the TRIPS, at least to the extent that the person seeking to vindicate his rights, and the person against whom he seeks enforcement, are nationals of states That have acceded to that Agreement.

It is clear that the member states are committed to ensuring the enforceability of the decisions of the CCJ, and the fact that they have undertaken a treaty obligation in this regard would seem to reflect that determination. Moreover, the fact that the jurisdiction of the Court is exclusive in relation to those matters which it hears at the original level and its Appellate jurisdiction is final will undoubtedly contribute to certainty and uniformity, and consequently enforceability in the area of Intellectual Property. This is reinforced by the fact that, contrary to the usual practice in International Law, the provision in Article 221 of the Revised Treaty of Chaguaramas, which mandates that the decisions of the Court are subject to the doctrine of *stare decisis*, is reflected in the Agreement establishing the Court.<sup>15</sup>

In light of the observations above, I believe that the conclusions reached by Pollard<sup>16</sup>, are appropriate and I adopt them here. “The role of the CCJ in ensuring the efficient operation of the CSME cannot be denied. In the absence of this institution to pronounce authoritatively and definitively on the rights and obligations of Member States of the Community and their nationals,

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<sup>14</sup> Article 46 of the TRIPS Agreement.

<sup>15</sup> Article XXII

<sup>16</sup> See the article referred to at note 1 above

rights may tend to become illusory and obligations vacuous commitments. An integration regime comprising an association of Sovereign States requires an institution like the Caribbean Court of Justice to assist the justice sector in the delivery of services expected of the sector in any progressive, stable national environment". In its role as the enforcer of the rights of the owners of intellectual property, the role of the Court is not only crucial, but indispensable. Indeed, it may be no overstatement to say that the very existence of a Caribbean Single Market and Economy may have been rendered impossible without a Caribbean Court of Justice with the jurisdictional boundaries afforded this Court.

I foresee the timely unfolding of a truly Caribbean Jurisprudence, unique to the people of the Caribbean and fully reflective of their hopes and aspirations.

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ROY K. ANDERSON  
Judge, Supreme Court of Jamaica