A COMMENTARY ON THE EARLY DECISIONS OF THE CARIBBEAN COURT OF JUSTICE IN ITS ORIGINAL JURISDICTION

I. INTRODUCTION

The Revised Treaty of Chaguaramas ('the RTC') is an attempt on the part of a group of Caribbean States to respond in a collective manner to the pressing challenges posed by the forces of globalization and liberalization. The RTC seeks, inter alia, to deepen regional economic integration through the establishment of a Caribbean Community ('CARICOM') including a CARICOM Single Market and Economy ('CSME'). The States in question—Antigua & Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St Kitts and Nevis, Saint Lucia, St Vincent and the Grenadines, Suriname and Trinidad & Tobago—are for the most part former British colonies that gained their independence in the 1960s and 1970s. The RTC signals yet another important step in the tortuous path taken by these Anglophone Caribbean States 'to avoid the looming threat of marginalization'[1] following the failure in 1962 of the West Indies Federation.[2] Significantly, this latest step is being taken side by side with the non English speaking civil law States of Haiti and Suriname thereby adding a new and interesting dimension to the integration process.

The provisions of the RTC are drawn from a variety of sources. Some of them, notably the articles on trade, are re-enactments with slight modifications of the original Treaty of Chaguaramas. Many of these provisions were in turn borrowed from the European Free Trade Agreement. Other provisions of the RTC, especially those involving the movement of goods and services, have been inspired by, if not borrowed from, similar provisions of the EU Treaty and the World Trade Organisation (WTO).

The task of interpreting the RTC falls squarely to the Caribbean Court of Justice ('the CCJ'). The CCJ itself is a unique experiment. The court is both a municipal and an international court. It has two broad jurisdictions. It is the final appellate court in civil and criminal cases for those CARICOM States[3] that opt to use it for such purpose in lieu of recourse to the London based Judicial Committee of the Privy Council. This article does not concern itself with this appellate jurisdiction of the court.

The CCJ is also the court that has compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the RTC.[4] In carrying out this latter role, judgments of the European Court of Justice and of other Community Courts and international tribunals may provide some guidance. Undoubtedly, however, the process of authoritatively expounding the Treaty,

[1] K Hall, *Re-Inventing CARICOM—The Road to a New Integration* (2nd edn, Ian Randle Publishers, Kingston, 2003).

[2] The West Indian federation was formed in 1958 and embraced the then colonies of Antigua and Barbuda, Barbados, Dominica, Grenada, Jamaica, Montserrat, the then St Kitts-Nevis-Anguilla, St Lucia, St Vincent and Trinidad and Tobago. The Federation was established by the British Caribbean Federation Act of 1956 with the aim of establishing a political union among its members. See CARICOM website http://www.caricom.org/jsp/community/west_indies_federation.jsp?menu=community accessed 15 April 2010.

[3] At the time of writing three States, namely, Barbados, Guyana, and Belize, recognize the CCJ as their final municipal court of appeal. The State of Belize actually acceded to the appellate jurisdiction of the Court from 1 June, 2010.

[4] See art 211 of the RTC.

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reconciling its provisions one with the other and filling the large and several gaps that occur in the document is one that must be carried out, as it were, from scratch. It is for the CCJ to make sense of the RTC in a way that is in keeping with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.[5] In doing so, the decisions of the CCJ create and develop an autochthonous CARICOM jurisprudence.

Prior to the handing down of the first judgment of the CCJ, that jurisprudence could have been conceived of as a blank canvass framed by the Treaty's provisions and set against the backdrop of rules of public international law. With each judgment the CCJ gives, its opinion makes an impression on that canvas. These initial judgments are of particular significance. They determine or portend how the jurisprudence will manifest itself, especially in those critical areas where clarity is sorely required. It is for this reason that, before the CCJ gave judgment in its first matter, an application by a private entity for special leave to appear as a party,[6] the court invited the Community and the Member States to make submissions on two highly contentious issues that arose for decision. Both of the issues went to the jurisdiction of the CCJ.[7] The court noted then[8] that to have determined those issues at the leave stage on the arguments only of the actual parties to the matter, would have had the consequence that the CCJ would be establishing a binding precedent for the Community and for all the Contracting Parties without having first afforded the latter an opportunity to make submissions on how those matters should be resolved.

Such a consequence would be normal and natural but the court obviously felt that in the circumstances it was prudent to invite the Contracting Parties and the Community to make submissions on these jurisdictional issues. It is not clear that this should be regarded as signaling a trend that jurisdictional matters would not be determined by the court at the special leave stage without first affording an opportunity to all Member States and the Community first to make their views known.[9] In another case, discussed later, the CCJ did not see it fit to invite Member States and the Community to make submissions in circumstances where jurisdictional issues came up even before a special leave hearing was convened.[10]

In this article, I wish to consider further these initial judgments of the CCJ in order to make some assessment of the manner in which the court has gone about fulfilling its role as the body charged with interpreting and applying the Treaty. The aim is to extrapolate from the cases the glimmering emergence of a picture of CARICOM jurisprudence as can be discerned at this point. But before this is done, it is appropriate to describe the implements the CCJ possesses to enable it to do its work including the institutional supports upon which the court rests.

The Member States Parties have given the CCJ ample tools and enormous discretion to make its mark on that unfolding roll of canvass. These may be found not only in the Treaty but also in the Agreement Establishing the Court ('the CCJ Agreement'), a prior

[5] See art 31 of the Vienna Convention on the Law of Treaties.

[6] Individuals and private entities require special leave from the court in order to commence proceedings directly before the court. This matter is addressed at length later.

[7] See Interim Order of the court dated 22 July, 2008 in the matter of *TCL v Guyana* CCJ Application No AR 1 of 2008.

[8] At para 7.

[9] At the substantive stage of proceedings the Community and the Member States always have the option of being heard. See The court's Original Jurisdiction Rules Part 10.3.

[10] See *Johnson v CARICAD* [2009] CCJ 3 (OJ) discussed later in this essay.

treaty entered into by the same States Parties that have implemented the RTC. The CCJ Agreement addresses both the appellate and original jurisdiction of the CCJ but as previously indicated the focus in this essay is only on those aspects that relate to the original jurisdiction.

In the first place, it is of some interest to note that the CCJ is not only mandated to interpret the RTC. The remit of the CCJ may also extend to the application of its provisions. The court has compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Treaty.[11] So as to ensure consistency and uniformity in the interpretation and application of the RTC national courts are obliged to refer to the CCJ for determination any question arising before them that concerns the interpretation or application of the Treaty.[12]

Significantly, the CCJ is *not* listed as an organ of the Community.[13] Article 12 of the RTC mandates the Conference of Heads of Government of Member States to be the supreme organ of the Community. Listing the court as an organ could have had the effect of compromising the independence of the CCJ by rendering it a subordinate body. Indeed, the measures taken by the Member States to secure and guarantee both the institutional independence of the CCJ as a corporate entity and the judicial independence of the judges are unparalleled.[14] They include the following:

– Appointment of an independent, reasonably broad-based and impartial Regional Judicial and Legal Services Commission ('the RJLSC') to select the Judges and senior staff of the court;[15]
– Selection of the President, other judges and senior staff of the court by a competitive, transparent and merit-based process;[16]

[11] See art 211(1) of the Revised Treaty. See also art XII(1) of the Agreement. The term 'exclusive' has to be viewed in context. The RTC also provides for a range of dispute settlement modes between States. See Professor A. R. Carnegie "How Exclusive is 'Exclusive' in Relation to the Original Jurisdiction of the Caribbean Court of Justice? A Consideration of Recent Developments" A Paper presented on November 25, 2009. Sourced at http://www.cavehill.uwi.edu/news/articles/nov2009/Conflicts_of_Jurisdiction.pdf

[12] Art 214 states: 'Where a national court or tribunal of a Member State is seised 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.' Art XIV is worded in identical manner.

[13] The Organs of the Community are set out in art 10 of the Revised Treaty. The absence of the court on the list is to be compared for example with art 7(1) of the COMESA treaty where the court of Justice there is declared to be an organ of the Common Market and art 6(1) of the ECOWAS treaty where the Community Court of Justice is declared to be an Institution of the Community.

[14] Notwithstanding these measures, in *Independent Jamaica Council for Human Rights (1998) Ltd and Others v. Marshall-Burnett and Another* [2005] *UKPC* 3 the Judicial Committee of the Privy Council, indicating that it had 'no interest of its own in the outcome' of the proceedings before it, struck down three Bills passed by the Jamaica legislature for the purpose of having civil and criminals appeals from Jamaica determined by the court in its appellate jurisdiction in lieu of those appeals being determined by the Judicial Committee on the ground that there was a risk that the governments of the Contracting States might amend the CCJ Agreement so as to weaken that court's independence.

[15] See art V of the CCJ Agreement.

[16] The positions are widely advertised and applications are received from individuals from many different Commonwealth States. The Commission ultimately interviews those shortlisted before making the final selection.

– The financial independence of the court being guaranteed through the unique mechanism of a trust endowed with monies obtained from the Caribbean Development Bank (CDB). These monies are being repaid to the CDB by regional States in a manner corresponding to their projected annual percentage contributions to the budget of the CCJ. The obligation to make repayment is premised solely on a State's ability to access the original jurisdiction of the court. The CCJ is therefore simultaneously guaranteed of its funding while not being required to interface with the States of the region on matters relating to the same;
– The requirement that the CCJ Agreement is incapable of amendment unless the proposed amendment is ratified by all CARICOM States;[17]
– The strengthening of the sustainability of the court by introducing stringent measures for any State that wishes to withdraw from the CCJ Agreement. Any such State must give three years' notice and the withdrawal cannot take effect before the expiry of five years after the notice has been received[18] (article XXXVII).

The CCJ itself has also been empowered to make, and has in fact made, a comprehensive set of rules to govern the exercise of its jurisdiction[19] and the CCJ Agreement, enacted into domestic law by the Member States,[20] has given these rules the force of law.[21]

Member States do not have an option as to whether they may accept the jurisdiction of the CCJ in any particular matter. The RTC provides that they recognize the jurisdiction of the CCJ as compulsory, *ipso facto* and without special agreement.[22] In the event of a dispute as to whether the CCJ has jurisdiction, the matter is to be determined by decision of the court itself.[23]

Although the CCJ must apply such rules of international law as may be applicable, no special or further direction is given to the court as to how it must go about approaching its interpretive task. The RTC specifically mandates that the court may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law[24] and, if the parties so agree, the court is entitled to decide a dispute *ex aequo et bono*.

The CCJ is required to give a single judgment.[25] There is no room for dissenting opinions. Judgments of the court constitute legally binding precedents for parties in proceedings before the court unless such judgments have been revised pursuant to the provisions of the Treaty.[26]

To date,[27] in its original jurisdiction, the CCJ has delivered seven reasoned opinions in what may be regarded fundamentally as three cases. Two of the judgments were given in respect of separate applications by the same private entity for leave to pursue

[17] Art XXXII of the Agreement.
[18] Art XXXVII of the Agreement.
[19] See art XXI of the Agreement and art 220 of the Revised Treaty. The Rules which have been made by the President in consultation with the Judges of the court are styled. The Caribbean Court of Justice (Original Jurisdiction) Rules 2006.
[20] See The Caribbean Court of Justice Act No 10 of 2004 Antigua and Barbuda; The Caribbean Court of Justice Act, Cap 117, Barbados; Act No 16 of 2004, Belize; Act No 23 of 2005, Commonwealth of Dominica; Act No 3 of 2005, Grenada; Act No 16 of 2004 Guyana; Act no 17 of 2005 Jamaica; Act No 7 of 2004, St Christopher & Nevis; Act No. 34 of 2003 Saint Lucia; Act No 32 of 2004 St Vincent and the Grenadines; Act No 22 of 2003 Suriname; Act No 8 of 2005 Republic of Trinidad and Tobago.
[21] See s 3 of the respective CCJ Acts.
[22] Art 216(1).
[23] See art 216(2).
[24] See art 217(2).
[25] See Part 3.4(4) of the Original Jurisdiction Rules.
[26] See art 221.
[27] July, 2010.

respectively claims against, in the one case, the State of Guyana, and in the other case, the Community, for alleged breaches of the RTC. The court subsequently heard these claims on their respective merits and gave separate judgments in respect of them. In the fifth judgment the court, on a preliminary point, struck out a claim brought by a dismissed employee against the Caribbean Centre for Development Administration (CARICAD), an Associate Institution of CARICOM. The last two judgments provide the concluding chapters to the case brought against the State of Guyana. In the one instance the court gave reasons for refusing an application for a variation of its earlier judgment in the case brought against Guyana ('the judgment against Guyana') or in the alternative a stay of execution of that judgment. And in the final judgment the court gave its opinion on a contempt of court application.

All of the cases filed to date have been instituted by private entities. This is hardly surprising. Although among themselves, judging from statements made in the Press from time to time, it is clear that the States do have ongoing disputes among themselves concerning the interpretation and application of the RTC, it is only natural that in a close knit community States would be reluctant to institute court proceedings against each other. Moreover, the RTC contains a raft of alternative measures that can be utilized to produce a non-litigious settlement of a dispute between States.[28] These measures include good offices,[29] mediation,[30] entering into consultations,[31] conciliation,[32] arbitration[33] and third party intervention.[34] While there is no obligation on States first to exhaust these modes of settlement for resolution of their disputes[35] the likelihood is that they will do and have been doing just that.

Apart from dealing with any referrals from national courts[36] or issuing advisory opinions,[37] the business of the CCJ is likely therefore to be consumed with applications by private entities. In this regard the court's early judgments have helped to clarify the role such entities may play in making the CSME work in an effective and efficient manner. Those judgments have also touched on a number of other important areas. They have for example gone some way towards demarcating the CCJ's jurisdictional boundaries. The court's approach to reconciling the tension between the much vaunted sovereignty of each Member State[38] on the one hand and the obligation of Member States faithfully to observe the Treaty and the rule of law on the other has also come up for consideration. These are some of the areas that shall be looked at in this essay. But first, it is in order to give a brief synopsis of the allegations made in the three cases brought before the CCJ to date.

[28] See arts 191–210.
[29] Art 191.
[30] Art 192.
[31] Art 193.
[32] Art 195–203.
[33] Art 204–207.
[34] Art 208.
[35] Art 188(4) specifically states that the use of any of these voluntary modes of dispute settlement is 'without prejudice to the exclusive and compulsory jurisdiction of the court in the interpretation and application of the treaty. . .'.
[36] See art 214.
[37] See art 212.
[38] CARICOM sometimes refers to itself as 'an Association of sovereign States'. The Rose Hall Declaration on 'Regional Governance And Integrated Development' adopted on the occasion of the 30th Anniversary of CARICOM at the 24th Meeting of the Conference of Heads of Government of CARICOM at Montego Bay, Jamaica 2–5 July, 2003 reaffirms, at A-1, that 'CARICOM is a Community of Sovereign States'. See also K Hall and M Chuck-A-Sang, 'Caricom Single Market and Economy: Challenges, Benefits, Prospects (Ian Randle, Kingston 2007) 27.

Trinidad Cement Limited ('TCL'), a company headquartered in Trinidad & Tobago, figured in two of the three cases that have come before the CCJ. In the first case,[39] TCL and its Guyana subsidiary, TCL Guyana Incorporated ('TGI'), instituted proceedings against the State of Guyana. The companies alleged (and Guyana did not dispute) that Guyana had suspended a tariff on non-CARICOM cement without the prior approval of COTED,[40] the CARICOM organ responsible for issuing the authority to suspend. In the second case,[41] TCL complained that COTED had wrongly authorized several Member States to suspend the tariff on cement. In the third case,[42] a dismissed employee of CARICAD instituted proceedings before the CCJ against her former employer and personally against its Executive Director.

The objective of this essay is not so much to examine the merits of the respective cases. Instead, from the judgments, one endeavours to extract and discuss certain principles which will likely guide the court in its determination of future cases that come before it.

II. THE ROLE OF PRIVATE ENTITIES AS QUALIFIED SUBJECTS OF THE RTC

A private entity has only qualified or conditional *direct* access to the CCJ.[43] *Linton v The Attorney General*,[44] a case recently decided by the Antigua and Barbuda municipal court, suggests that it is open to a private entity to institute a domestic action in a national court founded upon a perceived breach of the RTC. One suspects that *Linton* may not represent the last word on the matters discussed in the judgment given in that case. If in the course of trying a domestic action, however, it is determined by the trial court that resolution of the action involves a question concerning the interpretation or application of the Treaty, the domestic court 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.[45] At any rate, before any private entity can commence *directly* a claim before the CCJ it must first comply with article 222 of the RTC.

[39] [2009] CCJ 5 (OJ).

[40] The Conference on Trade and Economic Development (COTED) is established as an organ of the Community by art 15 of the RTC. Art 83 vests in COTED the responsibility for authorizing a suspension of the CET. Between meetings of COTED that authority may be exercised by the Secretary General.

[41] *Trinidad Cement Limited v The Caribbean Community* [2009] CCJ 2 (OJ).

[42] *Doreen Johnson v Caribbean Centre for Development Administration (CARICAD)* [2009] CCJ 3 (OJ).

[43] See art 222.

[44] Claim No ANUHCV2007/0354.

[45] See art 214. In *Linton v The Attorney General* Civil, the claimant sought relief on the domestic plane alleging, inter alia, that the State of Antigua & Barbuda had breached his rights under the treaty. In considering whether there were issues of interpretation or application of the RTC that should be referred to the court the judge held that since the treaty had not been incorporated into Antigua's domestic law by way of local legislation, a) the obligation to refer was not binding upon the local court and b) no question of interpretation or application of the RTC could properly arise. The court proceeded to find in favour of the applicant and to give him the relief he sought.

That Article, headed '*Locus Standi of Private Entities*', states:

> 'Persons, natural or juridical, 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 this Treaty intended that a right or benefit conferred by or under this Treaty on a Contracting Party shall enure to the benefit of such persons directly; and
> (b) the persons concerned have established that such persons have been prejudiced in respect of the enjoyment of the right or benefit mentioned in paragraph (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.'

Interestingly, the CCJ Agreement contains this same provision except that in the Agreement the relevant Article[46] begins with the words, 'Nationals of a Contracting Party may . . .'.

Given the introductory words of the relevant Article in the CCJ Agreement and bearing in mind that article 32 of the RTC lays down certain tests for meeting the definition of a 'national',[47] the question arose in the application for Special Leave brought by TCL and TGI against the State of Guyana[48] whether a private entity seeking to bring an action must first meet those tests laid out in article 32. It was not clear from the pleadings whether TCL had met or could meet those tests.

In resolving this and other related issues, the court spent some time discussing the treatment of private entities in international law generally and specifically under the RTC. The court recalled that the classic or traditional rule in customary international law was that States were regarded as subjects while individuals were regarded solely as objects of international law. The individual had little place, no rights in the international legal order.[49] The court, however, was mindful of the International Law Commission's observation that[50] . . .

> Today the situation has changed dramatically. The individual is the subject of many primary rules of international law, both under custom and treaty, which protect him at home, against his own Government, and abroad, against foreign Governments. This has been recognized by the International Court of Justice in the *La Grand*[51] and *Avena*[52] cases.

[46] Art XXIV.

[47] Art 32 in very general terms stipulates that a person shall be regarded as a national of a Member State if such person (i) is a citizen of that State (ii) has a connection with that State which entitles him to the benefits of citizenship; or (iii) is a company or other legal entity constituted in the Member State and which that State considers as belonging to it provided that the company is substantially owned (ie in excess of 50 per cent of the equity interest therein) and controlled by persons described in (i) and (ii).

[48] [2009] CCJ 1 (OJ).

[49] See for example: *Mavrommatis Palestine Concessions (Greece v UK*) PCIJ Rep 1924, Series A, No 2, 12.

[50] See Draft Articles on Diplomatic Protection with commentaries, 2006, art 1(3) International Law Commission's Commentaries on the Draft Articles on Diplomatic Protection.

[51] *La Grand* case *(Germany v United States of America)* [2001] ICJ Rep 466 paras 76–77.

[52] *Case concerning Avena and Other Mexican Nationals (Mexico v United States of America)* [2004] ICJ Rep 12 para 40.

The court examined the relevant articles of the Treaty in light of the context, object and purpose of the RTC and concluded that given the concrete role envisaged for private economic entities in achieving the objectives of the CSME, the Contracting Parties clearly intended that such entities should be important actors in the regime created by the Treaty and that they should have conferred upon them and be entitled to enjoy rights capable of being enforced directly on the international plane.[53]

A. Entitlement of Private Entity to Commence Proceedings Directly

As to whether TCL, a company registered in Trinidad and Tobago, had demonstrated that it fell within the definition of a 'national', the CCJ rejected the view that the meaning of 'national' for the purpose in question (ie the bringing of proceedings before the court) was linked to the definition of that term set out in article 32 of the RTC. Article 32, it was pointed out, is contained in Chapter Three of the Treaty which concerns itself with issues critical to the success of an integration regime, namely, the right of establishment, the movement of labour, the right to move capital and the right to provide services. The court distinguished those rights from the right to commence an action alleging a breach of the RTC.[54] The former were fundamental core rights given by the Treaty in order to ensure that certain strategic economic advantages remain with persons belonging to or having a close connection with the Community. In those circumstances it was entirely understandable that the definition of 'national' in article 32 should be tightly drawn and expressly reserved for the purposes of Chapter Three. On the other hand, the CCJ held, the provisions of article 222, which article is contained in an altogether different Chapter, were intended to be available to persons of a Contracting Party (whether Community nationals, within the meaning of article 32 or otherwise) who can establish injury or prejudice in the enjoyment of a right conferred on a Contracting Party and which right enured directly to the benefit of the private entity. The court concluded that for a company to be within the meaning of the phrase 'persons, natural or juridical, of a Contracting Party', it was sufficient for such an entity to be incorporated or registered in a Contracting Party. Since TCL was registered in Trinidad and Tobago it fell within that phrase.

This ruling of the CCJ has the far reaching consequence that individuals who are not nationals of a CARICOM State but who have a sufficient connection with such a State and companies that are registered or incorporated in a CARICOM State but which companies are owned by CARICOM non nationals will have the same qualified right of access to the CCJ to complain of a breach of the Treaty as do CARICOM nationals and companies controlled by such nationals.

B. Is a Private Entity Entitled to Sue its Own State?

In *TCL & TGI v Guyana*,[55] the CCJ confronted and gave a definitive answer to the troubling question as to whether a private entity (TGI) could commence proceedings against its own State (Guyana). Article 222 is capable of yielding either a liberal or a restrictive answer to that question. In contending for the restrictive approach Guyana

[53] See para 18.
[54] See para 26.
[55] [2009] CCJ 1 (OJ).

submitted that it always had the option of itself bringing any proceedings that its national desired to institute; that since it was impossible for it to exercise that option and simultaneously also be the defendant to those very proceedings, then, as a matter of compelling inference, article 222 must be interpreted in a way to produce the result that, as a matter of policy, the RTC intended that a private entity could not bring proceedings against its own State.

The court acknowledged that this contention of Guyana's might represent a literal interpretation of Article 222. But the court noted[56] that no other provision of the RTC lent support to that restrictive interpretation. Throughout the Treaty, apart from the provisions of article 222(c), private entities prejudiced in the enjoyment of a right that had enured to their benefit were able either to apply to the CCJ for special leave to commence, or to have brought, against the offending party, proceedings to vindicate the right of theirs that had been prejudiced. The interpretation of article 222 supported by Guyana would have placed an unduly restrictive limitation on the category of persons entitled to complain about the conduct of a Contracting Party or of the Community and it flew in the face of the Treaty's objectives.

The CCJ observed three important reasons justifying the conclusion that it was not the intention of the Member States to prohibit a private entity from bringing proceedings against its own State.[57] Firstly, any such prohibition would frustrate the achievement of the goals of the RTC. It would impact negatively not only on nationals within the meaning of article 32(5) but also on companies owned by non-nationals (including nationals of other States of the Community) who chose to incorporate in an allegedly delinquent State. A State in breach could be encouraged to violate the RTC with impunity in circumstances where such persons were the only ones who suffered prejudice. Conversely, such persons would have imposed upon them a serious fetter on the vindication of rights enuring to them pursuant to article 222(a).

Secondly, nothing in the CCJ Agreement precluded a private entity that had a substantial interest capable of being affected by a decision of the court[58] from applying to intervene in a matter in which its own State was the defendant. In principle therefore, the CCJ Agreement did not rule out a private entity appearing before the court on the opposite side of its own State.

Thirdly, the restrictive interpretation would produce a collision with article 7 of the RTC which proscribed discrimination on grounds of nationality only. While, in the very proceedings against Guyana for example, a non-national private entity, TCL, would be free to seek to vindicate its rights by direct action against Guyana, a person of Guyana such as TGI, for no reason other than being a national of Guyana, would be faced with an insuperable procedural obstacle. Given the emphasis the RTC lays on the role and status of private entities and on equality of treatment among Community nationals, the CCJ rejected a conclusion that would produce such a restrictive result. The court in effect resorted to teleological interpretation in order to render the Treaty's provisions effective.

It was the court's contention that the fundamental objective of the provisions of article 222(c) was to avoid a duplication of suits; that the provision was a procedural device to avoid a State allegedly in violation being twice vexed, once by an injured private entity and again by the Contracting Party of that private entity; that the

[56] See paras 39–42.
[57] See para 40.
[58] See art XVIII(1) of the CCJ Agreement.

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provision (article 222(c)) could not and did not apply where the State against which proceedings were to be brought was the Contracting Party of the private entity seeking to institute such proceedings.

This decision of the CCJ has been criticized by Professor Winston Anderson[59] who has opined that in treaty interpretation, 'it is not permissible to abandon the literal approach *unless* at least one of three conditions is satisfied ie, the literal interpretation leads to ambiguity *or* obscurity *or* to a result that is absurd or unreasonable'. But this criticism must be seen in light of the fact that it was the court's unmistakable view that a literal interpretation of the relevant provision did indeed produce a result that was unreasonable in light of the Treaty's object and purpose and the interpretation *of treaty provisions* as set forth in article 31(1) of the Vienna Convention on the Law of Treaties does in fact set forth a tripartite test for the interpretation of treaty texts, viz the meaning of the words used, in their context, and in the light of their object and purpose.

C. The Accrual of Rights and Benefits to Private Entities

In conferring a right of access to the CCJ by private entities, article 222 speaks to the conferment upon them of rights and benefits, to the enuring of these advantages to their benefit and to prejudice being suffered in the enjoyment by the private entities of these rights and benefits. It is therefore necessary to determine the circumstances a) when a right or benefit is regarded as being conferred, b) when the same enures to the benefit of the private individual and c) when enjoyment of the same has been prejudiced.

Identification of the rights and benefits is by no means a straightforward exercise. For the most part, the Treaty does not explicitly confer rights. As the court made clear in the TCL/TGI case many of the rights are to be derived or inferred from correlative obligations imposed upon the Contracting Parties. Unless specifically otherwise indicated, the obligations set out in the Treaty are imposed on Member States (or a class of Member States) collectively. Where an obligation is thus imposed, it is capable of yielding a correlative right that enures directly to the benefit of private entities throughout the entire Community.[60]

In the cement cases the CCJ held that the obligation on Member States to impose the Common External Tariff (the 'CET') on cement imported from Third States yielded a right or benefit to the applicants because this obligation was of potential benefit to all persons carrying on business in the Community having to do with regionally produced cement. Equally, the failure by any particular Member State to fulfill this obligation was of potential prejudice to all such persons.[61]

D. The Requisite Standard of Proof

One of the difficulties the CCJ has had to address in relation to article 222 is that the article conflates jurisdictional, substantive and special leave requirements under a heading that addresses *locus standi* to prosecute a claim. Article 211 sets out the jurisdiction of the court in contentious proceedings references 'to hear and determine

[59] See unpublished manuscript, 'The Most Recent CCJ Decision: Cause for Relief And Concern' [2009] (on file with the author).
[60] See para 32.
[61] See para 34.

disputes concerning the interpretation and application of the Treaty, including . . . (d) applications by persons in accordance with Article 222 concerning the interpretation and application of [the] Treaty.' It might thus be said that the CCJ's jurisdiction in relation to hearing a private entity directly is conditional upon that entity successfully navigating its way through article 222. The provisions of article 222(a) and (b) speak to substantive hurdles that a private entity *must* cross in order successfully to prosecute proceedings. Finally, article 222 contemplates that before a private entity may *commence* a suit, the special leave of the CCJ must be obtained by the entity satisfying the court that it had complied with article 222(a), (b), (c), and (d).

Although the article is headed '*Locus Standi* of private entities' in some respects that heading can be confusing. '*Locus Standi*' in article 222 does not mean that some threshold must be met in order to institute an action for special leave. Any private entity is free to institute an action before the CCJ for special leave. But a frivolous or mistaken application or an action that does not have a proper defendant or one that contains no viable cause of action will flounder at or even before the special leave hearing.[62] Nor does '*locus standi*' imply that if special leave were given to a private entity, that entity had sufficiently established once and for all the conditions laid down in article 222. The applicant must still, at the substantive hearing, conclusively establish that it has met the conditions laid down in article 222(a) and (b).[63] It must still establish that its Originating Application is admissible.

The grant of special leave does not imply that a Defendant has lost the right at the substantive stage to challenge a Claimant's ability conclusively to establish article 222(a) and (b). At the substantive stage a defendant whose opposition to the grant of special leave was unsuccessful is not barred from bringing forward new facts and arguments that place the claims of the Claimant in a new and different light. An interesting question arises here. If and when, at a substantive hearing, an applicant fails to establish that it has met conclusively the conditions laid down in article 222(a) and (b), are its claims to be dismissed for lack of *locus standi*, a failure of admissibility, on the part of the Claimant or its application, or are they to be rejected on the merits?

This latter is not a purely academic question. Invariably, the court first looks at whether the Originating Application of a Claimant is or is not admissible before considering the claims on their merits. One way of approaching this question may be to distinguish between the *locus standi* of an applicant and the *admissibility* of that applicant's Originating Claim and to hold that *locus standi* is achieved when an applicant is able to persuade the court that it should be granted special leave to present an Originating Application. The Originating Application that is later filed is, however, not necessarily admissible. The court may conclude, after hearing submissions at the substantive hearing, that the Originating Application is inadmissible and so decline to consider further the merits of the claim. Admissibility then becomes an indispensable pre-condition to success at the substantive stage of the proceedings. But these are matters upon which the CCJ may in due course pronounce.

At any rate, the CCJ has recognized from the outset that it would not be appropriate to have a Claimant make out in full the requirements of article 222(a) and (b) at the special leave stage only to have to establish them again at the substantive stage of

[62] See for example *Johnson v CARICAD* CCJ Application No AR 2 of 2008.

[63] See *TCL & TGI v Guyana*—judgment of the court given in CCJ Application No AR 1 of 2008 [2009] CCJ 1 (OJ).

the proceedings. The fundamental objective of special leave proceedings clearly is to sift out unmeritorious cases. The court therefore had to find a way of granting standing to file an Originating Application while at the same time avoiding the risk of prolonging the special leave procedure unnecessarily and, more importantly, prejudicing the submissions that would invariably be made at the substantive stage of the proceedings if the special leave application was successful and an Originating Application ultimately was filed.

The method employed by the court to do this was to establish differing standards of proof in relation to the matters set out in article 222(a) and (b) (ie the areas that addressed respectively a) the accrual of a right or benefit that enured directly to the private entity and b) prejudice in the enjoyment of such a right). The CCJ has decided[64] that at the special leave stage, it is sufficient for an applicant merely to make out an arguable case that the conditions set out in article 222(a) and (b) can or will be satisfied at the substantive stage.

E. Other Issues Relating to the Jurisdiction of the Court

The case brought against CARICAD[65] threw up other interesting issues regarding the CCJ's jurisdiction. Article 21 of the RTC lists CARICAD, among others, as 'an Institution' of the Caribbean Community. CARICAD enjoys diplomatic immunity in Barbados where it is headquartered. The applicant, a Barbadian national, had been employed with CARICAD for some time but after a dispute between herself and the organization she commenced an action before the CCJ against the Institution and personally against its Executive Director alleging abuse of power, wrongful dismissal, violation of the labour laws of Barbados, breach of contract, breach of the Constitution of Barbados and discrimination on grounds of nationality. This last allegation was grounded in the circumstance that employees of CARICAD who happen to be nationals of Barbados were not afforded the same pension rights as were conferred upon employees who were nationals of other States.

During the course of a preliminary application the Executive Director applied to have herself removed from the record claiming that whatever she was alleged to have done was done by her as an officer and employee of CARICAD. The CCJ acceded to this application on the undertaking and concession given by CARICAD that the organization accepted responsibility for terminating the claimant's employment.

In lieu of considering the application for special leave to institute the proceedings against CARICAD, the court elected to determine two jurisdictional issues, firstly as to whether CARICAD could be sued and secondly, which, if any, of the complaints made in the proceedings were justiciable before the court even assuming that CARICAD could be sued.

The CCJ ruled that it had no jurisdiction to entertain a suit against CARICAD. In doing so, the court drew a distinction between the Organs and Bodies[66] of the Community on the one hand and the Institutions and Associate Institutions[67] of the Community on the other. The court pointed to various Articles of the

[64] See [2009] CCJ 1 (OJ) at [33].
[65] [2009] CCJ 3 (OJ).
[66] Arts 10 and 18 respectively of the RTC lists the organs and bodies of the Community.
[67] Arts 21 and 22 respectively lists the Institutions and Associate Institutions of the Community.

RTC[68] which indicate that the Community implements its policies and carries out its work principally through its Organs and Bodies. These are in every sense agents that reflect the will of the Community. On the contrary, although recognized as entities working within the CARICOM system, the acts and omissions of the Institutions are not necessarily attributable to the Community as are the acts and omissions of the Organs and Bodies.[69] The Community could not bear responsibility for the acts and omissions of CARICAD which had no power actual or ostensible to bind or represent the Community. In the circumstances that Institution was therefore not a proper defendant before the CCJ. The court also indicated further that if a complaint is to be lodged against an Organ or Body, such complaint must really be made not against that Organ or Body but against the Community which has full juridical personality[70] and which can be sued for the acts of its Organs and Bodies.

This opinion of the CCJ, taken together with the striking out of the name of the Executive Director, appears to suggest that in the Original Jurisdiction the only proper defendants are Member States or the Community; that an individual cannot properly be a defendant. But the court did not explicitly make such a definitive conclusion.

Although it was unnecessary to proceed to address the second of the two issues (i.e. which of the complaints were really justiciable), the court nonetheless did so and held that save for the complaint alleging discrimination on grounds of nationality, all the other complaints of Ms Johnson were matters for the domestic courts of Barbados and were non-justiciable by the CCJ whose fundamental remit in its original jurisdiction is to interpret and apply the RTC.

One can't help but feel a measure of sympathy for the applicant whose case therefore had to be dismissed. CARICAD would be entitled to claim diplomatic immunity should an attempt be made by the applicant to obtain some form of recourse in the courts of Barbados. It is a matter for debate as to whether the Caribbean Court of Justice should accept responsibility for providing an avenue for redress to a litigant who finds herself in such a situation. But it is of course possible that should a domestic suit be filed in Barbados CARICAD could opt to waive its immunity and permit those proceedings to be heard on their merits.

III. STATE SOVEREIGNTY, ADHERENCE TO THE RULE OF LAW AND JUDICIAL REVIEW

A. State Sovereignty

Faithful implementation of decisions solemnly arrived at by CARICOM has been described as the Achilles heel of the integration movement.[71] CARICOM has in the past developed the habit of arriving at conclusions and agreements only for them to remain unimplemented by the respective governments. Indeed, the insistence on describing CARICOM as an association of sovereign States[72] suggests that notwithstanding its membership of CARICOM, each State retains the right to do what it pleases, how it pleases and when it pleases. It is therefore unsurprising that the first attempt by a private entity to bring up a Member State before the CCJ for an alleged breach of the

[68] Arts 47, 49, 57, 70, 74, 77, 187 and 240 for example.
[69] See para 14.
[70] See art 228 of the RTC.
[71] See *Time For Action: Report of the West Indian Commission* (2nd edn, The Press, University of the West Indies, Jamaica, 1993).
[72] See (n 34).

Treaty would be resisted on the ground that the claimant was seeking to 'hinder the functioning of the Community' and 'constrain the exercise of state sovereignty'.

In *TCL and TGI v Guyana*,[73] Guyana questioned the claimant's right to institute proceedings against that State. According to Guyana, the right to institute proceedings before the CCJ was a right peculiarly vested in States Parties and, in any event, the bringing of proceedings by one State against another under the Treaty 'may have serious political implications for the continuation and future of the Community because the Revised Treaty intends that Contracting Parties operate as joint partners in the Caribbean Community and Caribbean Single Market and Economy'.[74]

The CCJ has confronted this kind of plea head-on. In the Special Leave proceedings in *TCL v The Community*,[75] relying on the *Case of the SS* '*Wimbledon*'[76] the court ruled that by signing and ratifying the RTC and thereby conferring on the CCJ ipso facto a compulsory and 'exclusive' jurisdiction to hear and determine disputes concerning the interpretation and application of the Treaty, the Member States had transformed the erstwhile voluntary arrangements in CARICOM into a rule-based system, thus creating and accepting a regional system under the rule of law. A challenge by a private party to decisions of the Community was therefore not only permissible, but was itself a manifestation of such a system. It was not correct to say that the functioning of the Community or the exercise of state sovereignty is unduly constrained by any such challenge.[77] Indeed, it is by the exercise of State sovereignty that each State has opted voluntarily to become a member of the CSME and thus participate in a regime that guarantees to the State rights that are more extensive than were hitherto enjoyed. A State, for example, has the right to call to account before the CCJ any of the other Member States for breaches of the RTC that detrimentally affect it. This is a right which of course carries with it a reciprocal obligation to abide by the Treaty.

B. Judicial Review

Article 187 of the RTC provides examples of the kinds of disputes that the court may be called upon to adjudicate. These include allegations:

a) that an actual or proposed measure of another Member State is or would be, inconsistent with the objectives of the Community;
b) of injury, serious prejudice suffered or likely to be suffered, nullification or impairment of benefits expected from the establishment and operation of the CSME;
c) that an organ or body of the Community has acted *ultra vires*;
d) that the purpose or object of the Treaty is being frustrated or prejudiced.

In light of these provisions there can be no doubt about the CCJ's right judicially to review the acts of the Community and the early judgments have provided the occasion for the court to begin setting out the parameters of its judicial review function.

[73] [2008] CCJ 1 (OJ).
[74] See para 17.
[75] (2009) Case No AR 3 of 2008 judgment delivered 5 February, 2009.
[76] PCIJ Rep, Series A, No 1, 25 (1923); and see also the Separate Opinion of Judge Anzilotti in the *Austro-German Customs Union Case*, PCIJ Rep, Series A/B No 41 (1931) 57–58.
[77] See para 32.

The CCJ has confirmed that it has the power to scrutinize the acts of the Member States and of the Community to determine whether they were in accordance with the rule of law. In carrying out such review, the court noted, a balance had to be struck. On the one hand the court had to be careful not to frustrate or hinder the ability of Community organs and bodies to enjoy the necessary flexibility in their management of a fledgling community. But equally, the Community had to be accountable and operate within the rule of law. In particular the Community could not trample on rights accorded to private entities by the RTC and, unless an overriding public interest consideration so required, or the possibility of the adoption of a change in policy by the Community was reasonably foreseeable,[78] States and the Community had to respect any legitimate expectations they had created. The balance to be struck, said the court, envisioned the necessity to preserve policy space and flexibility for adopting development policies on the one hand and the requirement for necessary and effective measures to curb the abuse of discretionary power on the other; the maintenance of a Community based on good faith and a mutual respect for the differentiated circumstances of Member States (particularly the disadvantages faced by the lesser developed countries) on the one hand and the requirements of predictability, consistency, transparency and fidelity to established rules and procedures on the other.

The CCJ accepted that the power to review the decisions of COTED was limited in circumstances where COTED had exercised a discretion[79] and in that light the court neglected to interfere with COTED's decision to authorize several Member States to suspend the CET since the ability to authorize suspension was inherently a power to cater for the kind of flexibility that was required in the carrying out of policy. The court insisted, however, that applications for suspension must be dealt with in a principled, procedurally appropriate manner and the occasion for a suspension may only lawfully arise if one of the conditions laid out for it in the RTC is present. Authorization to suspend the CET, the court noted, should not be sought or granted for improper purposes.

C. Remedies Available to a Litigant

The RTC does not contain any specific provisions relating to the remedies available to a litigant or the sanctions that may be imposed by the court against a Member State or the Community for a breach of the Treaty. It has therefore been left entirely to the CCJ to fill this lacuna. In one of the cases,[80] the court brushed aside the notion that it is entitled only to make declaratory awards. The CCJ justified this conclusion by pointing out that both the RTC and the CCJ Agreement indicate that judgments of the court are to be enforced by domestic courts as if they were judgments of a superior court of that Contracting Party. Moreover, Member States are obliged to ensure that all domestic authorities act in aid of the court. It could not have been the intention then that the CCJ should be restricted to the issuance of mere declarations because if that were so, none of the enforcement mechanisms referred to in the CCJ Agreement would have been

[78] See for example *Johann Luhrs v Hauptzollamt Hamburg-Jonas*, Case 78/77 of 1978.

[79] See also E Osieke, 'Legal Validity of Ultra Vires Acts' (1983) 77 AJIL 239, 247. See also *Adler v Secretary-General of the UN*, Judgment No 267, UN Doc AT/DEC/267.

[80] See *TCL & TGI v Guyana* [2009] CCJ 5 (OJ) at [27].

required. The court reasoned[81] that in light of its duty to enforce the rule of law and to render the Treaty effective, competence to review the legality of acts adopted by Community institutions[82] must perforce include competence to award appropriate relief to private entities that have suffered and established loss as a result of an illegal act or omission on the part of the Community. Such relief, the court stated, may include the making of a coercive order.

Indeed, a coercive order was made against Guyana at the suit of TCL and TGI. Having admitted being in breach of the RTC by failing to impose the Common External Tariff on cement from Third States, and in light of its counsel's inability to give the court an undertaking that this breach would be cured and the tariff imposed, Guyana was ordered to implement and maintain the tariff within 28 days without prejudice to its right to make an application to the relevant authorities for a waiver.[83]

The CCJ has also made it clear that the remedy of compensatory damages is available to individuals and private entities whose rights under the Treaty are infringed by Member States. Such damages would, however, not automatically be awarded simply because a litigant has suffered loss. The losses must be incurred in circumstances that rendered them sufficiently proximate to the precise breach in question.[84] An aggrieved party would first have to demonstrate that the provision alleged to be breached was intended to benefit that person, that the breach was serious, that there is substantial loss and that there is a causal link between the breach by the delinquent State and the loss or damage to that person.[85] In the TGI suit against Guyana, that State avoided an award of damages being made against it only because no special circumstances had been proved by the claimants that served to establish the requisite degree of proximity between Guyana's breach of the Treaty and such loss as was claimed to have been suffered by TGI as a result.

TGI had also claimed exemplary damages against Guyana but the court declined to award any such damages noting that the concept of exemplary damages is a peculiar creature of the common law.[86] On the contrary, stated the court, '[t]he weight of academic and judicial opinion is that international law has not accepted as one of its principles the concept of punitive damages'.[87] The CCJ of course applies 'such rules of international law as may be applicable'.[88]

In this regard, one can already notice that European jurisprudence is likely to exert some influence on CARICOM jurisprudence. At the outset it was stated that many of the provisions of the RTC were borrowed from the European Union Agreements. In the cases under review Counsel appearing before the CCJ have therefore cited a number of decisions of the European Court of Justice (ECJ) for the court's consideration. The court in turn has relied on some of these opinions in its own judgments. For example, the reasoning of the court in relation to State liability and compensatory damages for breach of the Treaty drew on the European decisions of *Francovich v Italy*[89] and

[81] See *TCL v The Caribbean Community* [2009] CCJ 4 at [42]–[43].
[82] This of course assumes that the particular Institution in question is an agent of the Community.
[83] See *TCL & TGI v Guyana* [2009] CCJ 5 (OJ) at [45].
[84] See *TCL & TGI v Guyana* [2009] CCJ 5 (OJ) at [33].
[85] [2009] CCJ 5 (OJ) at [27].
[86] [2009] CCJ 5 (OJ) at [35].
[87] [2009] CCJ 5 (OJ) at [36].
[88] See art 217(1).
[89] [1991] ECR 1-5357.

Brasserie du Pêcheur SA v Germany and R v Secretary of State for Transport ex parte Factortame Ltd.[90]

IV. CONTEMPT OF COURT

Article XXVI of the CCJ Agreement records the intention of the States Parties:

> to take all the necessary steps, including the enactment of legislation to ensure that:
> . . .
> b) the Court has power to make any order for the purpose of . . . 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.

Section 11 of the Guyana Act of Parliament that seeks to implement the CCJ Agreement into domestic law provides that the CCJ 'shall have the same power as the [Guyana] Supreme Court to make any order for the investigation or punishment of any contempt of court' and section 11(4) states that 'A Judge of [the CCJ] may exercise all of the powers and functions of a superior court judge of the Supreme Court'.

In the case brought by TCL against Guyana that State had neglected immediately to comply in full with the judgment delivered by the court.[91] While compliance was still pending TCL made an application to hold Guyana's Attorney General in contempt for failure to implement and give effect to the judgment. The court dismissed this application on the narrow ground that the Attorney General was not responsible for Guyana's failure to comply but the court went on to discuss the wider question that arose, namely, whether the CCJ was entitled to exercise a jurisdiction in civil contempt. The court expressed doubt as to the possibility that it could exercise any such jurisdiction.

Article XXVI (b) actually provided no basis for the exercise of any such jurisdiction. That article merely *assumes* the existence of a jurisdiction in some form of contempt and in consequence expresses the agreement of the States Parties to take the necessary steps, including the enactment of legislation to ensure that the exercise of the court's (assumed) jurisdiction is recognized and given full force and effect on the domestic plane. Nor could the judgment creditor found a civil contempt jurisdiction on section 11 of Guyana's Act of Parliament since municipal Acts were wholly incapable of conferring broad jurisdiction on the CCJ.

Of course, common law courts possess an inherent jurisdiction in certain areas including matters of contempt of court. Some international courts have also assumed an inherent jurisdiction in criminal contempt.[92] It is doubtful, however, whether it would ever be appropriate for an international court to claim an inherent jurisdiction in civil contempt, especially where that court is charged with interpreting a treaty in circumstances where the States Parties to the treaty include civil law States. In any event, as the court pointed out,[93] even if civil contempt of court were recognized on the

[90] Joined Cases C-46/93 and C-48/93, [1996] ECR I-1029.

[91] Guyana eventually complied fully with the judgment some four months after the order of the Court was made.

[92] See for example Case No IT-94-1-A-R77 *Prosecutor v Tadić*, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin, in the Appeals Chamber of the ICTY and also Case No. IT-03-66-T-R77 *Beqa Beqaj* before the ICTY's Trial Chamber.

[93] See *TCL & TGI v Guyana* [2010] CCJ 1 (OJ) at [40].

international plane, the CCJ had 'no tipstaff or gaols' to enforce such common law contempt remedies as imprisonment or sequestration. The court therefore found it sufficient to issue a declaration that Guyana was in breach of article 215 of the RTC which mandates that 'The Member States, Organs, Bodies of the Community, entities or persons to whom a judgment applies, shall comply with that judgment promptly'.

V. CONCLUSION

Three cases giving rise to seven reasoned opinions do not by any means constitute a sufficient body of work fully to assess either the mettle of the court or the contours of the new Caribbean jurisprudence which it must construct. But these opinions do give us helpful insights. As the CCJ goes about fulfilling its role in its original jurisdiction the most obvious and significant challenge it faces is the necessity to eschew purely common law approaches to interpretation and consistently to apply rules of international law when determining the disputes that are brought before it. Most of the judges, although not all, are common lawyers. While counsel in the region are natural experts in common law, based on the quality of the submissions made to date it is apparent that Counsel who have appeared before the CCJ have had varying levels of exposure to international law and to what one may refer loosely as community law. CARICOM includes States that have a civil law tradition. Submissions of law that are routinely made in common law courts may be entirely out of place in the CCJ's original jurisdiction but they are nonetheless sometimes presented to the court. This naturally places an extra onus on the court which must go well beyond choosing between alternative submissions. The relative deficit on the part of counsel in familiarity with treaty law and with the original jurisdiction rules may even contribute to a hesitance in the filing of proceedings in the original jurisdiction of the CCJ. If this is true, hopefully it would be only a temporary measure.

As for the judges of the CCJ, in January, 2009, the court was pleased to co-host the Sixth Brandeis Institute for International Judges. The professed aim of the Institute is 'to provide a time and space for judges sitting on international courts and tribunals to meet and reflect, discuss issues of mutual interest, generate ideas that enrich their work, and move toward developing policies that strengthen their standing'.[94] Regular exchanges of this nature will serve not only to build professional linkages but also ensure that the judges of the CCJ are abreast of contemporary approaches to international legal issues.

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[94] See Report of the Brandeis Institute for International Judges 2009—www.brandeis.edu/ethics/internationaljustice/biij/index.html.

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