SUPRANATIONALITY AND REGIONAL INTEGRATION COURTS

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Sovereignty and Supranationality

An analysis of the status of regional integration courts as supranational organizations must take as its point of departure the allocative disposition of competences in international law between these collectivities and their constituent political entities, as well as the resulting impact on their autonomy of decision-making on important issues of regional and national policy. Such an analysis would also appear to require a credible and lucid determination of the essential attributes of sovereignty and supranational as international juridical constructs, since, in the ultimate analysis; their interface determines the allocative disposition and residuum of competences among the principal actors.

Sovereignty, in the present context, attests to the totality of rights, powers and privileges which international law, and in particular, customary international law, recognizes a state as entitled to exercise in relation to a defined area or territory, including its superjacent airspace, and the persons, assets and resources therein, subject to compliance with the obligations correlative to the exercise of those powers, rights and privileges. The jurisdiction of the state also extends to ships and persons bearing its nationality wherever they may be, to the continental shelf and exclusive economic zone adjacent to the territorial seas of states and to the resources thereof in respect of which the coastal state is recognized as having sovereign rights of exploration and exploitation. As an international constitutional law doctrine, sovereignty does not involve the unfettered employment of competences by the state, but is constrained by applicable rules of international law, especially those set out in the United Nations Charter, by which the legality of state acts is determined. Despite the foregoing submissions, however, limitations on the sovereignty of states are not to be lightly presumed but must be definitively established in every case by reference to applicable norms of international law. For example, the provisions of the United Nations Charter contain various restrictions on the sovereign competence of States and which were voluntarily assumed by them. Consider in this context the provisions of Chapter VII of the Charter.

1 Among the better-known regional integration courts are the European Court of Justice (ECJ), the Court of First Instance (CFI), the Central American Court of Justice, the Court of Justice of the Andean Community, the Court of the European Free Trade Association, and the Court of Justice of the Common Market for Eastern and Southern Africa.
4 Contrast in this context, the Hobbesian and Austinian concepts of sovereignty in municipal law. For example, see G. SABINE, History of Political Theory 4th ed. Lyden Press, Illinois 1973 pp. 433-4 and 620.
5 See, Starke’s International Law, op. cit., p. 91.
6 See, for example the Lotus Case, PCIJ, Series A, No. 10 (1927).
7 For example, Article 51 of the Charter is widely construed as imposing restrictions on the employment of force except in self-defense to an armed attack. In this connection, it
Supranationality, on the other hand, speaks to voluntary derogations of sovereignty and to the competence of a collectivity to undertake sovereign acts, such as to make laws with direct effect for persons, natural and juridical, within the territorial jurisdiction of constituent state entities, without confirmation or promulgation by the State. The status of supranationality, in effect, is perceived to require in the ordinary course of events, the state in relation to which this competence is exercised voluntarily surrendering certain attributes of statehood or sovereignty to the relevant supranational entity. Of course, exceptionally, supranationality may be a function of coercion where, for example, a conquering state legitimately employing military coercion effects a transfer of sovereignty from the vanquished state. The classic examples of supranational jurisdiction, however, are to be found in the treaties establishing the European Coal and Steel Community (ECSC) and the Economic Community, now incorporated in the European Union since the Treaty of Maastricht. In the characterization of the European Court of Justice, “by contrast with ordinary international treaties, the EEC treaty has created its own legal system which…. became an integral part of the legal systems of the Member States and which their courts are bound to apply.” By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign rights… and have thus created a body of law which binds both nationals and themselves… It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed without being deprived of the character of Community Law and without the legal basis of the Community itself being called into question. The transfer by the States from their domestic legal system to the Community’s legal system of the rights and obligations arising under the Treaty, carries with it a permanent limitation of their sovereign rights against which a subsequent unilateral act incompatible with the concept of the community cannot prevail”.

The European Court of Justice, in determining that the European Community had established a novel corpus of law, distinct from national law or traditional international law as is generally known, found that the states of the European Community had voluntarily transferred attributes of their sovereignty to the collectivity; had established a legal order separate and apart from that of the

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9 See, for example, The Treaty on Political Union adopted by the Heads of State and Government of the Community of 10 December 1972.
10 See, for example, Articles 189-92 which address the legal incidence of regulations, directives, decisions, recommendations for Member States and private entities within their jurisdiction.
11 Costa v en el No. 6/64, 1964 CMLR 425.
Member States; had concurred in Community law having direct applicability for persons and bodies in the jurisdiction of the Member States and submitted to the primacy of Community law which could not be revoked or amended by national law of the Member States. In short, these features of Community law particularized the European Community as a supranational entity.\textsuperscript{12} Accepting the validity of these findings of the European Court of Justice, it does appear to be in the nature of an ineluctable inference that collectivities of states, which are wanting in one or more of these attributes, would not qualify for the status of a supranational entity.\textsuperscript{13} Postulated in other terms, whereas an essential attribute of sovereignty, in the present submission, is the inherent faculty to compromise it to the extent determined by the sovereign power,\textsuperscript{14} supranationality, in the ordinary course of events, appears to require a voluntary surrender of sovereign powers to an authority other than the conferring entity.

**Supranationality and the European Court of Justice**

And, it is against this background that an attempt will be made to determine the extent, if any, to which one or another regional court, and, in particular, the Caribbean Court of Justice, enjoys supranational jurisdiction in relation to the state entities participating in the regional integration movements concerned. In the case of the European Court of Justice and the European Court of First Instance\textsuperscript{15} established to assist the European Court of Justice in the performance of its duties, these institutions constitute an integral part of the European Community to which the Contracting States have voluntarily surrendered attributes of statehood or sovereignty, the most important of which is the competence to make laws with direct effect for nationals and persons within their jurisdictions, that is, without the intervention of their national legislatures and the correlative right of private entities to have \textit{locus standi} in proceedings before the Court. To this extent therefore, the European Court of Justice, as an integral part of the European Community and one of its principal institutions\textsuperscript{16} may be perceived to enjoy, by association, attributes of supranationality. In one submission, “(t)he provisions relating to the Court clearly demonstrate the state

\textsuperscript{12} See, Dr. Klaus-Dieter BORCHARDT, \textit{The ABC of Community Law}, European Commission 2000 p. 25.

\textsuperscript{13} K.-D. BORCHARDT, \textit{id.}, pp. 23-24.


\textsuperscript{15} See Article 168a of the Treaty of Maastricht which reads: “A Court shall be attached to the Court of Justice with jurisdiction to hear and determine at first instance, subject to a right of appeal to the Court of Justice on points of law only and in accordance with the considerations laid down by the statute, certain classes of action or proceedings defined in accordance with the conditions laid down in paragraph 2. The Court of First Instance shall now be competent to hear and determine questions referred for a preliminary ruling under Article 177”.

\textsuperscript{16} See Part V of the Rome Treaty and in particular Section 4 entitled The Court of Justice.
like institutional structure of the Community”. In this context, it is important to bear in mind the role of the Court in interpreting and applying Community Law, and in so doing, upholding the primacy and supremacy of Community Law over national law which has been expressed to be incapable of revoking or amending Community law. Further, the referral procedure of the Court as set out in Article 177 of the Treaty of Rome and in Article 234 of the Treaty of Maastricht, has been perceived to be one of the most potent catalysts for economic and social cohesion in the European Union. This procedure allows the European Court of Justice to insinuate itself in important aspects of national law to ensure convergence of the applicable norms of national law and Community law. In the submission of Lord Denning MR in the P. Bulmer Ltd. v Bollinger S.A (1974), “when it comes to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back. Parliament has decreed that the Treaty is henceforward to be a part of our law. It is equal in force to any statute. Any rights or obligations created by the Treaty are to be given legal effect in England without more ado”. Consider in this context, too, the competence of the Court to determine its own jurisdiction and the direct applicability of Community law in national jurisdictions of the European Union.

The European Court of Justice has been accorded the power to impose sanctions for non-compliance with its determinations on both states and private entities within the contemplation of the European Union. Such a sanctioning process of prescription is generally perceived as partaking more of an attribute of statehood than a competence enjoyed by an association of state entities established by treaty. In this context, Article 171 of the Rome Treaty suggests itself for consideration since it expressly requires Members States to “take the necessary measures to comply with the judgments of the Court” when the Court finds that there was failure to fulfill a Community obligation in or under the Treaty. Similarly, the Court is competent to review the legality of acts of the Council and the Commission, and any natural or legal person may institute proceedings in the European Court of Justice against a decision of those bodies directly affecting the person aggrieved. And these bodies are required by the Treaty of Rome to take the measures necessary to comply with the judgments of the Court. The locus standi accorded private entities in proceedings before the Court, and which must be seen as an aberration from the normal requirements of traditional international law, appears to be a reasonable incident of European Union nationality. Such a right is extremely important for a finding of supranationality in the jurisdiction of the European Court of Justice where private

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18 See K-D BORCHARDT, op.cit., note 12, p. 24. This interpretation of the legal arrangements in the Community, if valid, would appear to have extremely important implications for the doctrine of Parliamentary supremacy in British Constitutional law.
19 Articles 173 and 175 of Rome Treaty 1957.
20 Article 176 of Rome Treaty 1957.
21 The definitive attributes of European citizenship are spelt out in Articles 8 – 8(e) of the Treaty of Maastricht (1972).
entities adversely affected by determinations of Community organs with direct effect are entitled to institute proceedings before the Court where those determinations impact negatively on their private interests.

An examination of the Agreement creating the Court of Justice of the Cartegena Agreement would also appear to support an inference that the Andean Court of Justice possesses some attributes of supranationality. Article 19 of the aforementioned Agreement, for example, empowers national and juridical persons to bring actions of nullification against decisions of the Commission or resolutions of the Junta, which are applicable to them and directly affect them. Like private entities in the European Union, private entities in the Andean Community have, as a matter of right, *locus standi* in proceedings before the Andean Court of Justice in respect of acts of central organs with direct effect.22

**The CCJ and Supranationality**

In evaluating the supranational attributes of the European Court of Justice, it was submitted that the status of this institution may be assimilated to that of the European Community of which it was an integral component and whose status as a supranational entity appears to be incontrovertible. However, it is important to point out that the perception of supranationality as it relates to the status of the European Court of Justice is more a function of the relevant provisions of the constituent instrument of the European Community than an axiomatic rationalisation of its status as an institution of the Community. Consider in this context the indeterminate juridical status of the European Parliament which is an institution of the Community but which cannot, by reason of its limited competence to make legally binding rules for State and private entities in their jurisdictions, be regarded as possessing attributes of supranationality. By analogous reasoning, it is proposed to examine the extent, if any, to which the Caribbean Court of Justice possesses any attributes of supranationality, either in its own right or as an integral part of the Caribbean Community.

In this connection, it is important to appreciate that the Caribbean Community including the Caricom Single Market and Economy, which was established by the Revised Treaty of Chaguaramas 2002, and has not yet formally entered into force but which is being provisionally applied pending its definitive entry into force, is an association of Sovereign States. This status of the Caribbean Community finds concrete juridical expression in the unanimity rule, which governs decision-making in the Conference of Heads of Government – the supreme policy-making organ of the institution.23

In the present submission, therefore, even if it could be established that the Caribbean Court of Justice is an integral component of the Caribbean Community, this judicial institution, by that very fact, could not be regarded as

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23 See Article 28 of the Revised Treaty Chaguaramas Establishing the Caribbean Community including the Caricom Single Market and Economy.
partaking of attributes of supranationality. In this connection, it does appear to be
an interesting juridical circumstance that although the provisions on disputes
settlement of the Revised Treaty identifies the Caribbean Court of Justice as the
principal instrument for the judicial settlement of disputes, the Court has not been
accorded the status of an organ of the Community. In point of fact, important
political considerations argued persuasively at the material time, against making
the Caribbean Court of Justice an organ of the Community thereby subjecting it to
the political direction and control of the Conference of Heads of Government, the
supreme policy-making organ. Consequently, the Agreement Establishing the
Caribbean Court of Justice is an autonomous judicial instrument, separate and
apart from the Revised Treaty and the institution it creates, though indispensable
for the efficient functioning of the Caricom Single Market and Economy, is not
organically linked to the Caribbean community.

However, by including in the disputes settlement provisions of the Revised
Treaty articles of the Agreement Establishing the Caribbean Court of Justice
relating to the original jurisdiction of the Court and which speak expressly to the
settlement of disputes concerning the interpretation and application of the
instrument, states parties have submitted to the compulsory and exclusive
jurisdiction of the Court ipso facto and without special agreement. The Revised
Treaty, moreover, does not accord the Court the status as an institution or organ
of the Caribbean community. This being the legal position, the question falling
to be answered is whether the Court, as an autonomous institution, possesses
attributes of supranationality in its own right. Resolution of this issue does appear
to require careful examination of the Court’s constituent instrument and the
relevant provisions of the Revised Treaty in order to determine its competence
and jurisdiction. Compare in this context the legal arrangements for other
regional integration courts like the Central American Court of Justice, the Court
of Justice of the Andean community, the Court of the European Free Trade
Association, the Court of Justice of the Common Market for Eastern and Southern
Africa.

Given the connotation which the term supranationality attracts, it would
appear that unless it can be established that the CCJ in the exercise of its
jurisdictions, appellate and original, creates new law with legally binding effect
on the Member States and entities public and private within their jurisdictions,
without the intervention of their national legislatures, it would be difficult if not
impossible, to infer attributes of supranationality in relation to the Court. In the
exercise of its appellate jurisdiction, the CCJ will be required to interpret and
apply the municipal law, both statute law and common law, of State parties to its

24 Consider in this context Article 211-223 of the Revised Treaty and Articles XII -
XXIV of the Agreement Establishing the Caribbean Court of Justice.
25 See, Article 216 of the Revised Treaty of Chaguaramas and Article XVI of the
Agreement Establishing the Caribbean Court of Justice.
26 See, Article 10 of the Revised Treaty which details the organs of the Caribbean
Community.
27 P. SANDS, R. MACKENZIE and Y. SHANY, Manual on International Courts and
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constituent instrument. And, in so doing, it must be perceived to be discharging a function essentially similar to that performed by the Judicial Committee of the Privy Council (JCPC), its predecessor. But the JCPC, like any other common law court is constrained to confine its jurisdiction to the declaration and application of the law and to resist the temptation to usurp the functions of the legislature by innovative forays into judicial legislation. Indeed, all common law courts are required to respect the primordial principle of separation or balance of powers and to represent themselves as conforming to this constitutional requirement. In the characterization of the World Court “when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules…” Nevertheless, it must be recognized that the law in any given polity aspires to regulate an extremely volatile and dynamic environment and that, in the ultimate analysis, the law, to be effective, is required to be as dynamic as the environment of its control.

However, it does appear to be the subject of an axiomatic postulate that the legislature, more often than not, lags behind technological, social, political and economic developments in the modern state and that the common law is persistently lethargic in encapsulating and reflecting, as it must, in the ultimate analysis, the collective social ethos of a people. In these circumstances, therefore, the legislature is invariably called upon to intervene, and the courts being required to determine issues of law without guidance from the legislature or the common law, are constrained to indulge a measure of innovation and inventiveness in arriving at determinations appearing to offer the most satisfactory resolution of the issue at hand. Advocates of judicial legislation like Cardozo and Greanawall discern gaps in the law which are, more often than not, a function of the lethargy of the legislature in keeping normative prescriptions current with social, economic and technological changes in the controlling environment. Such gaps the judiciary may be required to fill. To the extent, therefore, that the CCJ would be required in the exercise of its appellate jurisdiction to indulge a measure of judicial legislation, to this extent the Court may be perceived as exhibiting attributes of supranationality, given the requirement of Member States of the Community to enforce its decisions in their national jurisdictions.

The supranational attributes of the CCJ, in the exercise of its original jurisdiction, however, appear to be open to considerably less doubt and

28 North Sea Continental Shelf Case ICJ Reports, 1969, paragraph 88.
29 For an exposition on the relevance and sustainability of a social ethic in relation to its environment of control, See R. H. TAWNEY, Religion and the Rise of Capitalism, PETER SMITH, Lexington Ave, MA. (1930).
31 See Article XXVI of the Agreement Establishing the Caribbean Court of Justice.
speculation. In the first place, Article 217 (2) of the Revised Treaty and Article XVII (2) of the Agreement Establishing the Caribbean Court of Justice perceive the Court as competent to deliver judgments where there is obscurity in the law or where the parties to a matter before the Court agree that the Court may proceed ex aequo et bono to reach a determination. In effect, where the Court is unable to discern any applicable rules for a resolution of the case at hand because the law on the issue is either uncertain, obscure, or simply does not exist, the Court is required to apply general principles of law to render a judgment. In such an eventuality, the Court would be able to rely on various decisions of international tribunals in determining and applying general principles of law. In this connection it is also useful to remember that the International Law Commission of the United Nations also supports the view that international tribunals should eschew declining to reach a judgment on the ground of silence or obscurity of the law to be applied.

In terms of the practice of international tribunals in employing general principles of law, reference may be made to the Chorzow Factory (Indemnity) Case where the Permanent Court of International Justice applied the principles of res judicata and the entitlement of a person aggrieved by the breach of an engagement to be compensated. The general principles, which may be applied by international tribunals, are of both a substantive and evidentiary nature. In the Mavrommatis Palestine Concessions Case, the World Court referred to subrogation as a general principle while in the case of Diversion of Water from the River Meuse, the World Court, through Judge Manley Hudson, expressed the view that the equitable principles of the common law may be applied as general principles. It does appear to be the subject of an ineluctable inference, therefore, that when the Caribbean Court of Justice, as an international tribunal, in the exercise of its original jurisdiction, is constrained to resort to the application of general principles of law in order to avoid declining to make a determination on the ground of obscurity in the law or the absence of applicable rules to reach a determination on the instant issue, the Court may be seen to indulge a measure of judicial legislation. And to the extent that the national courts of States parties are required to enforce the judgments of the Caribbean Court of Justice like judgments of their superior courts to that extent it may be argued that the Caribbean Court of Justice is indulging a measure of supranationality.

Similarly, it may be submitted that the CCJ, in applying equitable principles to arrive at determinations, subject to the agreement of the parties in proceedings before the Court, is indulging a measure of supranationality inasmuch as its decisions create legally binding decisions for States and private natural and

32 See Article 217 (3) of the Revised Treaty and Article 17 (3) of the Agreement Establishing the Caribbean Court of Justice.
33 See Article II of the Draft Articles on Arbitral Procedure elaborated by the ILC.
34 (1928) PCIJ Series A, No. 17, p. 29.
35 See the Corfu Chemical Case, ICJ, 1949, 4 at p. 18.
36 (1924) PCIJ, Series A, No 2, p. 28.
38 See Article XXVI of the Agreement Establishing the Caribbean Court of Justice.
judicial entities of parties to the Agreement establishing the CCJ. For in so doing it is clear that the Court is not invariably applying settled and determinate rules of law but is engaging in a measure of judicial legislation in order to arrive at an equitable solution acceptable to the parties. In the North Sea Continental Shelf Case, the World Court considered certain equitable principles of Anglo American Common law and applied its own in order to arrive at a just solution. In this context, there is much judicial precedent for international courts reaching determinations ex aequo et bono even though the relevant precedents are not always convergent. Thus, in the Serbian Loans Case, the World Court declined to apply the equitable doctrine of estoppel\(^{39}\) one of the most potent and innovative principles of the common law contributed by British Courts to the corpus of general principles of law recognized by civilized States.\(^{40}\)

As applied by international tribunals, the equitable doctrine of estoppel is known as the doctrine of preclusion, which has been accepted and applied by the World Court in several of its judgments. Outstanding cases in point are the Case concerning the Temple of Preah Vihear,\(^{41}\) the Barcelona Traction (Preliminary Objections) Case\(^{42}\) and the North Sea Continental Shelf Case.\(^{43}\) Similarly, in the Eastern Greenland Case, the World Court held that a declaration by a foreign Minister on matters within his competence established a right by way of estoppel or preclusion.\(^{44}\) Consider in this context, too, the decision of the Arbitral Tribunal in the Argentina-Chile Boundary Arbitration Award (1966)\(^{45}\) where it was held that representations regarding the course of boundary lines created an estoppel constraining the interlocutor making the representation from disputing or challenging the legality of the course of those boundary lines. The competence of the Caribbean Court of Justice to render decisions ex aequo et bono is, in the present submission, a powerful tool of judicial legislation and reinforces the perception of a potential supranational competence attributable to the Caribbean Court of Justice.

Conclusion

Before definitively pronouncing on the status of the Caribbean Court of Justice as a supranational institution, however, it would be important to bear in mind that the European Court of Justice in reaching the determination that the constituent instrument of the European Union had established a new legal order, different from that normally created by an association of States established by treaty, had identified certain features among which was the faculty of permanence; in effect the relevant constituent instrument did not provide for a

\(^{39}\) (1929) PCIJ, Series A Nos. 20-21, pp. 38-39.
\(^{40}\) Consider in this context the decision of Lord Denning in Central London, Property Trust Ltd. v Hightrees House Ltd. (1947) KB, 130.
\(^{41}\) ICJ, 1962, p. 6.
\(^{42}\) ICJ, 1964, p. 6.
\(^{44}\) See, Eastern Greenland Case (1933) PCIJ Series A/B No. 53.
\(^{45}\) See, Argentina-Chile Boundary Arbitration Award (1966) 38 ILM 10.
duration. In the case of the Caribbean Court of Justice, however, parties to the Agreement are free to withdraw from the regime after five years.\textsuperscript{46} In this context, it should also be borne in mind that where international instruments accord private entities a right of \textit{locus standi} in proceedings before an international court, such a right appears to stand in axiomatic correlation to the competence of the relevant collectivity to establish norms with direct effect. This is the case both in the European Union and in the Andean Community as indicated above. Where private entities of the Caribbean Community are concerned, however, no such right is accorded in proceedings before the Caribbean Court of Justice. Consistently with traditional international law private entities aggrieved by non-compliance, or the threat thereof, with an obligation in or under the Revised Treaty or by the impairment or nullification of a right granted therein, must prosecute their claims through the competent state of nationality. However, the Caribbean Court of Justice, may, in its absolute discretion recognize a private entity as entitled to \textit{locus standi} in proceedings before it.\textsuperscript{47} Furthermore, although the Revised Treaty expressly incorporated the provisions of the Agreement Establishing the Caribbean Court of Justice as a part of its structure, there is no juridical nexus between the CCJ and the Caribbean Community as exists in the case of the European Court of Justice and the European Union. Viewed another way, the Caribbean Court of Justice unlike the ECJ, is not organically linked to the Caribbean Community and partaking of the attributes of a collectivity of States possessing supranationality as is the case with the ECJ. And there are sound historical reasons for this. Opposition to the Caribbean Court of Justice was virulent from the private Bar in the Caribbean Community and, in particular, the private Bar of Jamaica. This opposition was due in no small measure to suspicion of the political directorate whose attitude to the courts in one or two cases fuelled the perception that an attempt would be made to subject the Caribbean Court of Justice to political direction and control. The Revised Treaty of Chaguaramas, 2002, not unlike its predecessor, the Treaty of Chaguaramas 1973, installed the Conference of Heads of Government as the Supreme policy-making organ of the Community. In the premises, it was perceived that any attempt to make the Caribbean Court of Justice an organ of the Community would support the conviction about its control by and subordination to the regional political directorate. But, even if the Caribbean Court of Justice were perceived to be organically linked to the Caribbean Community, nothing in the legal arrangements of this institution reinforces the perception that it is a supranational body. In effect, a finding for a supranational competence for the Caribbean Court of Justice would have to be grounded on either the powers enjoyed by the Court in its own right and constituting a function of the legal arrangements agreed in its constituent instrument, or on its organic relationship with the Caribbean Community as a supranational body. However, it does appear that in both respects it cannot be persuasively submitted that the Caribbean Court of Justice is a supranational body, although it does appear to exhibit some

\textsuperscript{46} See Article XXXVII of the Agreement Establishing the Caribbean Court of Justice.
\textsuperscript{47} See, for example, Article 222 of the Revised Treaty and Article XXIV of the Agreement Establishing the Caribbean Court of Justice.
attributes of supranationality similar to those of its predecessor, the Judicial Committee of the Privy Council in the exercise of its appellate jurisdiction.