THE CARIBBEAN COURT OF JUSTICE IN REGIONAL ECONOMIC DEVELOPMENT

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1. Role of Law in National Economic Development

"……justice sectors in the Caribbean have been seen historically as users of resources, rather than as contributors to economic and social development."[1]

An understanding of the role of the proposed Caribbean Court of Justice in regional economic development would be greatly facilitated by adopting as the point of departure an examination of the role of the justice sector, in particular, and that of the law, generally, in the national economic development process. For present purposes, law will be defined as the corpus of societal norms which is established, interpreted, applied and enforced by the central authorities of the State in order to regulate the conduct of persons, both natural and juridical, in their normal interface with one another. The central authorities which are normally involved in the process described are the legislative assemblies, offices of the solicitors-general, offices of the attorneys-general, ministers of justice, the courts, directors of public prosecutions, commissioners of prisons and police, probation officers, legal aid clinics, associations of public and private law practitioners and other relevant legal and administrative institutions. Collectively, this assemblage of organisations and institutions is known as the Justice Sector.

A generally acceptable compendium of factors perceived to influence structured national, social and economic development will probably include an impressive body of determinants of a psychological, geopolitical, economic, environmental, legal and institutional nature of a varying mix, depending on the peculiar circumstances of the political entities examined. Of the factors identified above, conventional economic wisdom would probably ascribe a very low rating to the legal determinant. This disposition may be explained by reference to generally uniformed and misconceived perceptions enjoying wide currency in various professions, including the legal fraternity, about the role of law and the justice sector in the national development process. Similar perceptions of a more deep-seated nature are entertained by the political directorate of various jurisdictions in the Caribbean Community where resources committed to enhancement of the justice sector are not perceived as translating into positive political outcomes at election time. Within recent times, however, the role of law and the justice sector in national economic development has been accorded favorable recognition my multilateral financial institutions which are insisting on improvements in the justice sector as a catalyst for attracting and sustaining investments for the economic development of disadvantaged States.[2] It has been observed in this context that high direct and indirect costs of violence can deter both domestic and foreign investment and stimulate the migration of scarce skills. Similarly, improvements in both the criminal and civil justice systems not only enhance social stability but also impact positively on tourism, the domestic investment environment and economic development generally.

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[1] Challenges of Capacity Development: *Towards Sustainable Reforms of Caribbean Justice Sectors* – Volume 1: Policy Document. IDB/CGCED, May 2000 at p. 4.

[2] See, R. E. MESSICK, *Judicial Reform and Economic Development: A Survey of the issues*, THE WORLD BANK RESEARCH OBSERVER Vol. 14, No. 1 Feb. 1995. pp. 117.

Contrary to popular persuasion, however, the law and legal institutions play a determinative, though, oftentimes, unheralded role in national economic development. This is particularly the case in the Caribbean Community where the sole proprietor and family establishments continue to dominate and even impede economic activity. The vast majority of companies in the Community are private companies and most of them comprise family businesses. **Indeed, even some wholly owned Government companies and subsidiaries of large transnational corporations are registered as private entitled not to file accounts with the Registrar of Companies.**[3] Financial economists like Hayek recognise, on the one hand, the importance of legal institutions for the efficient functioning of financial markets and, on the other hand, the contribution of financial markets to national economic development. In this context, it is worthy of note that **the basic unit of any currency, legal tender, is a creature of law and underpins monetary and financial transactions of States in their international economic, monetary and financial transactions.**[4] The critical importance of the financial sector in national economic development and the contribution of legal norms in establishing the architecture of the sector may be inferred from the submissions of the United States delegation in the FTAA negotiations which read, **inter alia**, as follows:

"In the view of the United States, a review of FTAA rules affecting the financial sector and the development of specialized provisions for that sector as appropriate should be pursued in a distinct FTAA forum. The sensitivity of financial markets and institutions and the complexity of financial regulations warrant establishing one forum to ensure the development of clear coherent rules for this …"[5]

In support of the perception of the positive role of law in national economic development, it has been submitted that "(c)onsistent enforcement of understandable laws helps provide a stable environment where the long-term consequences of economic decisions can be reasonably predicted and assessed. An effective and efficient judiciary has the added benefit of making the legal system affordable and accessible for relatively small-sized enterprises and less privileged citizens, thereby achieving poverty and equity objectives as well as an increase in overall economic activity".[6] In point of fact, the most critical actors in national economic activity are creatures of the law - juridical entities, like the corporation, the limited liability company and the firm. These legal creations are, in large measure, responsible for much of the economic activity in the so-called

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[3] *Report of the Working Party on the Harmonisation of Company Law in the Caribbean Community*, p. 11. This state of affairs, in the present submission, is unacceptable and should be remedied by legislative means.

[4] For the nature and impact of legal institutions on monetary policy and financial transactions, see, generally, F.A. MANN, *The Legal Aspect of Money*, 1963, Clarendon Press.

[5] Non-paper circulated by the US Delegation during the FTAA negotiations on services.

[6] *Challenges of Capacity Development: Towards Sustainable Reforms of Caribbean Justice Sectors – Volume II: A Diagnostic Assessment* – IDB/CGCED, May 2000 at p. 1.

developed societies. In this connection, the innovative, defining and expansionist role of the joint stock / limited liability company in industrial and economic development in Britain and Europe during the nineteenth century must be accorded historical recognition, especially after the landmark decision of the House of Lords in *Salomon & Salomon (1893)* which definitively established the company as a legal entity separate and apart from its members. Prior to this legal fiction, industrial development was apt to be stymied by entrepreneurial exposure to risk, unmitigated bankruptcy and even imprisonment. Indeed, current international economic activity is controlled and determined by mega-corporations resulting from transborder mergers of transnational corporations whose global reach is at best disconcerting and whose individual resources, natural, human, technological and financial, more often than not, dwarf the national resources of most developing nations.[7] The role of the State as the primary determinant of national economic policy and as an important actor in international economic activity has been considerably undermined by the emergence of globalisation. On the other hand, transnational corporate power has been exponentially augmented by trade liberalisation and globalization as evidenced in the establishment of the World Trade Organisation. Fortunately, though perhaps, belatedly, recognition of the importance of these legal entities by regional experts has come from no less a source than the Governor of the Eastern Caribbean Central Bank who, in attempting to establish a vision for the Caribbean Community in the new millennium, perceptively submitted, **inter alia**:

The vehicle for the production of both goods and services is the firm (read company). In this region we have tended to put the major emphasis on creating the conditions for production instead on the actual unit of production. The dominant firm in the region has been the multinational corporation which has traditionally controlled the export sectors in both agriculture and mining.

The predominant domestic enterprises have been in the distribution, wholesale and retail sectors. The very size and structure of our economies dictate that for us to achieve sustainable growth, our activities must be export-oriented and flexible enough to adapt to a dynamic and competitive environment.

The Caribbean private sector and governments must meet the challenge of developing and supporting the kind of firm structures which are appropriate to our circumstances and which give us the capacity to insert ourselves into the global commodity chains which now have come to represent the locus of international production, distribution and consumption.

One would want to suggest that the import/export firm so prevalent in East Asia could be an appropriate vehicle for mobilising enterprise and production across the region and forming the link between the international economy and the region, and between small firms and the export economy.

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[7] See Duke E. POLLARD, *Law and Policy of Producers Association*, Clarendon Press, Oxford, 1982.

The strategy will have to concentrate on the institutional and incentive arrangements we put in place to capture international business. ***The legal and financial infrastructures are critical to the success of this enterprise; in these two areas, cutting edge legislation and financial products have to be important factors . . .***"[8]

Such cutting edge legislation must address issues in the areas of companies, banking, financial institutions, incentives, intellectual property, commerce, investment, bankruptcy, securities Such cutting edge legislation must address issues in the areas of companies, banking, financial institutions, incentives, intellectual property, commerce, investment, bankruptcy, securities, environment, international trade, competition, subsidies, dumping, economic integration to mention a few. Although conventional economists do not readily admit it, the law is the basic and essential catalyst for social and economic activity. In the modern State, itself a creature of law, nearly all regulated social and economic activities are conducted within parameters established by law. **However, because the role of law in national economic and social development is not readily appreciated by competent decision-makers or, if it is, it is not accorded due prominence in the national political agenda, resources normally allocated to the establishment and maintenance of legal infrastructure are exiguous compared to resources allocated to other sectors like health and education, which continue to command relatively high political and electoral profiles**.

Significantly, too, the role of law in the achievement and maintenance of macro-economic stability and, *ipso facto*, in national economic development is not readily understood by conventional economic gurus. An interesting example in this context is to be found in the area of currency values. Although it is reasonable to assume that economists worthy of the designation discern the importance of stable currency values in contributing to business efficiency and a healthy macro-economic environment in the modern State, it is not always the subject of a reasonable assumption, however, that economists recognise that the required stability and predictability are necessarily a function of legal certainty and the ability of the law to adapt to and determine the dynamics of the economic environment.[9]

Such a lack of appreciation is often compounded by the omission of some economists to distinguish between depreciation of a national currency - erosion of its purchasing power - and devaluation, which is a conscious governmental act *established by law to lower the par value of the currency*. Similarly, the law plays a determinative role in the establishment of interest rates, the independence of central banks, prudential management of financial institutions and markets, the control of money supply, access by governments to central banks' financial resources, permissibility and extent of budgetary deficits, the borrowing powers

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[8] Dwight VENNER, *The Challenges of Economic Policy and Circumstances in the 21st Century*" *in the Caribbean Community: Beyond Survival*, edited by Kenneth O. HALL; IAN RANDLE PUBLISHERS, Kingston, 2000 at p. 695.

[9] See generally, David JOHNSTON et al, *Cyber Law*, STODDART PUBLISHING CO. LTD., Toronto, 1997.

of national administrations and so on *ad nauseum*. All of the factors identified may contribute in varying degrees to macro-economic stability and, by the same token, the stability of investor expectations, and in the absence of which the investment climate is unlikely to be favourable. In short, unless the prudent investor finds himself in a position to predict outcomes with reasonable accuracy and certainty, he is normally disinclined to commit his investment. And in this context, outcome predictability is, more often than not, a function of legal certainty.

Furthermore, the organisation of monetary systems, both internationally and nationally, including the establishment of par values, exchange rates and even legal tender, is a function of legislative enactments. Indeed, money is less an economic than a legal concept and may be defined as a chattel, issued under the authority of law, denominated with reference to a specific unit of account and endowed with the status of legal tender for the complete satisfaction of a debt or other monetary obligation. And it needs no arguing that monetary systems are indispensable for the organisation of modern economies.[10]

At the international level, it is impossible to ignore the role of the law in determining developments in trade, finance, technology transfers, transportation, shipping, exploitation of the resources of ocean space and outer space, telecommunications, technological innovation and such like. Indeed, the extensive system of multilateralism established during and after the second world war dictates, in large measure, State interaction in the international community at present. This system was the outcome of various multilateral conferences designed to legislate conduct in the post-war years in virtually every spatial dimension, with a view to restoring and promoting international trade. Beginning with the Bretton Woods Agreements in 1943, these multilateral instruments comprehended the Chicago Convention (1944), the aborted Havana Charter (1948), the Washington Agreement (1955), the International Telecommunications Convention (1961), the Washington Convention (1947), the United Nations Convention (1948), the General Agreement on Tariffs and Trade (1947), the Geneva Conventions on the Law of the Sea (1958 and 1960), the International Convention for the Protection of Industrial Property (1958), the General Assembly Declaration of Legal Principles Governing Activities of States in the Exploration and Use of Outer Space (1963), the United Nations Convention on the Law of the Sea (1982) and culminated in the Marrakesh Agreement (1994) establishing the World Trade Organisation.[11] These multilateral regimes impact decisively on national decision-making and sometimes critically determine the direction and scope of national economic development.

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[10] For a comprehensive analysis of these issues, see F.A. MANN, *The Legal Aspect of Money*, Clarendon Press, 2nd Edition, 1963, Chapters I and II.

[11] For the impact of this system of multilateralism on the economics of developing countries, see Duke E.E. POLLARD, *Law and Policy of Producers' Associations*, Clarendon Press, 1982, pp. 18. et seq.

II. Role of the Justice Sector in National Economic Development

Although law and the justice sector enjoy a symbiotic relationship, they are, nevertheless, discrete sociological phenomena. Law, as a centrally determined normative body of prescriptions, speaks to the regulation of human intercourse; the justice sector addresses the institutional and organisational arrangements which give tangible expression to the establishment, interpretation, application and enforcement of legal norms. And, if, as demonstrated in the previous section, the role of law in national economic development is perceived as critical, the justice sector must be seen to play an equally determinative role in the process of economic and social change.

Efficiently functioning institutions of the justice sector, by complementing and facilitating various legislative initiatives which, collectively, define conventional morality and the prevailing social ethos of a people, operate to institutionalise good governance, which is being posited by the international donor community as a conditionality of financial assistance in the form of grants, concessional loans and even preferential trading arrangements. Consider in this context the EU/ACP Cotonou Agreement and the unfolding FTAA Agreement. Institutions of the justice sector, particularly, judicial institutions, by enhancing the delivery of services both in terms of swiftly and decisively punishing socially deviant behaviour, ensuring that contractual obligations are performed and protecting and enforcing property rights through the expeditious, fair and transparent settlement of disputes, contribute to a healthy business and investment climate. In short, an efficient and effective justice sector instills confidence in the general populace and engenders conditions of stability conducive to predicting the consequences of critical decision-making, particularly in the area of investments.

More importantly, many functions of institutions operating in the justice sector contribute in large measure to a reduction in the transaction costs of conducting business with probable beneficial impact on the national investment climate. Addressing the issue of the investment climate, Prime Minister Owen Arthur of Barbados observed: *The environment must therefore be created within which the Region's enterprises can be adequately capitalised and acquire the critical mass to compete at home and to compete internationally. Widespread encumbrances and the high cost of doing business in the Region must be systematically reduced".*[12] Much of this cost is due to inefficiencies in the operation of the justice sector. In this context, mention must be made of affordable access to justice and expeditious, efficacious disputes settlement procedures, especially in the area of commercial disputes. Similarly, by effectively protecting property rights from various forms of fraud and brigandry, the justice system relieves property owners of expenditure on protective services thereby reducing the costs of business transactions. Lower transaction costs impact positively on production costs resulting in an enhanced competitive

[12] *The Future of the Caribbean Community and Common Market: The Caribbean Community – Beyond Survival*. Edited by Kenneth O. HALL, IAN RANDLE PUBLISHERS, at p. 622.

position for businesses. Furthermore, stability in the social and macro-economic environment issuing from an effective and efficient justice sector lowers the incidence of investment risks and the price of capital to borrowers and entrepreneurs. In this context, too, it must be observed that social stability in the national environment coupled with plausible assurances of protection for life and limb of individuals, impacts favourably on the tourism industry which is the largest generator of foreign exchange and an important source of employment in the economies of most Member States of the Caribbean Community.

On the basis of the foregoing, it appears to be the subject of a reasonable inference supported by anecdotal evidence that much underdevelopment and economic stagnation in countries of the Caribbean Community may be traced to inadequate legal infrastructure and inefficiencies in the functioning of national justice sectors and underscores the need for reforms in the justice sector. *By raising the cost of conducting business, a poorly performing justice sector makes a nation's goods and services less competitive on international markets. At the extreme, inoperative justice sectors cannot prevent or control violence, thus diminishing existing physical capital and deterring new investment".*[13] Reforms in the justice sector, however, must go hand in hand with reforms dictated by developments associated with globalization and liberalization. In one submission: "*globalization and technological advancements have the potential to free most developing countries from the restrictions imposed by a small domestic market, low savings and limited access to world technology and credit .... The creation and development of mechanisms to support more market-oriented economic policies - such as regulatory agencies in support of private sector led growth and anti-trust, anti-dumping and fair trading commissions - are urgently needed in most developing countries. Globalisation has also intensified the link between justice sector services and development, and it has raised the costs associated with an ineffective and inefficient justice sector".*[14]

III. The Caribbean Court of Justice in Regional Economic Development

A credible evaluation of the role of the Caribbean Court of Justice in regional economic development must bear in mind two important factors. Firstly, the proposed Caribbean Court is intended to be a unique institution in international institutional relations. For not only is the Court designed to replace the Judicial Committee of the Privy Council (JCPC) as the highest appellate municipal court for the Member States of the Caribbean Community but it is also structured to be an international tribunal employing rules of international law in interpreting and applying the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy. In the exercise of its appellate jurisdiction, the Court will be the tribunal of last resort for participating Member States of the Community. As an international tribunal,

[13] *Challenges of Capacity Development: Towards Sustainable Reforms of Caribbean Justice Sectors*, Volume II. A Diagnostic Assessment, IDB/CGCED, May 2000 at p. 2.

[14] *Challenges of Capacity Development: Towards Sustainable Reforms of Caribbean Justice Sector*, Volume 1: Policy Document, IDB/CGCED, May 2000 at p. 2.

however, the Court will exercise an original but exclusive jurisdiction in respect of the interpretation and application of the Treaty. In the exercise of both jurisdictions, the Court is expected to play a critical role in ensuring legal certainty in the Community and CSME, in the absence of which there is unlikely to be the stability of expectations which investors require as a basis for predicting outcomes in respect of economic decisions, especially those relating to investments in one or another economic activity.

One or two policymakers in the Community at an earlier stage of the process had wondered whether retention of the JCPC in respect of civil suits might not inspire greater investor confidence with probable positive impact on the regional investment climate. In the present submission, however, three observations may be tendered for consideration in this context. Firstly, the JCPC rarely overturns decisions of regional courts on civil matters, thereby attesting to the generally high quality of regional judicial pronouncements. Secondly, foreign investors proposing to commit substantial investments in developing regions normally provide for disputes settlement procedures in the relevant investment instrument. Such procedures usually provide for the settlement of disputes by the International Centre for the Settlement of Investment Disputes (ICSID), an instrumentality of the World Bank (IBRD). Thirdly, the Agreement Establishing the Caribbean Court of Justice expressly provided for the promotion and establishment of alternative disputes settlement modes and this should provide a vehicle for the expeditious and satisfactory resolution of a wide range of commercial disputes.

Of no less importance is the fact that, despite its misleading nomenclature, the Caribbean Community remains, and was always intended to be, an association of sovereign States. Indeed, the principle of sovereign equality of States finds cogent legal expression in the unanimity rule prescribed for determinations on substantive issues in the highest decision-making organ of the Community - The Conference of Heads of Government.[15] The legal status of the Caribbean Community has important consequences for the functioning of its organs and the benefits intended to inure to nationals of Member States. And in all of this, it is worthwhile to remember that the express intention of competent decision-makers is the creation of a single economic space in the Community.

However, given that the Community consists of several sovereign jurisdictions, establishment of a single economic space would require the superimposition of collective economic decision-making on discrete national administrations, which, in the ultimate analysis, retain autonomous decision-making powers in areas of national economic development. Furthermore, the relevant integrating instruments setting out the rights and obligations of nationals of Member States have to be enacted into law by the national assemblies concerned before such rights and obligations can be enforced in national jurisdictions. One important consequence of this is that, in the absence of constraining legislation to this effect, national courts would be competent to

[15] See Article 29(1) of the Revised Treaty of Chaguaramas.

interpret and apply the relevant enabling legislation.

The rights inuring to nationals of Member States consist, in the first instance, of the right of establishment, the right to provide services and the right to move capital within the Community.[16] The right of establishment has been expressed to include the right to engage in any non-wage-earning activities of a commercial, industrial, agricultural, professional or artisanal nature, as well as the right to create and manage economic enterprises within the contemplation of the revised Treaty. In this connection, it is important to note that non-wage-earning activities means activities of an economic nature undertaken by self-employed persons or independent contractors. In order to facilitate the right of establishment, Member States will be required to eliminate all legislative prescriptions and administrative practices which impede the exercise of the right of establishment. Such constraining prescriptions and practices relate to the employment of managerial, technical and supervisory personnel in economic enterprises, the establishment by qualifying companies of agencies, branches or subsidiaries and conditions for entry of relevant personnel, their spouses and dependants.

One intractable outstanding issue relates to the question of other rights contingent on the right of establishment as defined and agreed. These so-called contingent rights relate to the terms of access by beneficiaries to social infrastructure of host States. Are the children of persons exercising the right of establishment entitled as of right to be accorded places in schools of their choice, assuming the satisfaction of non-discriminatory conditions? And if so, are such students entitled to be admitted on the same conditions as nationals in accordance with relevant provisions of the revised Treaty proscribing discrimination on the grounds of nationality? Similar considerations apply to access to health services and other social services. All such issues are to be addressed in a separate Protocol to be elaborated for the purpose.[17] Similar problems may be expected to arise in relation to the provision of services by professionals and approved categories of skilled workers. In this connection, however, Member States are expected to put in place *appropriate mechanisms to establish common standards to determine equivalency or to accord accreditation to diplomas, certificates and other evidence of qualification secured by nationals of other Member States".*[18] Both with respect to establishment and provision of services, Member States are prohibited from introducing new restrictions.

In all the situations contemplated for the removal of restrictions, competent Organs of the Community are required to establish agreed programmes for the removal of such restrictions. At the end of the time frames established for the removal of restrictions on the right of establishment, the provision of services and the movement of capital, it is envisaged that the most important factors of production would be free to move to any area of the Community where they can

[16] See, for example, Articles 32, 38 and 40 of the Revised Treaty of Chaguaramas signed in Nassau, The Bahamas on 5 July 2001.

[17] See Article 239 of the Revised Treaty of Chaguaramas.

[18] See Article 35(2) of the Revised Treaty.

be most productively and efficiently employed. The axiomatic assumption in all this is that skills will only be inclined to move with opportunities for beneficial employment and that persons entitled would not willingly become a charge on the exchequer of the host country. And in any event, Member States reserve the right to employ safeguard mechanisms in support of their balance of payments positions.[19] Moreover, disadvantaged countries, regions and sectors are allowed special derogations and concessions as appropriate to facilitate their participation in the CSME.

In terms of capital, Member States undertook to remove discriminatory restrictions on banking, insurance and other financial services. Similarly, Member States undertook not to introduce new restrictions on the movement of capital and payments connected therewith and on current payments and transfers.[20] In this context, the Council for Finance and Planning (COFAP) was tasked with establishing, in collaboration with the Committee of Central Bank Governors, a programme for the removal of the restrictions mentioned above. Member States also undertook to co-ordinate their foreign exchange policies in respect of the movement of capital between them and third States. However, given the position currently existing in the Community in the area of foreign exchange policies, with Barbados, Belize, The Bahamas and the OECS States maintaining fixed exchange rates and the rest floating currencies, it is difficult to understand the commitment to co-ordinated foreign exchange policies in the absence of an obligation to redirect national policies. In the long term it is proposed to move to a single currency for the Community based on voluntary compliance with agreed convergence criteria. Given, however, the temptation to break ranks especially where political imperatives prescribe such a course of action, it is submitted that nothing less than a legal obligation, backed by credible sanctions, to comply with the agreed convergence criteria, will facilitate the achievement of the stated objectives.

The rights identified above are some of the more important rights nationals of the Community will expect to enjoy in order to be persuaded that integration is indeed working. And for this to happen, there must exist somewhere in the Community credible mechanisms for authoritative and definitive identification and protection of such rights. And this is where the Caribbean Court of Justice must be seen to play an important role. As mentioned above, the municipal courts of all Member States, in the absence of legislative constraints, will be competent to interpret and apply the revised Treaty as enacted into local law. This would be no less than a prescription for legal uncertainty issuing from a variety of judicial pronouncements not required to be consonant with one another. Legal uncertainty in this context is likely to engender instability by frustrating the predictability of economic decisions and their consequences. Such an environment is likely to impact negatively on macro-economic stability and the investment climate in general. This will not augur well for the Caribbean Community comprising in large measure capital-importing countries.

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[19] See Articles 39 and 40 of the Revised Treaty.

[20] See Article 43(2), 47 and 48 of the Revised Treaty.

Viewed from this perspective, it would be possible to grasp the critical role of the proposed Caribbean Court of Justice in the CARICOM Single Market and Economy. As mentioned above, the status of the Community as an association of sovereign States, coupled with the requirement for every Member State to enact the revised Treaty into local law, subjects this instrument to as many interpretations as there are national jurisdictions, thereby constituting a built-in prescription for legal uncertainty. In order to avoid this eventuality, the political directorate of the Community determined to invest the Caribbean Court of Justice with compulsory and exclusive jurisdiction in respect of issues relating to the interpretation and application of the revised Treaty.[21] Consequently, where a municipal court in any national jurisdiction of a Member State party to the Agreement Establishing the Caribbean Court of Justice is seized of an issue concerning the interpretation and application of the revised Treaty, it will be required to stay proceedings on such an issue pending a pronouncement thereon by the Caribbean Court of Justice if the Court is satisfied that a determination of the CCJ is necessary to deliver a judgment.[22] In point of fact, Article 177 of the Rome Treaty prescribes a similar requirement for municipal courts of Member States of the European Community from which there is no appeal.[23] In this way, uniformity of applicable norms is ensured with positive effects on legal certainty and the stability of the investment climate.

As concerns the referral procedure, however, it is important to appreciate the absence of automaticity in the process as set out in Article 177 of the Rome Treaty and Article XIV of the Agreement Establishing the Caribbean Court of Justice. In both situations there is a large element of discretion residing in the national Courts as to which a ruling of the ECJ and the CCJ is necessary for the delivery of judgment. There is no requirement for referral unless the national courts so determine. But once a referral is made to the CCJ or the CCJ rules on the issue, this ruling establishes a legally binding determination for future similar cases. The situation, however, is different in the case of the ECJ which is not bound by precedent. And national courts may keep referring the same issue to the ECJ if there is any plausible expectation that a change in relevant circumstances

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[21] See Article 211 of the Revised Treaty.

[22] See Article 214 of the Revised Treaty which reads as follows: "Where a national court or tribunal of a Member State is seized of an issue whose resolution involves a question concerning the interpretation or application of this Treaty, the court or tribunal concerned shall, if it considers that a decision on the question is necessary to enable it to deliver judgment, refer the question to the Court for determination before delivering judgment".

[23] Article 177 of the Treaty of Rome reads as follows: "1. The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. 2. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considered that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. 3. Where any such question is raised in a case pending before the Court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice."

may prompt a revision of an earlier ruling by the European Court of Justice.[24]

A comparison of Article 177 of the Rome Treaty and Article 214 of the Revised Treaty would reveal some interesting differences. For whereas Article 177 (2) gives a court or tribunal, which is not a municipal court of last resort, a double discretion to refer an issue to the European Court of Justice, Article 214 of the Revised Treaty restricts the discretion to situations where the court or tribunal considers that a referral to the CCJ is "necessary to enable it to deliver judgment." In the case of judicial institutions of the European Union, there is a further discretion to refer or not to refer even where it is considered that a decision on a question is necessary to enable judgment to be delivered. In effect, ordinary municipal courts and tribunals are competent to rule on issues concerning the interpretation and application of the Treaty of Rome, and unless those determinations are appealed to court of last resort where referrals to the ECJ are a requirement, there may be various conflicting opinions on any given issue relating to the Treaty of Rome subsisting simultaneously. Such a situation, however, is unlikely to arise with the same degree of intensity in the Caribbean Community where the incidence of referrals, however, could inundate the Caribbean Court of Justice.

In addressing the application of Article 177 of the Rome Treaty Lord Denning established some useful guidelines. Firstly, in determining whether a decision on a question is necessary, the court or tribunal must conclude that it would be impossible to deliver judgment without such a decision. Secondly, where the same point has been decided by the European Court of Justice, the court of tribunal may act on the decision of the European Court or Justice without a referral. But, since the European Court is not governed by the rule of stare decesis a court or tribunal may still refer a question on which the court has ruled in the expectation that a material change of circumstance might induce the European Court of Justice to rule differently on the same question. Where, however, the court or tribunal is persuaded that the question in issue leaves little room for doubt, then the task is to apply the Treaty of Rome and not to seek an interpretation of it. Finally, before making a determination on the necessity to secure a decision on the question, the court or tribunal must establish the facts of the case.[25] Undoubtedly, similar considerations are likely to guide the courts of the Caribbean Community in construing and applying Article 214 of the Revised Treaty.

It is also important to bear in mind that the law to be applied by the Court in the exercise of its original jurisdiction is international law which is common to both civil law and common law jurisdictions.[26] This requirement, however, does

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[24] See Lord Denning, op.cit., p. 1235.
[25] See Lord Denning, op.cit., p. 1235.
[26] See Article 217 of the Revised Treaty.
[27] See paragraph 3 of Article 212 of the Revised Treaty.
[28] Contrast the determinations of the ECJ which "is not absolutely bound by its previous decisions" per Lord Denning in H. P. BULMER Ltd. v J. BOLLINGER SA (1974) 2 All ER at p. 1222.

not preclude the Court from reaching determinations *ex aequo et bono* where the parties to a dispute before the Court so agree.[27] Consequently, both Suriname and Haiti will have no problems in submitting to the jurisdiction of the Court in the exercise of its original jurisdiction. The fact that the jurisdiction of the Court in respect of those submitting thereto is both compulsory and exclusive contributes to uniformity in the applicable rules. This is enhanced by the binding nature of the Court's decisions for third parties. Thus Article 221 of the revised Treaty provides that decisions of the Caribbean Court of Justice constitute *stare decisis*.[28]

Consistently with traditional international law, only subjects of international law are normally accorded *locus standi* in proceedings before the Caribbean Court of Justice. In the premises, private entities or individuals aggrieved by a denial of rights to be accorded under the revised Treaty are required to have their claims espoused by their States of nationality in proceedings before the Court.[29] However, this requirement could result in a denial of access to justice when one party to a dispute is a Member State which declines to espouse the claim of its national. To pre-empt this eventuality, Article 222 of the revised Treaty provides for private entities to be accorded *locus standi* in proceedings before the Court with leave of the Court where the requirements of justice so prescribe.

Based on the foregoing, 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, 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. Indeed, despite its status as a supranational collectivity, the European Union still requires the European Court of Justice to inject legal certainty and provide social and economic cohesion in the operational environment. In the Caribbean Community, the Caribbean Court of Justice is expected to contribute no less.

[29] See D.E. POLLARD, *Law and Policy of Producers, Associations*, Clarendon Press, Oxford, 1982 p. 286 ff.