The Legal Impact of the CCJ on Fostering International Trade and Harnessing Regional IPR

Opening Remarks By:

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Good morning. I am very pleased and honoured to be here on this second day of our conference: Establishment of the Caribbean Court of Justice: The Effect on IP and International Trade.

I wish to express thanks to both the International Intellectual Property Institute and USPTO, as well as to the Government of Barbados, Sir Davis Simmons and Sir Dennis Byron, for inviting me here.

Let me briefly introduce the speakers of this first panel - "The Legal Impact of the CCJ on Fostering International Trade and Harnessing Regional IPR", and then say a few words myself.

The topic of this panel is quite ambitious: The Legal Impact of the CCJ on Fostering International Trade and Harnessing Regional IPR. Obviously, much of the discussion yesterday was directly relevant to this subject. It involves, in some ways, a crystal ball gazing exercise. As Peter Fowler said yesterday, if we were all to return here in some 20-25 years, we would be able to assess, clearly, the significant legal impacts the CCJ will have had on Trade and IP?

There is a famous line, the original source of which is unclear, but some commentators attribute it to a Hollywood move which came out 1989, "If you build it, they will come". Now this quote was picked up as a mantra by an entire generation of companies who wanted to build website based businesses during the "com" boom, and a number of those companies are not with us today. However, when thinking about fostering trade and IP, I think we can consider this quote to the more relevant as we consider the establishment of the CCJ and how it will attract important cases and establish precedents for the region, and perhaps think historically about the significant impact on Trade, IP and development that — as Commissioner Lehman called it — "the rule of law" has had.

We can go back as far as the 12th century, when Henry II, King of England created a unified system of “common” law throughout the country, there by harmonizing the law by elevating local customs to the national level and eliminating arbitrary remedies. This brought forth, as a number of the speakers yesterday emphasised, legal consistency and predictability of the rule of law, which was fundamental even then to the development of trade.

Next, as early as the 15th century, the system of equity evolved, administered by Courts of Chancery, and so equity and the law grew up together. More recently, as we heard yesterday, common law and civil law traditions have become “intermingled” in the living development of the law in certain jurisdictions. This is quite appropriately the foundation upon which the CCJ can now establish itself and build its own body of precedents for the future of the Caribbean region and the CSME. As I said earlier, “if you build it, they will come.”

Now we can ask, how is this historical context, and emphasis on the rule of law and role of the courts, truly relevant today to “fostering international trade and harnessing regional IPR?” Again, we may be back to a crystal-ball gazing exercise, but I want to mention a few specific examples from my own experience, a career in which I have focused very significantly on the design, implementation and active use of a number of dispute settlement systems in commercial, international and IP contexts.

First, let me refer again to English law and the role of English courts. About one year ago, I was involved in negotiating a joint venture between a Lebanese broadcast company and an Egyptian newspaper, for the establishment of a new broadcast news network for the Arabic speaking world, called LBC. Why was I involved? For two reasons. First, because the core of this transaction involved cross-licensing of IP rights between the two parties. Secondly, because the company that was established as the corporate vehicle for the joint venture was to be an English company, located in London and subject to English law, and to the exclusive jurisdiction of the English courts in the case of a dispute.

Here we see, in practice, an example of how a strong and true legal tradition, the English law, harnessed - in this case in the UK - to assist the two joint venture partners to accomplish their objective. Of course, it is in some ways unfortunate that they found it necessary to come to London, away from their own countries and legal system, in order to achieve the required legal certainty and predictability. Had there been a well respected CCJ, type court in the region, would the entire approach have been different?

Now, let me move quickly to a second example, in a completely different sphere. In 1998, I was a Senior Legal Officer and Head of the Electronic Commerce Law Section of the World Intellectual Property Organization. People at that time were beginning to use domain names, such as <www.IIPI.org> or www.caribbeancourtofjustice.org for important trade and commercial purposes, as well as other purposes.

There was a conflict between the pre-existing rights of many trademark owners, and those who were now actively requesting domain names - in many instances, requesting the names of TNI owners. WIPO was called upon to address this problem. We issued a report, the WIPO Internet

Domain Name Process Report, in which we recommended a new dispute settlement system, specifically for disputes involving Domain Names and Trademarks.

This was the birth of the so-called UDRP, the Uniform Domain Name Dispute Resolution Policy.

What does this have to do with the CCJ? Well the UDRP established a single, international forum of dispute resolution for these conflicts. At the time we did it, there was much discussion about whether anyone would use it. All of the stakeholders involved in the debate expressed skepticism about a new dispute settlement forum and whether it could have a real impact upon the problem. Would it have an impact on this area, which was a new channel for international trade and development of IP —the Internet?

The answer? Absolutely yes. Since 1999, there have now been more than 9000 UDRP cases covering some 15,500 DNs. Domain name registration has grown during this period to more than 30 million domain names. Many communities have developed their own UDRP-similar dispute settlement systems. The overall impact of this dispute settlement system on the Internet and on proper naming, and therefore on trade and IP, must be clearly recognised.

Now my third example, The European Court of Justice established in 1958, and in the EU Court of First Instances, established in 1988. I want to use an example to show specifically how that court is facilitating a harmonized view of IP within the EU. Just as a few of the speakers suggested yesterday, the role of this court and its impact in relation to EU intellectual property rights, is an ongoing, important and still developing phenomenon.

One of the ways in which this court exercises its appellate jurisdiction is as a court of appeal for the EU Court of First Instance. The Court of First Instance, in turn, can hear appeals from the European Trademark Office, also known as OHIM, when the registration of a trademark is refused.

In July 1999, the OHIM refused to register a trademark, “BABY-DRY” because it was considered by the trademark office to be non-distinctive. The Court of First Instance agreed with this decision, finding that the trademark was merely descriptive and nondistinctive — devoid of distinctive character. However, on appeal, the ECJ ruled that the phrase was registrable as a trademark and proceeded to define a new standard for “distinctiveness” in the EU. Now, the OHIM and all of the courts of the Member States of the EU will have to re-examine their approach to this basic issue of distinctiveness in order to qualify for trademark registration. The impact will be an overall increase in the cohesive approach on this important trademark issue.

Thus, this is a specific example of how an appellate court can influence the development of international trade, IP and exercise a harmonizing influence in a regional context. The CCJ, through prudent adjudication of the disputes before it, can do the same in the future for this region.

Finally, I want to comment on international arbitration in relation to the CCJ, and drawn on the comments of Commissioner Lehman and Mr Archibald QC.

I note the potential that both of these speakers emphasised yesterday. Article XII of the CCJ Agreement provides that Each Contracting Party shall "encourage and facilitate the use of arbitration and other means of ADR for the settlement of international commercial disputes". Article 223 of the Treaty of Chaguaramus also refers to Member States, encouraging use of arbitration, and in Sections 2 - 3 suggests that Member States must implement appropriate procedures in legislation, and implementing the 1958 New York Convention will be deemed to comply with this requirement.

Now, we heard yesterday that England is a centre for international arbitration. A better set of examples, for purposes of this region, might be Switzerland and Stockholm, Sweden, both of which have successfully established themselves as centres for international arbitration.

But one point under English law that I wanted to comment on is Art 69 of the 1996 UK Arbitration Act. For an arbitrator whose judicial seat is London, there can be an appeal on points of law to the High Court. This could also serve as an interesting model for appellate jurisdiction to the CCJ. For those arbitrations sited in the region, one can consider a regional arbitration law, with final recourse to the CCJ. A long-term view in this area is appropriate, however, there is no reason why the CCJ and the regional approach it fosters cannot be the basis for promoting the Caribbean as a hub for international commercial arbitration.

To conclude, the important role of a stable legal system, as well as a sound regional court establishing precedents that carry a harmonizing impact, cannot be overemphasized.

Thank you, and I will now turn to our next speaker on the panel.