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The Formation of the Caribbean Court of Justice: The Sunset of British Colonial Rule in the English Speaking Caribbean

Leonard Birdsong

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The Formation of the Caribbean Court of Justice: The Sunset of British Colonial Rule in the English Speaking Caribbean

Leonard Birdsong*

I.	INTRODUCTION	198
II.	HISTORICAL BACKGROUND	201
	A. <i>The ESC and the Development of the Caricom Single Market and Economy ("CSME")</i>	201
	B. <i>The ESC and the Death Penalty Debate</i>	203
III.	THE PROVISIONS AND STRUCTURE OF THE CARIBBEAN COURT OF JUSTICE	205
	A. <i>Part I</i>	205
	B. <i>Part II</i>	206
	C. <i>Part III</i>	208
	D. <i>Part IV</i>	209
IV.	THE INFRASTRUCTURE IMPLEMENTATION PROCESS AND INAUGURATION OF THE CARIBBEAN COURT OF JUSTICE	210
	A. <i>Funding</i>	210
	B. <i>The Commission and Its Role in Choosing Judges</i>	212
	C. <i>The Inauguration of the Court</i>	215
V.	LEGAL AND PRACTICAL OBSTACLES IN THE FORMATION OF THE CARIBBEAN COURT OF JUSTICE	216
	A. <i>If You Build It They Will Come</i>	216
	1. Original Jurisdiction: The Caribbean Court of Justice and the Economy of the Region....	216

* Leonard Birdsong is an Associate Professor of Law at Barry University School of Law, Orlando, Florida. He was a visiting Associate Professor of Law at Wake Forest University School of Law, Winston Salem, North Carolina, for the fall 2004 semester where he completed work on this article. He received his B.A. (Cum Laude) at Howard University and his J.D. from Harvard Law School. He served as an Assistant U.S. Attorney for the District of Columbia, and also served as a Special Assistant U.S. Attorney for the U.S. Virgin Islands. He later served with the U.S. State Department as an American Consul in Hamburg, Germany, and Nassau, Bahamas. He teaches Immigration and Criminal Law, as well as Evidence and White Collar Crime. He occasionally appears as a legal analyst and commentator for Fox News, Court TV, and MSNBC. Professor Birdsong, who follows legal developments in the English Speaking Caribbean, wishes to thank Reference Librarians Warren McEwen and Ann Pascoe of the Barry University School of Law Library for their research assistance in preparation of this article.

2. Regional Appellate Jurisdiction	217
B. <i>Coordinating Three Legal Systems</i>	221
C. <i>Enforcement and Withdrawal</i>	223
D. <i>The Death Penalty Debate</i>	224
VI. CONCLUSION	226

I. INTRODUCTION

For a period of almost three centuries, ending at the close of World War II, Great Britain ruled a vast colonial empire. During this period, it was said that the sun never set on the British Empire. Britain ruled colonies in the Near East,¹ the Far East,² India, Africa,³ Australia, New Zealand, and the Caribbean.⁴ Since World II, all but a few British colonies sought and won their independence.⁵ A number of the former colonies formed their own governments, implemented their own parliaments, and devised their own court systems.⁶ Many became Commonwealth countries, keeping strong ties to Britain.⁷ Despite their independence, however, most former colonies retained the English common law as their legal system.⁸

As a part of this British legal tradition, most of the newly independent countries, as codified in their new constitutions, were required to rely upon the Judicial Commission of the Privy Council ("Privy Council")⁹ as their final court of appeal.¹⁰ Although these countries implemented local court systems, they may have believed that their legal traditions were still too new to have produced judges with enough experience to sit on a court of final

1. For example, Ceylon (now Sri Lanka) and Burma.

2. For example, Malaya and Hong Kong.

3. Most notably, these included Kenya, Uganda, Tanganyika, and Zanzibar.

4. For example, Jamaica and Barbados.

5. See Central Intelligence Agency, *CIA - The World Fact Book - Jamaica*, available at <http://www.odci.gov/cia/publications/factbook/geos/jm.html> (last visited Feb. 23, 2005).

6. See *id.*

7. See *id.*

8. See *id.*

9. The Judicial Committee of the Privy Council is often simply called the Privy Council. The Privy Council is a part of the House of Lords in London, England, made up of senior judges who look at appeals from trials in lower courts and decide if any errors were made. The Privy Council has remained the final court of appeal for ESC countries. See Jamaicans for Justice, *Brochure on the Privy Council and the Proposed Caribbean Court of Justice*, available at http://www.jamaicansforjustice.org/Documents/ccj_brochure.doc (last visited Feb. 10, 2005).

10. See Amnesty International, *State Killing in The English Speaking Caribbean: A Legacy of Colonial Times* 7, April 2002.

appellate jurisdiction.¹¹ This is the case with the eleven countries in the English speaking Caribbean (“ESC”), which retain the Privy Council in England as their final court of appeal.¹²

When many people think of the ESC countries, or the West Indies, as the area is often called, all that comes to mind are exotic vacations on golden, sun-splashed beaches filled with days and nights of rum drinking and limbo dancing under the stars to the sound of steel bands playing calypso music. Much of the world seldom recognizes that the countries of the ESC are also independent, sovereign island nations. The majority of the population of these nations is comprised of citizens who descended from ancestors brought from Africa as slaves to work on the sugar cane plantations, and later, others who had been brought from India and China as indentured servants or contract laborers.¹³

The population of the ESC is approximately 6 million people.¹⁴ The vast majority are people of color. They are people who have respect and honor for the rule of law, and have been dogged in seeking independence and their own self-determination from their former colonial ruler. Thus, when one thinks of the ESC, or the West Indies, one should recognize that there is a substantial population of people of color who have built institutions to further peaceful democracies and continue the rule of law. Like many other former British colonies, ESC nations have built and fostered their own governments and parliaments, and have implemented their own local court systems.

In 2001, a number of these countries signed an Agreement Establishing the Caribbean Court of Justice (“Agreement”).¹⁵ This court will have a dual function. The Caribbean Court of Justice

11. A familiar example of a court with this type of final appellate jurisdiction is the United States Supreme Court.

12. The English speaking Caribbean (“ESC”) countries which retain the Privy Counsel as their final appellate court are: the Bahamas, Jamaica, Trinidad and Tobago, Belize, St. Lucia, St. Kitts and Nevis, Antigua and Barbuda, Grenada, St. Vincent and the Grenadines, Barbados, and Dominica. See Amnesty International, *supra* note 10, at 7 n.8.

13. See Central Intelligence Agency, *supra* note 5.

14. See CARICOM Secretariat, *CARICOM: Single Market and Economy: Free Movement and Competitiveness* 3, 4, 11, available at <http://www.caricom.org> (last visited Oct, 21, 2004).

15. See DUKE E. POLLARD, *THE CARIBBEAN COURT OF JUSTICE: CLOSING THE CIRCLE OF INDEPENDENCE* 258-355 (2004) (these pages indicate the appendices to this work, the first of which contains the text of the Agreement Establishing the Caribbean Court of Justice); see also Agreement Establishing the Caribbean Court of Justice, Feb. 14, 2001, available at <http://www.caricom.org/archives/agreement-cj.htm>.

("CCJ") is envisioned as a final court of appeal for the ESC that will replace the Privy Council as the court of final appellate jurisdiction for the decision of criminal and civil matters.¹⁶ It will also function as a new international court for the region, designed as a court of original jurisdiction to settle disputes of ESC countries under the Caribbean Community ("Caricom") Treaty.¹⁷ The hybrid nature of the CCJ, with its exercise of both original and appellate jurisdiction, is part of a vision of those who hope to ensure autonomy of judicial determinations in the ESC as a means of strengthening regional integration in a postcolonial world. The implementation of the CCJ, the formation of a regional, "super national" court by the ESC, should be viewed as a historic legal accomplishment of which the world should be aware. The formation of the CCJ is one of the final steps in the self-determination of people of color in the ESC whose ancestors were once oppressed.

For a number of years, citizens and politicians of the ESC suggested that the ESC form their own supreme court and de-link themselves from the Privy Council.¹⁸ This is about to happen. The Agreement to Establish the Caribbean Court of Justice has been formulated and ratified by the requisite number of ESC members.¹⁹ The ratification of the Agreement, and the soon expected inauguration of the CCJ, are important to many in the ESC because it signals the end of the final vestiges of colonialism in the ESC.²⁰ It appears that with the implementation of the CCJ the sun will finally set on British colonial rule in the ESC.²¹

16. See *Jamaicans for Justice*, *supra* note 9.

17. *Id.* The original treaty, known as "Caricom," established the Caribbean Community and Common Market. See Treaty Establishing the Caribbean Community ("Treaty," "Caricom Treaty," or "Treaty of Chaguaramas"), done at Chaguaramas July 4, 1973, available at <http://www.caricom.org/archives/treaty-caricom.htm>.

18. The 1973 Caricom Treaty envisioned a regional court that would serve as the final court of appeal for the Caribbean region. This original idea of a "Caribbean Court of Appeal" was outlined in Articles 211 - 222 of the Treaty. This court did not come to fruition and never functioned. See Treaty Establishing the Caribbean Community, *supra* note 17, at Annex, arts. 11-12.

19. See *supra* note 15 and accompanying text.

20. See *The CCJ: Closing the Chapter on Colonialism*, THE GLEANER (Jam.), June 15, 2003.

21. This author has, for a number of years, followed and written about legal issues in the ESC, especially those concerning the death penalty debate. The need for the CCJ often was mentioned with respect to the death penalty debate in the ESC. Upon learning of the ratification of the CCJ Agreement, he decided to travel to the nation of Trinidad and Tobago, the site of the CCJ, to speak with government officials there to learn more about the court and to determine the progress of the formation of this new

The purpose of this article is to introduce the Agreement formulated by people of the ESC, which establishes the Caribbean Court of Justice. In so doing, it is the author's intention that students, lawyers, judges, scholars, and those interested in international courts and international law may better understand the court's intended functions and proposed workings. The article will also examine some of the practical, political and legal obstacles in forming a new "super national" court system.

II. HISTORICAL BACKGROUND

A. *The ESC and the Development of the Caricom Single Market and Economy ("CSME")*

ESC countries began to gain their independence from Great Britain in 1962.²² "The idea for the establishment of a court of last resort for the Caribbean was first seriously mooted, it is said, at a Caricom Heads of Government meeting in Kingston, Jamaica[,] in 1970."²³ A few years later a number of the heads of governments of ESC countries met at Chaguaramas, Trinidad, and agreed to establish their own common market system. The agreement, signed on July 4, 1973, by those heads of government, was named the Treaty Establishing the Caribbean Community ("Treaty of Chaguaramas"), known today as Caricom.²⁴

Starting in 1997, with an eye toward strengthening a regional agreement that would allow for competition with other world trading blocks in a growing global trade market, heads of government of ESC countries met to negotiate a better system.²⁵ These negoti-

court. This article followed. As part of the research for this article, the author traveled to Port of Spain, Trinidad, in June 2004, to see the temporary headquarters of the CCJ and to speak with Ministry of Legal Affairs officials and local court magistrates involved in the implementation and formation of the new court.

22. Jamaica and Trinidad and Tobago gained independence from Britain in 1962; Barbados and Guyana gained independence in 1966; the Bahamas gained independence in 1973; Grenada 1974; Dominica 1978; St. Vincent and the Grenadines and St. Lucia in 1979; Antigua and Barbuda in 1981; St. Kitts and Nevis 1983. See Central Intelligence Agency, *CIA - The World Fact Book*, available at <http://www.odci.gov/cia/publications/factbook/index.html> (last visited Feb. 23, 2005).

23. Hon. Godfrey Smith, Attorney General, Remarks at Belize City, The Caribbean Court of Justice: An Overview of the Challenges & Prospects (Aug. 28, 2001), available at http://www.belize.gov.bz/features/Caribbean_court/challenges&prospects.html.

24. See Treaty Establishing the Caribbean Community, *supra* note 17.

25. The heads of government signatories to the Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the Caricom Single Market and Economy included: Barbados, Jamaica, Trinidad and Tobago, Guyana, St. Lucia, St. Kitts and Nevis, Antigua and Barbuda, Grenada, St. Vincent and the Grenadines,

ations culminated in July 2001, in Nassau, Bahamas, where the heads of government signed the Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the Caricom Single Market and Economy ("Revised Treaty" or "Revised Treaty of Chaguaramas").²⁶ "The notion of a Caribbean region without barriers, strengthened by its collective resources and opportunities, has been a shared vision that inspired the commitment of regional integrationists from the early days."²⁷

With the Revised Treaty the heads of government signatories recognized that "globalisation and liberalisation have important implications for international competitiveness[.]"²⁸ Thus, they committed, through the Revised Treaty, to strive to deepen "regional economic integration through the establishment of the CARICOM Single Market and Economy ("CSME") in order to achieve sustained economic development based on international competitiveness, co-ordinated economic and foreign policies, functional co-operation and enhanced trade and economic relations with third States[.]"²⁹

The CCJ is intended to provide a solid judicial foundation for the success of the CSME by protecting and enforcing a range of rights.³⁰ The CCJ is "also . . . expected to enforce obligations associated with such rights."³¹ Further, this will serve to strengthen the process of regional integration with respect to trade, the movement of capital, persons, and provision of services.³² Under the CSME restrictions that are placed upon goods, the movement of capital, and provision of services will have to pass the test of being in accordance with the law of the Revised Treaty.³³ It is believed

Montserrat, Surinam, and Belize. See Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the Caricom Single Market and Economy ("Revised Treaty" or "Revised Treaty of Chaguaramas"), July 2001, available at <http://www.sice.oas.org/trade/caricom/caricind.asp>. The Bahamas is not a party to the Revised Treaty, and has not signed the Agreement Establishing the CCJ. See POLLARD, *supra* note 15, at 333-34.

26. See Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the Caricom Single Market and Economy, *supra* note 25.

27. CARICOM Secretariat, *CARICOM: Single Market and Economy: Free Movement and Competitiveness*, *supra* note 14, at fwd.

28. Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the Caricom Single Market and Economy, *supra* note 25, at pmbl.

29. *Id.*

30. See CARICOM Secretariat, *CARICOM: Single Market and Economy: Free Movement and Competitiveness*, *supra* note 14, at fwd., 17-21.

31. *Id.* at 19.

32. See *id.*

33. See *id.*

with the "removal of barriers to trade [in the ESC], with free movement of regional services, goods and capital, and people[,] [t]he establishment of the Caribbean Court of Justice ("CCJ") w[ill] ensure CSME integrity and assume custody of the rights of participating states and their nationals."³⁴

B. *The ESC and the Death Penalty Debate*

Throughout the same years that the CSME and the formation of the CCJ were being debated and developed, crime rates rose in a number of the ESC countries.³⁵ As a result of the rising crime rate there has been, for the last few years in the ESC, an ongoing debate concerning the use of the death penalty in the ESC.³⁶ The common law penalty of death-by-hanging is still the established penalty for capital murder throughout the ESC.³⁷ Many people in the region favor the death penalty.³⁸ Others wish to see it abolished.³⁹ In fact, a number of ESC death penalty sentences have been overturned by judicial opinions and decisions from the Privy Council.⁴⁰ Some believe that the Privy Council rulings have hampered the rightful imposition of the death penalty in the ESC.⁴¹

A number of detractors of the new court fear that the CCJ will become a "hanging court."⁴² As a result of the Privy Council's 1993 decision of *Pratt and Morgan*,⁴³ it is believed to be more difficult

34. *Id.* at fwd.

35. The increase in crime witnessed during the early 1990's was most pronounced in Jamaica, Trinidad, and the Bahamas. See Leonard Birdsong, *Open Forum: Is There a Rush to the Death Penalty in the Caribbean: The Bahamas Says No*, 13 TEMP. INT'L & COMP. L.J. 285, 291 (1999).

36. See generally Amnesty International, *supra* note 10; Leonard Birdsong, *In Quest of Gender-Bias in Death Penalty Cases: Analyzing the English Speaking Caribbean Experience*, 10 IND. INT'L & COMP. L. REV. 317 (2000); Birdsong, *Is There a Rush to the Death Penalty*, *supra* note 35.

37. See generally Amnesty International, *supra* note 10, at 3-4; Birdsong, *Open Forum: Is There a Rush to the Death Penalty in the Caribbean: The Bahamas Says No*, *supra* note 35, at 302.

38. See Amnesty International, *supra* note 10, at 1-6.

39. See Birdsong, *Open Forum: Is There a Rush to the Death Penalty in the Caribbean: The Bahamas Says No*, *supra* note 35, at 285-6.

40. See Amnesty International, *supra* note 10, at 7.

41. See *id.*

42. *Id.*; see Marika Lynch, *Jamaica Signs Up To Caribbean Appeal Court*, MIAMI HERALD, June 10, 2003.

43. *Pratt v. Attorney-General* [1994] 2 A.C. 1 (P.C. 1993). *Pratt and Morgan*, two consolidated death penalty cases from Jamaica, resulted in a 1993 landmark judgment of the Privy Council. In essence, the judgment established the principle that both Pratt and Morgan, who had been prisoners on Jamaica's death row for a period exceeding five years, could be seen as victims of cruel and inhumane punishment in violation of the Jamaica Constitution if they were then sent to the

for ESC countries to apply the death penalty.⁴⁴ Detractors believe that the appellate jurisdiction of the CCJ will allow ESC countries easier recourse to implement the death penalty.⁴⁵ Those who wish to see the abolition of the use of the death penalty in the ESC see the formation of the CCJ and the de-linking from the Privy Council in appellate matters as a dangerous assault on human rights.⁴⁶ Debate in the ESC concerning the implementation of the CCJ is often linked to the death penalty debate.⁴⁷

The Caricom Secretariat maintains the position that a renewed interest in the CCJ and the *Pratt and Morgan* decision are just an unfortunate coincidence.⁴⁸ Caricom maintains further that revived interest in the CCJ had its origin in the 1992 Report of the West Indian Commission,⁴⁹ which predated the landmark decision of *Pratt and Morgan* by one year.⁵⁰

At the time of the signing of the Revised Treaty of Chaguramas⁵¹ by the ESC heads of governments, ministers of justice from the ESC had already begun drafting the Agreement Establishing the Caribbean Court of Justice.⁵² The Agreement was signed on February 14, 2001, by the respective contracting parties.⁵³ The Agreement was subsequently ratified and entered

gallows. The Privy Council commuted their sentences to life in prison. In the decision the Privy Council also recommended that other prisoners on death row in the region for five years or more should also have their sentences commuted. As a result of *Pratt and Morgan*, all prisoners in the ESC, who had been on death row for longer than five years, had their sentences commuted to life in prison. As a direct result of this decision, of the 450 prisoners on death row more than half had their sentences commuted to life in prison.

44. See Birdsong, *In Quest of Gender-Bias in Death Penalty Cases*, *supra* note 36, at 291; Amnesty International, *supra* note 10, at 8.

45. These are personal observations gained by the author in interviews with officials and discussions with citizens of the ESC during his years of chronicling the death penalty debate in the ESC, 1999 - 2004. As a result of their having a free and vocal press, the author has found that the people of the ESC are very well read and knowledgeable about crime, the workings of their governments, justice systems, and the death penalty debate.

46. *Id.*

47. *Id.*

48. See CARICOM Secretariat, *The Caribbean Court of Justice: What It Is, What it Does* 3, available at <http://www.caricom.org> (last visited Feb. 10, 2005).

49. WEST INDIAN COMMISSION, *TIME FOR ACTION: REPORT OF THE WEST INDIAN COMMISSION* (1992).

50. See CARICOM Secretariat, *The Caribbean Court of Justice: What It Is, What it Does*, *supra* note 48, at 3.

51. See Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the Caricom Single Market and Economy, *supra* note 25.

52. See *supra* note 15 and accompanying text.

53. See POLLARD, *supra* note 15, at 282-84. The Agreement was signed on that day by representatives of Barbados, Antigua and Barbuda, Belize, Grenada, Guyana,

into force on July 23, 2003.⁵⁴

The Agreement came into force when Guyana deposited its instrument of ratification on that day following earlier deposit of instruments by St. Lucia and Barbados.⁵⁵ Pursuant to Article XXXV of the Agreement, the Agreement would “enter into force upon the deposit of Instruments of Ratification or Accession . . . by at least three member States of the Caribbean Community.”⁵⁶ The agreement was declared in force by the depositary, Dr. Edwin Carrington, at the seat of the new court in Port of Spain, Trinidad.⁵⁷

III. THE PROVISIONS AND STRUCTURE OF THE CARIBBEAN COURT OF JUSTICE

The CCJ has been set up through a number of instruments, chief of which is the Agreement to Establish the CCJ.⁵⁸ The Agreement contains several main provisions that set out the structure and responsibilities of the court and its judges.⁵⁹ The Agreement is an eighteen-page document, set out in four parts, consisting of thirty-nine articles, with two short appendices.⁶⁰

A. Part I

Part I of the Agreement⁶¹ establishes the court with:

- Original and Appellate Jurisdiction.⁶²

It further establishes:

- The seat of the court,⁶³ which will be located in Trinidad and Tobago. However, the court may sit in the territory of any other contracting party as circumstances warrant.⁶⁴ In essence, it appears that the judges may “ride

Jamaica, St. Kitts and Nevis, St. Lucia, Suriname, and Trinidad and Tobago. The Agreement was subsequently signed by representatives of Haiti, Montserrat and St. Vincent, and the Grenadines. *See id.*

54. *See* Sheldon A. McDonald, *States Signing up for CCJ Membership*, THE EXPRESS (Trin.), July 25, 2004, at 13.

55. *See id.*

56. POLLARD, *supra* note 15, app. 1, art. XXXV, at 281.

57. *See* McDonald, *supra* note 54, at 13.

58. *See* POLLARD, *supra* note 15, at 258-285.

59. *See id.*

60. *See generally id.*

61. *Id.* app. 1, pt. I, at 259-69.

62. *Id.* app. 1, art. III(1)(a)-(b), at 259.

63. *Id.* app. 1, art. III(3), at 260.

64. *Id.*

circuit" if they so choose.

- The constitution of the court. There will be a president of the court "and not more than nine other judges of whom at least three shall possess expertise in international law including international trade law."⁶⁵
- The Regional Judicial and Legal Services Commission.⁶⁶ This provision sets out the composition of the commission and sets out its responsibility for appointment and discipline of judges of the court, except the president.⁶⁷
- Tenure of judges' office.⁶⁸ The president of the court shall serve a seven year term or until he attains the age of seventy-two years, whichever is earlier.⁶⁹ The other judges of the court shall hold office until the age of seventy-two.⁷⁰ "A judge may be removed from office only for inability to perform the functions of office, whether arising from illness or any other cause or for misbehaviour"⁷¹
- Oath of Office.⁷²

B. Part II

Part II of the Agreement⁷³ relates to the original jurisdiction of the court and provides, in pertinent part:

- International law is the law to be applied by the court in the exercise of its original jurisdiction.⁷⁴
- Directs that the court have jurisdiction to hear and deliver judgments on disputes between contracting parties to the Agreement; disputes between contracting parties to the Agreement and Caricom; referrals from national courts or tribunals of contracting parties to the Agreement; and applications by nationals of Caricom

65. *Id.* app. 1, art. IV(1), at 260.

66. *Id.* app. 1, art. V, at 262.

67. *See id.* app. 1, art. V(1)-(3), at 262-64.

68. *Id.* app. 1, art. IX, at 266.

69. *See id.* app. 1, art. IX(2), at 266-67.

70. *See id.* app. 1, art. IX(3), at 267.

71. *Id.* app. 1, art. IX(4), at 267.

72. *Id.* app. 1, at 284. Appendix 1 of the Agreement Establishing the Caribbean Court of Justice provides the oath as follows:

I _____ do hereby swear (or solemnly affirm) that I will faithfully exercise the office of President/Judge of the Caribbean Court of Justice without fear or favour, affection or illwill and in accordance with the Code of Judicial conduct. (So help me God (to be omitted in affirmation)).

73. *Id.* app. 1, pt. II, at 269-74.

74. *See id.* app.1, art. XVII(1), at 271.

concerning the interpretation and application of the Caricom Treaty.⁷⁵

- Allows intervention by third parties.⁷⁶ A member state, Caricom, or a person who considers that he may have “a substantial interest of a legal nature which may be affected by a decision of the court in the exercise of original jurisdiction . . . may apply to the court to intervene and it shall be for the court to decide on the application.”⁷⁷
- *Locus standi*⁷⁸ of private parties. This provision allows nationals of contracting parties⁷⁹ to pursue claims against a nation state.⁸⁰ This is unique, in that international law, as a general rule, only recognizes states as subjects.⁸¹ This provision allows an individual the opportunity to apply to the CCJ for special leave, under certain conditions, to espouse his action against a nation state, when the court finds the interest of justice so requires.⁸²
- Compliance with judgments of the court⁸³ and compulsory jurisdiction of the court.⁸⁴
- Allows the court to render advisory opinions.⁸⁵
- Judgments of the court will constitute *stare decisis*.⁸⁶
- Allows for revision of judgments.⁸⁷ This provision allows the court to reconsider a judgment “when it is based upon the discovery of some fact of such nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and party claim-

75. See *id.* app. 1, art. XII, at 269-70.

76. See *id.* app. 1, art XVIII, at 271.

77. *Id.* app. 1, art. XVIII(1), at 271.

78. See *id.* app. 1, art. XXIV, at 274.

79. Nations of the ESC who sign the Agreement to Establish the CCJ are contracting parties.

80. See POLLARD, *supra* note 15, app. 1, art. XXIV, at 274.

81. See CARICOM Secretariat, *Model Caricom Youth Summit: The Caribbean Court of Justice 2* (background paper prepared and submitted by the CARICOM Secretariat), available at <http://www.caricom.org/archives/cohsod/youth/rotaryyouthsummit4.htm> (last visited Feb. 5, 2005).

82. See POLLARD, *supra* note 15, app. 1, art. XXIV, at 274.

83. See *id.* app. 1, art. XV, at 270.

84. See *id.* app. 1, art. XVI, at 271.

85. See *id.* app. 1, art. XIII, at 270.

86. See *id.* app. 1, art. XXII, at 273. Article XXII provides that judgments of the court shall be legally binding precedents for parties in proceedings before the court unless such judgments have been revised in accordance with Article XX. This is a common law concept not usually applied in international law. See CARICOM Secretariat, *Model Caricom Youth Summit: The Caribbean Court of Justice*, *supra* note 81, at 2.

87. See *id.* app. 1, art. XX, at 272.

ing [reconsideration.]⁸⁸

- Encourages alternative dispute resolution measures.⁸⁹

C. Part III

Part III of the Agreement⁹⁰ addresses the appellate jurisdiction of the court and provides, in relevant part:

- The CCJ, "in exercise of its appellate jurisdiction . . . , is a Superior Court of record with such jurisdiction and powers conferred on it by th[e] Agreement or by the Constitution or any other law of a Contracting Party."⁹¹
- Appeals shall lie to the court from decisions of the court of appeal of a contracting party as *a matter of right* in certain cases.⁹² This provision of the Agreement tracks exactly the language of most ESC constitutions which now allow appeal as *a matter of right* to the Privy Council.⁹³
- An appeal shall lie to the Court *with the leave* of the

88. *Id.*

89. *See id.* app. 1, art. XXIII(1), at 274. Article XXIII(1) provides that "[e]ach contracting party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes." *Id.*

90. *Id.* app. 1, pt. III, at 275-77.

91. *Id.* app. 1, art. XXV(1), at 275.

92. *See id.* app.1, art. XXV(2), at 275. Article XXV(2) provides appeals shall lie as a matter of right in final decisions: in civil matters where the value is of not less than \$25,000 Eastern Caribbean Currency (EC \$25,000); in proceedings for dissolution of marriage; in any civil or other proceedings which involve interpretation of the constitution of a contracting party; relating to redress for contravention of the provisions of the constitution of a contracting party for the protection of fundamental rights; given in the exercise of a contracting party of a right expressly provided by that party's constitution; and any such other cases as may be prescribe by any law of a contracting party. *See id.*

93. *See, e.g.,* TRIN. & TOBAGO CONST. ch.7, pt.2, § 109(1). The Constitution of the Republic of Trinidad and Tobago provides:

An appeal shall lie from decisions of the Court of Appeal to the Judicial Committee as of right in the following cases-

(a) final decisions in civil proceedings where the matter in dispute on the appeal . . . is of the value of fifteen hundred dollars or upwards or where the appeal involves directly or indirectly property a claim to or question respecting property or a right of the value of fifteen hundred dollars or upwards;

(b) final decisions in proceedings for dissolution or nullity of marriage;

(c) final decisions in any civil, criminal or other proceedings which involve a question as to the interpretation of this Constitution: and,

....

(f) such other cases as may be prescribed.

Court of Appeal of a contracting party in other certain cases.⁹⁴ This provision of the Agreement, also, tracks exactly the language of most ESC constitutions which now allow appeal *with the leave* of the Court of Appeal to the Privy Council.⁹⁵

- The President in consultation with five other judges selected by him makes Rules of Court regulating the practice and procedure of the court in exercise of its appellate jurisdiction.⁹⁶

D. Part IV

Part IV of the Agreement⁹⁷ relates to the enforcement and financial provisions of the court and provides, in relevant part:

- Every state that is a signatory to the Agreement must pay its proportionate share of expenses of the CCJ.⁹⁸
- Salaries, allowances, benefits, and expenses of judges shall be determined and shall not be altered during their tenure of office.⁹⁹
- “The contracting parties agree to take all necessary steps, including enactment of legislation to ensure that” the exercise of jurisdiction shall be enforced.¹⁰⁰
- “There shall be a Registrar of the Court, Deputy Registrars and other officials and employees of the Court”¹⁰¹
- Right of audience of attorneys to practice before the

94. See POLLARD, *supra* note 15, app. 1, art. XXV(3), at 276. Article XXV(3) provides for such appeals from final decisions in any civil proceeding if the question involved is one of great general public importance; and such other cases as may be proscribed by any law of the contracting party. See *id.*

95. See, e.g., TRIN. & TOBAGO CONST. ch.7, pt.2, § 109(2). The Constitution of the Republic of Trinidad and Tobago provides:

An appeal shall lie from decisions of the Court of Appeal to the Judicial Committee with the leave of the Court of Appeal in the following cases-

- (a) decisions in any civil proceedings; where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to the Judicial Committee; and
- (b) such other cases as may be proscribed.

Id.

96. See POLLARD, *supra* note 15, app. 1, art. XXV(7), at 276.

97. *Id.* app. 1, pt. IV, at 278-84.

98. See *id.* app. 1, art. XXVIII(1), at 279.

99. See *id.* app. 1, art. XXVIII(2)-(3), at 279.

100. *Id.* app. 1, art. XXVI, at 278.

101. *Id.* app. 1, art. XXVII(1), at 278.

- court.¹⁰²
- Privileges and immunities for judges.¹⁰³
 - “Th[e] Agreement may be amended by the Contracting Parties . . . subject to ratification by the Contracting Parties in accordance with their respective constitutional procedures.”¹⁰⁴
 - “A contracting party may withdraw from th[e] Agreement by giving three years’ notice in writing”¹⁰⁵ However, “a Contracting Party that withdraws from th[e] Agreement undertakes to honour any financial or other obligation duly assumed . . . , includ[ing] any matter relating to an appeal filed before withdrawal becomes effective.”¹⁰⁶

IV. THE INFRASTRUCTURE IMPLEMENTATION PROCESS AND INAUGURATION OF THE CARIBBEAN COURT OF JUSTICE

A. *Funding*

The Agreement Establishing the CCJ¹⁰⁷ has been ratified by the requisite number of countries and the Agreement now has entered into force.¹⁰⁸

Adequate funding has been the foundation of the CCJ implementation process. Article XXVIII(1) of the Agreement¹⁰⁹ mandates that every state that is a signatory to the Agreement pay its proportionate share of expenses to the CCJ.¹¹⁰ According to infor-

102. *See id.* app. 1, art. XXIX, at 280. Article XXIX provides that attorneys “duly admitted to practice law in the courts of a Contracting Party shall, subject to the powers of the Court, not be required to satisfy any other condition in order to practice before the Court wherever the Court is sitting in exercise of its jurisdiction and they shall enjoy the privileges and immunities necessary for the independent exercise of their duties.” *Id.*

103. *See id.* app. 1, art. XXX, at 280. Article XXX provides that, “[t]he privileges and immunities to be recognised and granted by the Contracting Parties to the Judges and officers of the Court necessary to protect their independence and impartiality shall be laid down in a Protocol to this Agreement.” *Id.*

104. *Id.* app. 1, art XXXII(1)-(2), at 281.

105. *Id.* app. 1, art. XXXVII(1), at 282.

106. *Id.* app.1, art. XXXVII(2), at 282.

107. *See id.* at 258-355.

108. *See id.* app.1, art XXXV, at 281. Article XXXV provides that, “at least three Member States of the Caribbean Community” must ratify the Agreement. *Id.*

109. *Id.* app.1, art. XXVIII(1), at 279-80.

110. *See id.* Article XXVIII provides, in relevant part:

The expenses of the Court and of the Commission, including the cost of the maintenance of the Seat of the Court and the remuneration and allowances and other payments referred to in Article XXVII and this Article, shall be borne by the Contracting

mation provided by officials, Caricom Ministers of Finance from signatory states are required to make provisions in their national budgets for the first five years of the court.¹¹¹ In this regard, a one hundred million dollar (U.S. \$100 million) trust fund has been established for the purpose of sustaining the operations of the court,¹¹² and will be administered by the Caribbean Development Bank, located in Barbados. Contracting parties are required to put up a bond in the amount of their assessed contribution for the first five years.¹¹³ Failure to pay future contributions would lead to forfeiture of the bond.¹¹⁴

Officials confirm that the trust fund is up and running, a president has been elected, and a board of directors selected.¹¹⁵ Each contracting party makes a one time contribution to the fund.¹¹⁶ Trinidad, the largest contributor to the fund, contributed one hundred and ninety-nine million (TT 199 million) to the fund.¹¹⁷ Trinidad has also provided the temporary headquarters of the court in its capital city of Port of Spain and will bear the cost of its operation.¹¹⁸ Jamaica has contributed twenty-eight million, seven hundred thousand dollars (U.S. \$28.7 million) to the fund.¹¹⁹ It is reported that Guyana will contribute between forty-seven and forty-eight million dollars (U.S. \$47.8 million) to the fund.¹²⁰ Other smaller ESC countries have contributed amounts of approximately two million, five hundred thousand dollars (U.S. \$2.5 million).¹²¹ It has also been reported that Japan's Human Resource

Parties in such proportions as may be agreed by the Contracting Parties. The assessed contributions to be paid by a Contracting Party shall be charged by law on the Consolidated Fund or public revenues of that Contracting Party.

Id.

111. Interview with Officials, Trinidad and Tobago Ministry of Legal Affairs, in Trinidad (June 24, 2004) (interview given on condition of anonymity).

112. See A.J. Nicholson, *Financing the CCJ*, THE GLEANER (Jam.), Oct. 19, 2003.

113. Interview with Officials, Trinidad and Tobago Ministry of Legal Affairs, *supra* note 111.

114. *Id.*

115. *Id.*

116. *Id.*

117. This is approximately thirty-three million U.S. dollars.

118. Interview with Officials, Trinidad and Tobago Ministry of Legal Affairs, *supra* note 111.

119. See *CCJ Loan To Be Repaid Over 10 Years*, JAMAICA OBSERVER (Aug. 14, 2003), available at http://www.jamaicaobserver.com/news/html/20030813T200000-0500-47526_OBS_CCJ_LOAN_TO_BE_REPAID_OVER__YEARS.asp.

120. See Patrick Denny, *Ten-Member Team for Caribbean Court of Justice Seminar in Trinidad, Guyana to Contribute US\$47-8M to Court*, STABROEK NEWS (Guy.) (July 20, 2002), available at <http://landofsixpeoples.com/news022/ns207203.htm>.

121. See Felicia Toby, *CCJ Will Be a Reality*, BARBADOS ADVOCATE (Sept. 9, 2003),

Development Fund has provided three hundred thousand dollars (U.S. \$300 thousand) to help implement the operation of the CCJ.¹²² The Japanese contribution will be funneled through the United Nations Development Program ("UNDP").¹²³

The board of directors of the trust have set about directing the operations of the fund, establishing guidelines of investment, promulgating regulations for the trust, appointing investment managers, appointing an auditor, and approving an annual fund budget.¹²⁴ The board will meet twice each year¹²⁵ and each member state has one vote.¹²⁶ A simple majority is required to constitute a quorum.¹²⁷

B. The Commission and Its Role in Choosing Judges

In its exercise of appellate jurisdiction, the CCJ will consider and determine appeals in both civil and criminal matters that had once been adjudicated by the Privy Council. In its exercise of original jurisdiction, the CCJ will function as an international tribunal applying the rules of international law. As such, the CCJ is expected to perform functions like other international tribunals, including the European Court of Justice, the European Court of First Instance, the Andean Court of Justice, and the International Court of Justice. The judges of these international tribunals are typically elected by the signatory countries comprising those courts, or appointed by those countries' ministers of government.¹²⁸

available at <http://www.barbadosadvocate.com/newviewnewsleft.cfm?record=14858>. This news article covers part of a speech delivered to jurists at a Commonwealth Bar Association meeting and paraphrased Barbados Attorney General Mia Mottley as stating, "In terms of financing . . . the establishment of a trust fund would see countries from across the Eastern Caribbean settling US\$2.5 million, while the larger territories would combine to contribute just over \$30 million."

122. See *Caribbean Court of Justice Technical Assistance US\$300,000 Agreement Signed with Japan*, STABROEK NEWS (Guy.) (Aug. 21, 2002), available at <http://landofsixpeoples.com/news022/ns208213.htm>.

123. See *id.*

124. Interview with Officials, Trinidad and Tobago Ministry of Legal Affairs, *supra* note 111.

125. *Id.*

126. *Id.*

127. *Id.*

128. For example, the Treaty Establishing the European Community, provides:

The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence; they shall be appointed by common

Framers of the Agreement to Establish the CCJ¹²⁹ determined that the judges of the CCJ should not be directly appointed or elected by its member states.¹³⁰ Instead, the CCJ Agreement provides for a regional judicial and legal services commission that will choose the judges for the Court.¹³¹ Such a method serves to negate the perception of undue political influence in selecting the judges to the CCJ.

Article V of the Agreement Establishing the CCJ provides for the establishment of the Regional Judicial and Legal Services Commission.¹³² The Commission consists of a president, who shall be its chairman; two persons nominated jointly by the Commonwealth Bar Association and the Eastern Caribbean Bar Association; one chairman of the Judicial Services Commission of a contracting party; the chairman of a public service commission of a contracting party; two persons from civil society following consultation with regional nongovernmental organizations; two distinguished jurists nominated by law school deans; and two persons nominated jointly by the bar associations of the contracting parties.¹³³

The responsibilities of the Commission include: recommendation of appointment of the president of the court;¹³⁴ appointment of other judges;¹³⁵ appointment of the registrar, and other officials

accord of the governments of the Member States for a term of six years.

Treaty Establishing the European Community, *done at Rome* Mar. 25, 1957, art. 223, 298 U.N.T.S. 11. Additionally, the Treaty Creating the Court of Justice of the Cartagena Agreement, provides: "The judges shall be appointed by unanimous decision of the Plenipotentiary Representatives accredited for that purpose, from slates of three candidates each submitted by each Member Country. The government of the host country shall summon the Plenipotentiary Representatives." Treaty Creating the Court of Justice of the Cartagena Agreement, Mar. 10, 1996, ch. 2, art. 7., available at http://www.comunidadandina.org/ingles/treaties/trea/ande_trieb2.htm.

129. See *supra* note 15 and accompanying text.

130. Interview with Officials, Trinidad and Tobago Ministry of Legal Affairs, *supra* note 111.

131. Officials interviewed maintained that there was reluctance in the ESC to have judges appointed by ministers of governments. Instead, there was consensus that the Agreement would adopt the model already used in Trinidad for many years that provided for more independence in choosing judges. That is, judges would be chosen by an independent judicial and legal services commission. *Id.*

132. See POLLARD, *supra* note 15, app. 1, art. V(1), at 262-64.

133. See *id.*

134. See *id.* app. 1, art. V(3)(1)-(2), at 262-63. Article IV(6) provides: "The President shall be appointed or removed by the qualified majority vote of three quarters of the Contracting parties on the recommendation of the Commission." *Id.* app. 1, art. IV(6), at 261.

135. See *id.* app. 1, art. V(3), at 263.

and employees of the court; determining salaries of judges and other employees of the court; and providing rules for termination of appointments to the Court.¹³⁶ The President of the Commission is Sir David Simmons, the Chief Justice of the Barbados Supreme Court. He maintains that the Commission is hard at work.¹³⁷ The Commission has made its recommendations to the heads of governments for the president of the court pursuant to Article IV(6).¹³⁸ The heads of government are to decide their choice for president of the court at their annual Heads of Government Meeting to be held July 4-7, 2004.¹³⁹ He also maintains that there has been extensive advertising for the position of judges for the Court. Information has been sent to bar associations throughout the ESC and the British Commonwealth. The judicial positions have also been advertised on the internet.¹⁴⁰

Sir David contends that it has taken the Commission some time to recommend the president of the court. He believes that the appointments of the other judges will move much faster once the president is chosen.¹⁴¹ He further states that the Commission is looking for broad experience.¹⁴² Sir David maintains that the CCJ must have judges or lawyers with experience who can significantly shape the law.¹⁴³ He expects some of the appointees will already be judges, but the Commission is not limited to choosing sitting judges.¹⁴⁴ Sir David has been pleased with the response to the Commission's advertising and recruiting efforts. He explained that the Commission has already received ninety applications for consideration from all over the ESC, including England, South Africa, and other Commonwealth countries such as, Australia, Nigeria, and the Solomon Islands.¹⁴⁵ Sir David further indicated that although judges of the CCJ, other than the president, may remain on the bench until age seventy two, he did not see this as a problem. The Commission is looking for people with at least fif-

136. *See id.*

137. Telephone Interview with Sir David Simmons, President, Regional Judicial and Legal Services Commission, and Chief Justice, Barbados Supreme Court (July 24, 2004).

138. *See* POLLARD, *supra* note 15, app.1, art. IV(6), at 261.

139. Telephone Interview with Sir David Simmons, *supra* note 137.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

teen years of legal and/or judicial experience.¹⁴⁶ He doubted that anyone under the age of forty-five would be appointed to the court.¹⁴⁷

Sir David would not speculate on the exact inaugural date of the court but he does not expect that the judges will hear cases that first day the CCJ opens for business.¹⁴⁸ Instead, he reminds us, that pursuant to Article XXI of the Agreement,¹⁴⁹ the court will spend its first days promulgating rules of the court which will regulate the sittings of the court,¹⁵⁰ regulate the pleadings practice and procedure, and regulate the practice in the court by attorneys.¹⁵¹

C. *The Inauguration of the Court*

There has not been a specific date set for inauguration of the court. It is likely the CCJ will be inaugurated in late winter or early spring of 2005.¹⁵² Officials involved with the formation process and implementation of the CCJ contend that the heads of governments of the various signatory countries to the Agreement had originally set November 15, 2003, for the inauguration of the court.¹⁵³ This appears to have been an arbitrary date which did not fully take into account all the logistics of the implementation process.¹⁵⁴ Those planning the inauguration have come to realize that the support staff and the financial section of the CCJ need to be fully operational before a formal date is announced.¹⁵⁵ Officials believe that early in 2005, the implementation process will be complete. Inaugural ceremonies will entail invitation of heads of government of the signatory countries, as well as Caricom

146. *Id.*

147. *Id.*

148. *Id.*

149. See POLLARD, *supra* note 15, app.1, art. XXI, at 272-73.

150. Regulating the sittings of the court means that rules will be promulgated to determine how many judges will hear a particular type case. In the Court of Justice of the European Union, for example, the court "may sit as a full court, in a Grand Chamber (13 Judges), or in chambers of three or five Judges." CURIA, *The Court of Justice of the European Communities*, available at <http://curia.eu.int/en/instit/presentationfr/cje.htm> (last visited Feb. 10, 2005).

151. See POLLARD, *supra* note 15, app. 1, art. XXI(1)-(2), at 272-73.

152. Interview with Officials, Trinidad and Tobago Ministry of Legal Affairs, *supra* note 111.

153. *Id.*; see also *Setting Up The CCJ*, TRINIDAD GUARDIAN (May 20, 2003), available at <http://www.guardian.co.tt/archives/2003-05-20/editorial.html>.

154. Interview with Officials, Trinidad and Tobago Ministry of Legal Affairs, *supra* note 111.

155. *Id.*

officials.¹⁵⁶

V. LEGAL AND PRACTICAL OBSTACLES IN THE FORMATION OF THE CARIBBEAN COURT OF JUSTICE

The anticipated inauguration of the CCJ will be a monumental and historic event for the ESC. Yet, there still remain practical, legal, and political obstacles to the full operation of the CCJ.

A. *If You Build It Will They Come?*

Since it appears that a functioning CCJ will soon be a reality, the question becomes: "If you build it, will they come?" Stated another way: "Will the Court be utilized?" There appears to be considerable public support for the CCJ among many in the ESC. "According to the Caricom Secretariat, public support for the CCJ has grown from sixty eight percent in the year 2000 to some eighty percent by the end of last year (2002)."¹⁵⁷

1. Original Jurisdiction: The Caribbean Court of Justice and the Economy of the Region

The author believes that the CCJ will certainly exercise its original jurisdiction and can be successful as an international court. The Honorable Godfrey Smith, Attorney General of Belize expressed it best when he stated:

One of the strongest arguments in favor of the CCJ is perhaps the one least focused on, i.e., that the CCJ is a *sine qua non* for the success of the Caricom Single Market and Economy. The increasing globalization of the world economy due to the development of the WTO, the consequent emergence of regional trading blocks all over the world and the erosion of preferential treatment present major challenges to the viability and sustainability of individual Caricom nations. Indeed Prime Minister Owen Arthur of Barbados has highlighted the importance of the CSME to the very economic survival of the Caribbean region as a whole.¹⁵⁸

The Agreement, at Article IV, specifically mandates that, "[t]he Judges of the Court shall be the President and not more than nine other Judges of whom at least three shall possess exper-

156. *Id.*

157. *Confidence Growing in Caribbean Court*, GUYANA CHRON., Mar. 20, 2003.

158. Smith, *supra* note 23.

tise in international law including international trade law."¹⁵⁹ Though the court should start with at least three judges with international experience, there will probably be a learning curve with respect to their activities on a newly inaugurated court. It would be advisable that all, or at least a good number, of the judges visit the European Court or the Andean Court to view their work and consult with the judges of those courts to obtain a feel for international jurisprudence.

2. Regional Appellate Jurisdiction

The answer to "If you build it will they come?" with respect to the exercise of the court's appellate jurisdiction is more problematic at this time. The Privy Council has often been utilized in final appeals since the independence of the ESC. It is reported that from 1962 to 1999, one hundred and five criminal cases were taken to the Privy Council – an average of under three per year.¹⁶⁰ During the same period, 1962 to 1999, fifty-seven civil cases were taken to the Privy Council, an average of fewer than two per year.¹⁶¹ It has been further reported that in 1998, forty-five cases went to the Privy Council from the ESC.¹⁶² This would indicate that there is a need for a final court of appeal for the ESC. It is believed that such final court of appeal in the region will be less costly for litigants than appealing to the far away Privy Council in London.¹⁶³

Suriname and Haiti, both of which have signed the Agreement, never had the availability of the Privy Council written into their constitutions. These countries' use of the CCJ's appellate jurisdiction will not be an issue. For example, Guyana already has its own final court of appeal and de-linked from the Privy Council some time ago,¹⁶⁴ and is anxious to utilize the appellate jurisdiction of the CCJ.¹⁶⁵ However, the decision to leave the Privy Council has met with some criticism from opposition politicians across the region.¹⁶⁶ The criticism appears to center around tradi-

159. POLLARD, *supra* note 15, app. 1, art. IV(1), at 260 (emphasis added).

160. See Senator Delano Franklyn, *Let's Do Things for Ourselves*, THE GLEANER (Jam.), May 25, 2003.

161. See *id.*

162. See Toby, *supra* note 121.

163. See generally Franklyn, *supra* note 163.

164. Guyana presently relies upon the Eastern Caribbean Supreme Court as its final court of appeal.

165. See *Confidence Growing in Caribbean Court*, *supra* note 160.

166. See *Guyana Urges Region to Move Quickly on Caribbean Court of Justice*, BBC MONITORING AM., June 20, 2003, available at 2003 WL 58760620.

tion and cost, and ultimately has become a political and constitutional problem for some countries.¹⁶⁷

In order to avail themselves of the CCJ's appellate jurisdiction, most of the ESC signatory countries will find it necessary to amend their constitutions to de-link themselves from the Privy Council. An example is Trinidad and Tobago. As is found in most ESC constitutions, there is an express right granted to Trinidad to appeal to the Privy Council as the court of last resort.¹⁶⁸ The Trinidad constitution specifically provides that it may be altered¹⁶⁹ by the country's parliament on a vote of three-fourths of all members of the House, and a vote of no less than two-thirds of the members of the Senate.¹⁷⁰

Therein lies the problem: a "super majority" is required to amend the constitution with respect to the Privy Council. This means the governing party of Trinidad, the Peoples National Movement ("PNM"), must work with the opposition party, the United National Congress ("UNM"), to pass the legislation. The UNM's present position is to withhold support for the constitutional amendment to de-link from the Privy Council unless other constitutional reforms they desire are passed.¹⁷¹ Trinidad's Prime Minister Patrick Manning has asked other Caricom nations to help convince the UNM to alter their position.¹⁷² The UNM's position remained unchanged.¹⁷³ This constitutional and political stalemate leaves Trinidad, the temporary headquarters of the CCJ, unable to immediately avail itself of the CCJ's appellate jurisdiction.

There is a similar constitutional and political problem with respect to Jamaica. The Jamaican Constitution also provides that

167. Some argue that the Privy Council has always applied the laws of the country of whose cases it hears and not the laws of England, so why should they change a system that has been in effect for over one hundred years? See JAMAICANS FOR JUSTICE, *supra* note 9. Other people disagree. Some point out that it cost the governments of ESC countries to be able to use the Privy Council. See Franklyn, *supra* note 163. Some argue that with the CCJ, individual litigants pay, but it will cost these countries huge sums to be a part of the CCJ, and provide no reduction in legal fees to individual litigants. See generally CARICOM Secretariat, *The Caribbean Court of Justice: What It Is, What it Does*, *supra* note 48.

168. TRIN. & TOBAGO CONST. ch. VII, pt. 2, § 109.

169. The word altered, as used here, means amended with respect to Trinidad's use of the Privy Council.

170. TRIN. & TOBAGO CONST. ch. IV, pt. 2, § 54(1)-(3).

171. See Richard Charan, *PM Calls For Caricom's Help*, TRINIDAD EXPRESS (July 7, 2003), available at <http://www.trinidadexpress.com/index.pl>.

172. *See id.*

173. *See id.*

it might be amended to de-link from the Privy Council.¹⁷⁴ However, unlike Trinidad's Constitution, the Jamaican Constitution only requires a simple majority vote of both houses.¹⁷⁵ It is reported that Jamaican Prime Minister P.J. Patterson's governing party, the People's National Party ("PNP"), believes that they should use their recent election victory to amend the constitution to de-link from the Privy Council.¹⁷⁶ "However, the opposition Jamaica Labour Party ("JLP"), along with the Jamaican Bar Association have been demanding that the Patterson Administration hold a referendum to give the people the opportunity to decide whether they want to swap the Privy Council with the CCJ, as the country's final appeal court."¹⁷⁷ It is further reported that Jamaican "Opposition Leader, Edward Seaga (JLP), has repeatedly stated that future JLP Government would pull out of the CCJ if it were not given the stamp of approval by the people."¹⁷⁸

In a poll commissioned by *The Gleaner*, a Jamaican newspaper, it is further reported, "that even though most Jamaicans were in favour of the CCJ, a clear majority thought the Government should hold a referendum. Some 63 per cent of those interviewed are in favour of a referendum on the Court, while 34.5 per cent are opposed to it."¹⁷⁹ The Patterson administration had not moved to use the party's majority to force a vote on the constitutional change.¹⁸⁰ Although a referendum is not constitutionally required in Jamaica,¹⁸¹ it appears that the PNP is weighing the mood of the people before acting on the amendment. These constitutional and political problems in Trinidad and Jamaica may soon be resolved through typical political compromise and negotiation. Yet, until they are resolved, it is not clear if or when the CCJ's provisions for appellate jurisdiction will be utilized by two of the most populous countries in the ESC.

The constitutional problems may, however, be resolved another way. It has been reported that British Prime Minister

174. JAM. CONST. ch. VII, pt. 3, § 110.

175. See Vernon Daly, *A Step Closer: Jamaica Ratifies CCJ Agreement*, THE GLEANER (Jam.), June 10, 2003.

176. See *id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. See *id.*

181. It is reported that the constitution of St. Vincent and the Grenadines requires a referendum by the people to de-link from the Privy Council. See Prior Beharry, *Sobion Slams UNC, JLP for Not Backing CCJ*, TRINIDAD EXPRESS (Jan. 21, 2004), available at <http://www.trinidadexpress.com/index.pl>.

Tony Blair has announced his intention to overhaul the British court system and do away with the Privy Council.¹⁸² ESC officials view this as a timely signal to the region to put its own house in order with respect to the appellate jurisdiction of the CCJ.¹⁸³ “Barbados’ Attorney General, Mia Mottley, who is chairperson of the CCJ preparatory committee, said Blair’s proposals raises the question of whether the region should go ahead and establish its own final court or ‘wait and loiter on colonial premises.’”¹⁸⁴

There is also strong support from the Privy Council itself for the formation of the CCJ.¹⁸⁵ Upon returning from a London conference on de-linking from the Privy Council, Sir David Simmons, Chief Justice of the Barbados Supreme Court, and President of the Regional Judicial and Legal Services Commission of the CCJ, stated: “The Privy Council and the House of Lords judges fully understand the necessity for the CCJ, fully support what we’re doing and pledged their continued support for the court.”¹⁸⁶ Sir David added that, “the registrar of the Privy Council has also made it clear that the judicial body, which is currently the court of last resorts for most English-speaking Caribbean countries, is prepared to do ‘whatever is necessary to ensure that we set up the CCJ not only according to best practices but to ensure sustainability.’”¹⁸⁷ In this same regard, a few years earlier, the Senior Law Lord and Head of the Privy Council, Lord Nicolas Browne-Wilkinson, expressed the sentiment that the Privy Council was over burdened with Caribbean cases and maintained that the region should have its own court.¹⁸⁸

182. See *Judicial Reform in the UK Ignites Debate on Caribbean Court of Justice*, BBC MONITORING AM., June 22, 2003, available at 2003 WL 58760663.

183. See *id.*; see also *Going with Caribbean Court*, GUYANA CHRON. (June 15, 2003), available at <http://www.landofsixpeoples.com/news301/nc30615.htm>; see generally Stephen Vasciannie, *British Constitutional Changes*, THE GLEANER (Jam.) (June 16, 2003), available at <http://www.jamaica-gleaner.com/gleaner/20030616/cleisure/cleisure2.html>; *Jamaica Responds to Blair’s Decision to Establish Supreme Court in UK*, BBC WORLDWIDE MONITORING (June 15, 2003).

184. *Judicial Reform in the UK Ignites Debate on Caribbean Court of Justice*, *supra* note 185.

185. See *Strong Support from London Law Lords, Says Barbados’s Chief Justice*, BBC MONITORING AM., June 27, 2003, available at 2003 WL 58760746.

186. *Id.*

187. *Id.*

188. Lord Browne-Wilkinson is reported to have stated in an interview, in relevant part:

The ultimate court of appeal of a state should be in that state and staffed by citizens of it and not outsiders. The only reason we are completely laden with Caribbean cases is because City firms have taken them up and are ensuring the cases are well presented and

There has been no announced date as to when the British court system might be overhauled and the Privy Council abolished, but it appears that there would be no need for constitutional amendments in the ESC if the Privy Council were abolished. If the Privy Council is abolished the ESC countries will be left with no recourse to a final court of appeal other than through the appellate jurisdiction of the CCJ.

B. *Coordinating Three Legal Systems*

There are another set of obstacles which relate to the coordination of legal systems, irrespective of whether the CCJ is acting with original or appellate jurisdiction. In the European Court of Justice, there is a problem with signatory countries speaking and writing different languages. Therefore, the European Court utilizes simultaneous translations in its proceedings and prints its decisions in different languages.

The CCJ, however, grows out of a common law tradition, and will utilize international law.¹⁸⁹ Therefore, the CCJ will also find it necessary to coordinate and mesh three languages and two different legal systems. Most of the signatories to the Agreement are English speaking – hence the English Speaking Caribbean. However, Suriname, a signatory, was a Dutch colony and Dutch is the official language. They have a civil law tradition. Haiti has also signed on to the CCJ,¹⁹⁰ and they are a French speaking country with a civil law court system patterned after the Napoleonic Code.

finding a great deal there that would otherwise be observed. I should think 25 per cent of the Law Lord's time is taken up with Caribbean murder and crime decisions which is quite a fantastic number.

Caribbean Courts Should Hear Their own Appeals Says Senior English Law Lord, Stabroek News (Guy.) (July 25, 1999), available at <http://www.landofsixpeoples.com/news/ns907255.htm>.

189. "The Court, in exercising its original jurisdiction . . . shall apply such rules of international law as may be applicable." POLLARD, *supra* note 15, app. 1, art. XVII(1), at 271.

190. Although Haiti had become a member of Caricom and signed on to the Agreement to Establish the CCJ, its status, as of the writing of this article, is uncertain. According to a recent news report:

Caribbean leaders retreated to a private island Tuesday to debate the legitimacy of Haiti's interim government and whether the country should be allowed to return to the Caribbean Community. Haiti's interim government suspended membership in the 15-member regional bloc after Jamaica gave temporary refuge to ousted President Jean-Bertrand Aristide. The bloc then withheld support for the interim government at a March summit, raising concerns over Aristide's claim of a U.S. orchestrated coup.

Guyana, although an English speaking country, reportedly has a Roman law tradition.¹⁹¹

These legal systems will not necessarily make a great difference with respect to original jurisdiction; international law will apply.¹⁹² Although it will be costly, the language difference can be solved by simultaneous translations, as is done in the European Court, and the decisions may be printed in three sets of languages. However, if Suriname, Haiti, and Guyana decide to avail themselves of the appellate jurisdiction of the CCJ, this may present the interesting problem of meshing different legal systems.

The appellate jurisdiction of the CCJ is based upon a British common law model which is based on the concept of *stare decisis*. *Stare decisis* requires that the previous judgments of a court become legally binding precedent for all similar cases and proceedings that come before the court. The civil law systems do not follow this model. Nevertheless, with respect to appellate jurisdiction, the judges of the CCJ will be expected to follow the laws and constitutions of the signatory countries. It appears that many of the new judges who come from the ESC will require a crash course in civil law systems. Of course, the problem can be alleviated if a number of judges are appointed to the CCJ who already come from such civil law systems in Suriname, Haiti, and Guyana. It will be interesting to see how these systems will be meshed. Of course, perhaps Suriname, Haiti, and Guyana may decide only to utilize the CCJ for Caricom Treaty¹⁹³ matters and forego the appellate jurisdiction of the court. Once the judges are named to the CCJ, it

Caribbean Leaders Will Talk About New Ties With Haiti, ORLANDO SENTINEL, July 7, 2004, at A12.

The next day the Associated Press reported:

Caribbean Community leaders moved on to trade discussions Wednesday as they wrapped up a summit that ended with the region withholding recognition of Haiti's U.S. backed interim government. Leaders of the 15 nation regional bloc discussed efforts to form an EU-style regional trade market. On Tuesday, Caribbean leaders agreed to send five foreign ministers to meet with interim Haitian Prime Minister Gerard Latortue to discuss conditions for full recognition of the government.

Caribbean Bloc Says No to Haiti, ORLANDO SENTINEL, July 8, 2004, at A14.

191. See *Top Officials to Attend Ratification of Caribbean Court of Justice in Jamaica*, BBC MONITORING AM., June 9, 2003, available at 2003 WL 5860372.

192. See POLLARD, *supra* note 15, app. 1, art. XVII(1), at 271.

193. See Treaty Establishing the Caribbean Community, *supra* note 17; Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the Caricom Single Market and Economy, *supra* note 25.

would be advisable that a working group be formed among them to decide how the legal systems may be coordinated

C. *Enforcement and Withdrawal*

Enforcement of judgments of an international court can always be problematic. The CCJ will likely be no different. Usually, there is no true enforcement provision in a treaty with respect to sovereign states. It also appears such with the CCJ. With respect to the original jurisdiction of the CCJ, Article XV of the Agreement¹⁹⁴ speaks to compliance of judgments of the court. The Article provides: "Member States, Organs, Bodies of the Community or persons to whom a judgment of the Court applies, shall comply with that judgment."¹⁹⁵ This seems to have little teeth, and provides little comfort to an aggrieved party where a defaulting state refuses to enforce a decision of the CCJ.¹⁹⁶ Yet, the signatories to the Agreement have a tradition and culture of respecting the law.¹⁹⁷ The fact that fourteen states have signed on to the Agreement to Establish the CCJ creates hope that there will be lawful compliance with and obedience to the decisions of the new tribunal.

The prospect for enforcement with respect to the appellate jurisdiction of the CCJ is stronger, since the Agreement requires the states to enact legislation to ensure that judgments shall be enforced. Article XXVI provides:

The Contracting Parties agree to take all the necessary steps, including the enactment of legislation to ensure that:

- (a) all authorities of a Contracting party act in aid of the Court and that any judgment, decree, order or sentence of the Court given in exercise of its jurisdiction shall be enforced by all courts and authorities in any territory of the Contracting Parties as if it were a judgment, decree, order or sentence of a superior court of the Contracting Party¹⁹⁸

Hopefully, such legislation will be passed in the signatory countries without undue delay.

The Agreement Establishing the CCJ has a withdrawal provi-

194. See POLLARD, *supra* note 15, app. 1, art. XV, at 270.

195. *Id.*

196. See CARICOM Secretariat, *The Caribbean Court of Justice: What It Is, What it Does*, *supra* note 48, at 6.

197. See *id.*

198. POLLARD, *supra* note 15, app. 1, art. XXVI(a), at 278.

sion, as do many international agreements.¹⁹⁹ Theoretically, such a provision signals that the CCJ may be impermanent. That is, a number of countries, after a year or two, might decide to withdraw from the CCJ. This is doubtful if the signatory countries are as committed to the success of the CCJ as their funding and infrastructure building processes have shown. Again, under international law, states, as an attribute of their sovereignty, may choose to withdraw from a treaty or international agreement. The fact that there is a withdrawal provision should be of no significance to the court since withdrawal cannot take effect until five years after a signatory state has given written notice.²⁰⁰

D. *The Death Penalty Debate*

A number of detractors of the CCJ fear that its exercise of appellate jurisdiction will make it easier for ESC countries to put people to death once the moderating influence of the Privy Council is no longer available.²⁰¹ The truth or fallacy of this belief will become clear with time. At present the countries with the largest death row populations in the ESC are Jamaica and Trinidad,²⁰² and there are political and constitutional questions surrounding when and whether they will be able to avail themselves of the ability to de-link from the Privy Council.

Nevertheless, when those two countries resolve their constitutional problems and the others nations who have no such problems avail themselves of the appellate jurisdiction of the CCJ in death penalty cases, it is unlikely that it will be easier to put people to death. It is this author's belief that even if the Privy Council no longer exists, the concept of *stare decisis* will moderate a rush to the death penalty. The concept of *stare decisis* is written

199. See *id.* app. 1, art. XXXVII, at 282.

200. See *id.* Article XXXVII(1) provides

A Contracting party may withdraw from this Agreement by giving three years' notice in writing to the Depositary who shall promptly notify the other Contracting parties accordingly and *the withdrawal shall take effect five years after the date on which the notice has been received by the Depositary*, unless the Contracting Party before the withdrawal becomes effective notifies the Depositary in writing of the cancellation of its notice of withdrawal.

Id. (emphasis added).

201. See generally *Judicial Reform in the UK Ignites Debate on Caribbean Court of Justice*, *supra* note 185.

202. See generally *Birdsong, Open Forum: Is There a Rush to the Death Penalty in the Caribbean: The Bahamas Says No*, *supra* note 35.

into the Agreement to Establish the CCJ.²⁰³ Moreover, the CCJ, in its exercise of appellate jurisdiction, must interpret and apply the constitutions and other laws of the contracting parties.²⁰⁴

The Privy Council, over the years, has interpreted the constitutions of Jamaica and Trinidad in a way that moderates the imposition of the death penalty. Both *Pratt and Morgan*²⁰⁵ and *Roodal v. State*²⁰⁶ are now constitutional requirements that must be followed. It is the author's further belief that *stare decisis* must and will be followed. It is unlikely that a court with a common law tradition could or would abandon these constitutional requirements previously ruled upon by the Privy Council.

It has been reported that the governments of Jamaica and Belize have announced plans to amend their constitutions so that they may carry out hangings despite Privy Council rulings.²⁰⁷ Barbados has already passed such a constitutional amendment.²⁰⁸

203. POLLARD, *supra* note 15, app. 1, art. XXII, at 273-74. Article XXII, "Judgment of The Court to Constitute Stare Decisis," states: "Judgments of the Court shall be legally binding precedents for the parties in proceedings before the Court unless such judgments have been revised in accordance with Article XX." *Id.*

204. *Id.* app. 1, art. XXV, at 276. Article XXV provides, in relevant part:

(5) Nothing in this Article shall apply to matters in relation to which the decision of the Court of Appeal of a Contracting Party is, at the time of the entry into force of the Agreement pursuant to the Constitution or any other law of that party, declared to be final.

(6) The Court shall, in relation to any appeal to it in any case, have all the jurisdiction and powers possessed in relation to that case by the Court of Appeal of the Contracting Party from which the appeal was brought.

Id.

205. *Pratt v. Attorney-General* [1994] 2 A.C. 1 (P.C. 1993). *Pratt and Morgan* were two consolidated cases from Jamaica, wherein the Privy Council ruled that under the Jamaica Constitution it would be unconstitutional to put to death prisoners who were held on death row longer than five years. The Privy Council made this ruling applicable to all ESC countries.

206. *Roodal v. State*, [2003] U.K.P.C. 78 (appeal taken from Trin.) is a recent case from Trinidad where the Privy Council ruled that the mandatory sentence of death in a murder case is unconstitutional, and that sentence determinations should be made by the trial judge with input from the jury. This case was decided on November 20, 2003, and has been made applicable in all ESC countries. The author was advised in an interview with Trinidadian court officials during his visit to the country that as a result of *Roodal*, all sentencing determinations in murder convictions in the ESC have been put on hold while the various jurisdictions determine how to carry out sentencing determinations in murder cases. See Interview with Officials, Trinidad Court Administration, in Trinidad (June 24, 2004) (interview given on condition of anonymity).

207. See Peter Richard, *Trinidad: Spike in Murders Revives Hanging Debate*, INTER PRESS SERV., Jan. 9, 2003.

208. *Id.* See also Peter Richards, *Rights: Barbados to Prevent Delay in Executions*, INTER PRESS SERV., Aug. 5, 2002.

Such constitutional developments are troubling to death penalty abolitionists. However, because super majorities of legislators in parliament are required to amend the constitutions of most ESC countries in this regard, it is unlikely that one will see such constitutional changes in Jamaica and Belize very quickly. Until there are constitutional changes in countries other than Barbados, the five year limitation on death sentences of *Pratt and Morgan*²⁰⁹ and the sentencing determination of *Roodal*²¹⁰ should moderate any rush to the death penalty with respect to the CCJ.

VI. CONCLUSION

The formation of the CCJ presents a historic opportunity to start a new court for the Caribbean that will have original and appellate jurisdiction. However, for officials tasked with the original start up of the court the devil is truly in the details of initiating the project.

These start up details are those endemic to most organizations. The first detail has been convincing the heads of government of the signatory countries of the initial cost and the need for personnel.²¹¹ A court is more than just judges. It has been estimated that start up costs for the first year of operation will total approximately five million dollars (U.S. \$5 million).²¹² Two million dollars (U.S. \$2 million) for staff and three million dollars (U.S. \$3 million) for equipment, information technology, and library needs.²¹³ Administrators in Trinidad overseeing the project estimate that aside from judges, a forty-two person staff will be needed. This projection was cut to twenty-six people for the initial year of operation.²¹⁴ Officials also want the court to be high technology, with a capability for e-filing of pleadings, video conferencing, and an online library. It is unclear whether this technology will be in place at the inauguration of the court, but eventually, it will be required if the CCJ is to reach its true capability.

It is the author's hope that this review of the purpose, history, implementation, and problems faced by the Caribbean Court of Justice provides an understanding of what people of color in the ESC have entered into in their final quest for self-determination.

209. *Pratt*, [1994] 2 A.C. 1 (P.C. 1993).

210. *Roodal*, [2003] U.K.P.C. 78.

211. Interview with Officials, Trinidad Court Administration, *supra* note 209.

212. *Id.*

213. *Id.*

214. *Id.*

It is this author's belief that the CCJ is required for the ESC countries to truly gain their status of independent sovereign nations, and that it will be conducive to the development of regional jurisprudence. The original jurisdiction of the court is required to fully carry out the initiatives of the CSME. A break with the Privy Council in London will give the ESC a court of final appeal that is geographically located in the region and will provide judges with an appreciation of local circumstances. The inauguration of the CCJ should truly signal the sunset of British colonial rule in the ESC.