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## Using One's Head to Sustain One's Heart: A New Focus for the Establishment of the Caribbean Court of Justice

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# Using One's Head to Sustain One's Heart: A New Focus for the Establishment of the Caribbean Court of Justice

Neil Dennis

## **Abstract**

This Note focuses on the reasonableness of placing the sovereignty argument at the forefront of the Caribbean Court of Justice (CCJ) debate instead of the Caribbean Community (CARICOM) Single Market and Economy (CSME) argument. The reason being is the CSME cannot exist without the CCJ. Part I discusses the background of both the CCJ & the CSME. Part II analyzes the arguments of sovereignty and the CSME for the establishment of the CCJ. Part III advocates that it is wise to argue rationally, in today's age of globalization, rather than emotionally.

## NOTES

### USING ONE'S HEAD TO SUSTAIN ONE'S HEART: A NEW FOCUS FOR THE ESTABLISHMENT OF THE CARIBBEAN COURT OF JUSTICE

*Neil Dennis\**

#### INTRODUCTION

"A wise man should have money in his head,  
but not in his heart."<sup>1</sup>

Amidst the clear sea water and warm tropical breeze of Jamaica, two men stood in a courthouse to hear, for the first time, that they had been convicted of murder.<sup>2</sup> They were both sentenced to death and their executions were scheduled for March 7, 1991.<sup>3</sup> The defendants, Earl Pratt and Ivan Morgan, however,

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\* J.D. Candidate, May 2004, Fordham University School of Law; B.A. Hons., University of Toronto. I would like to thank God for giving me the wisdom and will power to write this Note. I also thank my family for their unending support and love. Honorable mention is given to Mr. Kenneth Lawrence, Jr. for always staying on top of the latest issues surrounding Jamaica and the Caribbean. Special thanks is given to all those who helped clarify the issues in this Note, especially Professor Chantal Thomas and Dr. David Berry. I thank those who have had great influence on my writing skills, particularly the Honorable Denny Chin and Professor Roger Riendeau. Of course, my deepest gratitude goes out to the editors and staff of Fordham International Law Journal, Volume XXVI, especially Julie Turner (a wonderful and caring person in every respect, and the best darn Notes & Articles Editor ever), Cara Hirsch, Inna Nazarova, Julie Wald, and Michele Totah. Honorable mention is given to Ms. Jessica Darpino (thanks in advance for reading this Note "cover to cover"). Finally, I would like to acknowledge a certain cosmic force that only I, and one other, know simply as "ZOHA."

This Note is dedicated to my fiancée, Wendy, for her infinite patience, understanding, and love (traits that all hard working people could only ever hope for in a spouse).

1. Jonathan Swift [Unknown source].

2. See HUGH RAWLINS, *THE CARIBBEAN COURT OF JUSTICE: THE HISTORY AND ANALYSIS OF THE DEBATE* 6 (2000), available at [www.caricom.org/expframes2.htm](http://www.caricom.org/expframes2.htm) (summarizing facts of Pratt and Morgan v. Attorney General of Jamaica, where two defendants, Earl Pratt and Ivan Morgan, were convicted of murder in 1979). See also Giselle Reid, *The Legacy of Colonialism: A Hindrance to Self-Determination*, 10 *TOURO INT'L L. REV.* 277, 293 (2000) (reporting that Pratt and Morgan committed murder in 1977).

3. See Laurence Helfer, *Overlegalizing Human Rights: International Relations Theory And The Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 *COLUM. L. REV.* 1832, 1869 (2002) (stating that in January 1979, Pratt and Morgan were sentenced to death). See also RAWLINS, *supra* n.2, at 6 (stating that defendants' executions had been scheduled to take place on March 7, 1991).

managed to stall their execution by petitioning their case to appellate courts and human rights commissions.<sup>4</sup> They claimed that issuing the death penalty after such a long delay, during which they were held in sub-human conditions on death row,<sup>5</sup> was an infringement of their constitutional rights not to be subject to torture or degrading punishment.<sup>6</sup>

Eventually, this case was heard by Jamaica's highest court of appeals, the Judicial Committee of the Privy Council in England (the "Privy Council").<sup>7</sup> This Court held that the prolonged delay in carrying out the sentence amounted to an infringement of the prisoners' constitutional rights.<sup>8</sup> Accordingly, the Court commuted the sentences of both Pratt and Morgan to life imprisonment.<sup>9</sup> In addition to this ruling, the Court also set out a five-year deadline between sentence and execution, and held that any case in which execution takes place for more than five years after the sentence is sufficient grounds for finding inhu-

4. See RAWLINS, *supra* n.2, at 6 (stating that delay was caused by Pratt and Morgan through their appeals and petitions to courts and human rights commissions, like United Nations Human Rights Committee ("UNHRC") and Inter-American Commission on Human Rights ("IACHR")). See also J. M.A. De La Bastide, *The Case for a Caribbean Court of Appeal*, 5 CARIBBEAN L. REV. 401, 404 (1995) (explaining that Jamaican Court of Appeal also caused some delay by taking four years to give reason for dismissing one of defendants' petitions for special leave).

5. See RAWLINS, *supra* n.2, at 6 (stating that Pratt and Morgan contended that they were held in sub-human conditions on death row). See also *Pratt & Morgan v. Attorney General of Jamaica*, 43 W.I.R. 340, 343 (PC 1993) (reporting that Pratt and Morgan had death warrants read to them on three different occasions, and that they were moved to condemned cells adjacent to gallows all within span of fourteen years).

6. See CONST. OF JAMAICA sec. 17(1). Section 17(1) provides that "[n]o person shall be subjected to torture or to inhuman or degrading punishment or other treatment." *Id.*

7. See Reid, *supra* n.2, at 290 (stating that at apex of court system is Judicial Committee of Privy Council in England ("Privy Council")). See also JAMAICA INFORMATION SERVICE, JUSTICE, at <http://www.jis.gov.jm/information/justice.htm> (stating that Privy Council in London, England is final court of appeal for Jamaica).

8. See *Pratt & Morgan*, 43 W.I.R. at 360 (holding that unconscionable delay in implementing death sentence constitutes infringement of section 17(1) of Jamaican Constitution). *But see* De La Bastide, *supra* n.4, at 406 (reporting that Privy Council included time taken to appeal to local Court of Appeals, and even Privy Council itself, when determining whether delay was so great as to render carrying out of sentence unconstitutional).

9. See Reid, *supra* n.2, at 295-96 (stating that Privy Council commuted petitioners' sentences to life imprisonment). See also De La Bastide, *supra* n.4, at 405 (explaining that Privy Council's decision overruled earlier decision of Jamaican Court of Appeals, which held that carrying out a death sentence survives any delay that occurs between sentence and execution).

man or degrading punishment.<sup>10</sup> This ruling forced a wave of commuted death sentences throughout the Caribbean.<sup>11</sup>

Although political independence amongst the Caribbean occurred over forty years ago, Caribbean Nations still chose to maintain their legal ties to the United Kingdom ("U.K.") through their allegiance to the Privy Council.<sup>12</sup> As such, the Privy Council is the highest appellate body for all Commonwealth Caribbean jurisdictions (except Guyana).<sup>13</sup> Yet, because of decisions like *Pratt & Morgan v. Attorney Gen. of Jamaica*,<sup>14</sup> a heated debate commenced regarding the replacement of this fi-

10. See *Pratt & Morgan*, 43 W.I.R. at 362 (setting forth five-year deadline for execution to take place to avoid infringing on prisoner's constitutional rights). See also Reid, *supra* n.2, at 295 (stating Privy Council's holding regarding five-year deadline for execution).

11. See De La Bastide, *supra* n.4, at 407 (reporting that fifty-three persons in Trinidad and Tobago had death sentences commuted because five-year time limit elapsed). The inevitable result is that all other appellants apart from convicted murderers are subject to a further delay in having their appeals determined. *Id.* See also Roget V. Bryan, Comment, *Toward The Development of a Caribbean Jurisprudence: The Case for Establishing a Caribbean Court of Appeal*, 7 J. TRANSNAT'L L. & POLICY 181, 190 (1998) (stating that Privy Council commuted two death sentences on grounds of unconscionable delay in Barbados based on precedent set by *Pratt & Morgan*).

12. See Helfer, *supra* n.3, at 1865 (stating that even though Caribbean States gained political independence from United Kingdom (the "U.K.") beginning in 1960s, each State did not sever legal ties to that country). In addition to the Privy Council, Caribbean countries, like Jamaica, also maintained other aspects of the English legal system, such as: a monarchical system of government along with a formal written Constitution as the supreme law of the land; the Queen of England as the Head of State, but not the head of government; the Prime Minister as the head of the government presiding over his Cabinet of ministers; and the Governor-General as the representative of the Queen. Reid, *supra* n.2, at 290.

13. See Helfer, *supra* n.3, at 1865 (stating that in addition to local trial and appellate courts, each State retained Privy Council as its highest court of appeal). See also ROSE-MARIE BELLE ANTOINE, COMMONWEALTH CARIBBEAN LAW AND LEGAL SYSTEMS 229 (1999) (stating that Republic of Guyana exercised its constitutional right to abolish appeals to Privy Council).

14. See RAWLINS, *supra* n.2, at 16-17 (describing facts of Guerra and Wallen v. State, where Lincoln Guerra and Brian Wallen ambushed a young couple, James and Leslie Girod, along with their seven-month-old son, Gregg, during a New Year's Day picnic in Trinidad and Tobago). The two men bludgeoned and raped James' wife, decapitated his son, and slit James' throat. *Id.* James managed to survive, however, and testify at trial. *Id.* at 17. Guerra and Wallen were convicted of murder and sentenced to death on May 18, 1989; their executions were scheduled for March 25, 1994. *Id.*

The Privy Council investigated the matter on appeal with leave. *Guerra v. Baptiste et al.*, [1996] A.C. 397, 399-400 (PC 1995) (reporting appeal made with leave of Court of Appeal of Trinidad and Tobago). The Court granted a stay of execution up to April 25, 1994, for reasons of leave to appeal. De La Bastide, *supra* note 4, at 413 (stating that Privy Council granted stay of execution). Once this stay lapsed, the Attorney-General stated that no execution was to take place until after the Court of Appeal determined

nal appellate court with a more domestic Caribbean Court of Justice (the "CCJ").<sup>15</sup>

While many arguments both for and against the establishment of the CCJ have been made,<sup>16</sup> the concept of sovereignty, or independence, has been brought to the forefront of this debate.<sup>17</sup> This is known as the argument for "nationalism and sov-

petitioners' application for a stay. *Id.* On April 29, 1994, the Court of Appeal agreed to these circumstances. *Id.*

Two days before the Court of Appeal could give its ruling, however, the Privy Council held that if the Court of Appeal dismissed the petitioners' appeal and did not immediately grant a conservatory order, the execution of the death sentence would be deferred until after the Privy Council itself determined the appeal. *Id.* at 414. The rationale for this decision was that to permit the execution of petitioners before they had exhausted their rights of appeal to the Privy Council, would constitute the gravest breach of their constitutional rights, and would frustrate the Privy Council's exercise of its appellate jurisdiction. *Id.* at 414-15. The Privy Council's actions have been interpreted as a lack of confidence in the Trinidadian Court of Appeal. *Id.* at 415. Ultimately, this decision effectively deprived the local Court of Appeal of making a decision on its own. RAWLINS, *supra* note 2, at 17 (stating that Privy Council issued conservatory order before Court of Appeal was able to consider granting conservatory order on its own decision).

15. See Reid, *supra* n.2, at 292-93 (stating that drive to abolish Privy Council seems to have been motivated by *Pratt & Morgan*). See also RAWLINS, *supra* n.2, at 6 (stating that debate intensified after *Pratt & Morgan*). It is also noteworthy to mention that even before the Privy Council delivered its controversial decisions, Caribbean Nations were debating (albeit not as "heatedly") over the establishment of a Caribbean Court of Justice (the "CCJ"). *Id.* at 10-14 (providing various newspaper articles, speeches, and essays, spanning from first half of 1970s to 1988, arguing both for and against establishment of CCJ).

16. See ROSALEA HAMILTON, LEGAL & ECONOMIC ARGUMENTS IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL V. CARIBBEAN COURT OF JUSTICE DEBATE (2000) (summarizing various legal and economic arguments both for and against establishment of CCJ). Other arguments include: the Caribbean jurisprudence argument (e.g., will CCJ interpret laws using historical, cultural, social, and economic experiences of Caribbean people, or are these considerations superfluous in legal system that adheres to binding precedents?); the access to justice argument (e.g., will CCJ provide judges who are privy to social experiences reflecting racial, educational, gender, and class profile of Caribbean, or is this concern already resolved by Privy Council's incorporation of Caribbean Judges on bench?); the independence of judiciary argument (e.g., how fair and unbiased will CCJ judges be?); and the institution of the court argument (e.g., can Caribbean governments afford expense of establishing CCJ?). *Id.* See also, RAWLINS, *supra* n.2, at 23-65 (dividing CCJ debate into emotional and rational arguments); Bryan, *supra* n.11, at 200-11 (dividing CCJ debate into five categories: positive law vs. law as product of society; legitimacy; nationalism and sovereignty; access to justice; and cost factor).

17. See RAWLINS, *supra* n.2, at 44 (stating that popular and justified argument for establishment of CCJ is to view CCJ as symbol of effort to assert independence and forge Caribbean unity). See also Reid, *supra* note 2, at 301 (stating that need for Jamaica, and other independent Commonwealth Caribbean Nations, to be truly independent is one of strongest arguments for abolishment of appeals to Privy Council).

ereignty.”<sup>18</sup> Many have placed the sovereignty argument above all other arguments in the CCJ debate because of its close relation to the controversy surrounding the death penalty.<sup>19</sup>

In contrast to the sovereignty argument, a more recent, and yet marginalized, argument has emerged in the debate surrounding the establishment of the CCJ with the attempt to establish the CARICOM Single Market and Economy (the “CSME”).<sup>20</sup> Still in its preliminary stages, this entity is a response by Caribbean Nations to the challenges and opportunities presented by the changes in the global economy.<sup>21</sup> One of the principal shifts

18. See RAWLINS, *supra* n.2, at 44 (noting that “nationalism and sovereignty” factor is argument cited in support of establishing CCJ); see generally DUKE POLLARD, *THE CARIBBEAN COURT OF JUSTICE (CCJ): CHALLENGE AND RESPONSE 1-2* (1999), available at <http://www.caricom.org/expframes2.htm> (discussing “sovereignty argument.”). For the purposes of this Note, this argument will be referred to as the “sovereignty argument.”

19. See ANTOINE, *supra* n.13, at 244 (arguing that common denominator of new move toward CCJ is to enable Caribbean governments and judges to hang prisoners on death row). See also BERNICE V. LAKE, *THE CARIBBEAN COURT OF JUSTICE: PUBLIC CONFIDENCE AND THE ROLE OF THE MEDIA*, Paper presented at the Fifth Annual Caribbean Media Conference 7 (May 16, 2002), available at <http://www.caricom.org/expframes2.htm> (asserting that opponents of CCJ contend that motivation for implementation of CCJ is power-driven by governments who have been stung by reversals before Privy Council in death penalty cases).

20. See DUKE POLLARD, *CARIBBEAN COURT OF JUSTICE: WHAT IT IS, WHAT IT DOES* (2000), available at <http://www.caricom.org/ccjq&a.htm> [hereinafter 2 POLLARD] (stating that CCJ’s importance to CARICOM Single Market and Economy (the “CSME”) is little understood and even less appreciated by many members of legal fraternity at present time). See also MINISTRY OF FOREIGN AFFAIRS & FOREIGN TRADE OF BARBADOS, *CARICOM PROTOCOLS — AMENDING THE TREATY OF CHAGUARAMAS 1* (2000), available at <http://www.foreign.gov.bb> [hereinafter CARICOM PROTOCOLS] (explaining that “Single Market” part of CSME allows for movement of CARICOM goods, services, people, and capital throughout Caribbean Community without tariffs/barriers or restrictions, while “Single Economy” part yields coordination of foreign exchange and interest rate policies, tax regimes, and laws and common currency).

21. See *CARICOM Single Market and Economy*, at <http://www.caricom.org/archives/2spcsmebackground.htm> (stating that in 1989, CARICOM Heads of Government of Caribbean Community (the “Heads”) decided to work towards establishment of CSME by way of Grand Anse Declaration in response to challenges and opportunities presented by changes in global economy). See also MINISTRY OF FOREIGN AFFAIRS AND FOREIGN TRADE — JAMAICA, *CARIBBEAN COMMUNITY AND COMMON MARKET (CARICOM) SINGLE MARKET AND ECONOMY* (2001), available at [http://www.mfaft.gov.jm/Intl\\_Community/Caricom.htm](http://www.mfaft.gov.jm/Intl_Community/Caricom.htm) [hereinafter CARIBBEAN COMMUNITY AND COMMON MARKET] (commenting that Heads’ decision was driven by need to deepen integration process and strengthen Caribbean Community in all of its dimensions to respond to challenges and opportunities presented by changes in global economy). The kinds of changes in the global economy include: the liberalization of trade and other economic activities; globalization; and the emergence and expansion of regional economic blocs. *Id.*

in the global economy affecting small States, like those in the Caribbean, is the trend towards globalization.<sup>22</sup> For procedural reasons, however, the CSME cannot be established without the existence of a CCJ vested with original jurisdiction.<sup>23</sup> Thus, the establishment of the CSME is another argument for the establishment of the CCJ.<sup>24</sup>

This Note focuses on the reasonableness of placing the sovereignty argument at the forefront of the CCJ debate instead of the CSME argument. The above quote from Jonathan Swift encapsulates this theme. The *head* represents a rational response to an economic problem. Here, the argument for the establishment of the CSME, the head, is the rational response to the economic problem of globalization. The CSME, however, cannot exist without the CCJ;<sup>25</sup> thus, the CSME is the rational argument for the establishment of the CCJ. On the other hand, the *heart* is analogous to an emotional response. In comparison to the CSME proposal, the sovereignty argument, the heart, is the more emotionally charged argument for the establishment of

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22. See Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy, pmbl. (not yet effected), available at <http://www.caricom.org/exprframes2.htm> [hereinafter The Revised Treaty]. The Preamble recognizes that globalization and liberalization have important implications for international competitiveness. *Id.* See also Owen Arthur, *Small States in a Changing World*, 24 FALL FLETCHER F. WORLD AFF. 3, 10 (2000) (text from speech given by Owen Arthur, Prime Minister of Barbados) (arguing that globalization confronts small States in general with challenges, arising principally from its new international trade and financial arrangements); Isabella D. Bunn, *The Right To Development: Implication For International Economic Law*, 15 AM. U. INT'L L. REV. 1425, 1464 (2000) (stating that globalization limits freedom of action governments have in setting own economic policies, and diminishes predictability of economic conditions in general).

23. See DAVID A. COX, THE ORIGINAL JURISDICTION OF THE CARIBBEAN COURT OF JUSTICE AND ITS ROLE IN THE SUCCESSFUL IMPLEMENTATION OF THE CSME, at <http://www.caricom.org/archives/ccj-originaljurisdiction.htm> (correlating CCJ's original jurisdiction with establishment of CSME). The relationship between these two entities is based on the stability and predictability of the Caribbean economy. *Id.* See also P.K. Menon, *Third World Perspectives on International Law and Its Teaching*, 6 CARIBBEAN L. REV. 198, 204 (1996) (explaining that economic activity cannot be effectively carried on without standard of stability and systemic order).

24. See RAWLINS, *supra* n.2, at 43-44 (arguing that CSME presents compelling case for establishment of CCJ). See also Hugh Salmon, *The Caribbean Court of Justice: A March with Destiny*, 2 FL. COASTAL L.J. 239, 239 (2000) (stating that new dimension of integration process goes over and beyond other arguments for establishment of CCJ).

25. See COX, *supra* n.23 (arguing that connection of CCJ to CSME is fundamental in that one cannot exist without other). See also Salmon, *supra* n.24, at 239 (arguing that emergence of CSME will inevitably lead to a need for interpretation of rights and obligations, which will be exercised by CCJ through original jurisdiction).



the CCJ.<sup>26</sup> For the moment, the heart has taken precedence over the head in this CCJ debate.<sup>27</sup>

Part I of this Note discusses the background of both the CCJ and the CSME. Part II analyzes the arguments of sovereignty and the CSME for the establishment of the CCJ. Part III advocates that it is indeed wise to argue rationally, in today's age of globalization, rather than emotionally. While the CSME and sovereignty arguments are closely related, and while the sovereignty argument is important to the existence of Caribbean Nations, the CSME argument should still be put at the forefront of the CCJ debate.

#### *PART I: FORMING THE HEAD AND THE HEART: THE UNDERLYING LEGAL AND POLITICAL BODIES*

The CCJ has been a concept in development for over three decades.<sup>28</sup> Almost twenty years after the notion of a CCJ entered the minds of Caribbean governments, the CARICOM Heads of Government of the Caribbean Community (the "Heads")<sup>29</sup> came to an agreement to work towards the establishment of the CSME.<sup>30</sup> Although they are two different entities, the CCJ and CSME are still closely intertwined.<sup>31</sup>

26. See RAWLINS, *supra* n.2, at 43 (describing sovereignty argument as both emotionally appealing, and rational). See also Salmon, *supra* n.24, at 231 (describing establishment of CCJ as defining moment to take destiny into own hands).

27. See RAWLINS, *supra* n.2, at 43 (stating that sovereignty argument carries very widespread appeal). See also 2 POLLARD, *supra* n.20 (stating that importance of CSME to establishment of CCJ is unappreciated by legal community).

28. See RAWLINS, *supra* n.2, at 10 (discussing meeting held in 1970 by Heads of Caribbean governments where question of creating final Caribbean appellate court was addressed). See also Reid, *supra* n.2, at 292 (stating that since 1970, heads of government in Caribbean community have been discussing establishment of CCJ).

29. See *The History of CARICOM*, at <http://www.caricom.org/history.htm> (stating that Prime Minister of Trinidad and Tobago convened first Heads of Government Conference in July 1963, in Trinidad and Tobago). Leaders from Barbados, British Guiana, Jamaica, and Trinidad and Tobago gathered at this Conference to discuss the need for close cooperation with Europe, Africa and Latin America. *Id.* See also CARICOM PROTOCOLS, *supra* n.20, at 1 (stating that CARICOM itself was established through Treaty of Chaguaramas (the "Treaty") and came into effect in 1973).

30. See *CARICOM Single Market and Economy*, *supra* n.21 (stating that State Heads decided to establish CSME in 1989). See also CARICOM PROTOCOLS, *supra* n.20, at 1 (stating that, in 1989, Heads decided to work towards establishing CSME by way of Grand Anse Declaration).

31. See Cox, *supra* n.23 (arguing that CCJ cannot exist without CSME and vice versa). See also Salmon, *supra* n.24, 239 (explaining that CCJ's original jurisdiction will

A. *The Caribbean Court of Justice*

The Privy Council was officially established by the Judicial Committee Act 1833.<sup>32</sup> Despite their independence from British colonial rule, all Caribbean jurisdictions today, except for Guyana, show deference to the Privy Council as the highest appellate body.<sup>33</sup> This appellate jurisdiction, however, is severely restricted.<sup>34</sup> Nevertheless, the Privy Council's limited jurisdiction did not keep Caribbean States from discussing the establishment of the CCJ.<sup>35</sup> One case, in particular, caused the debate to heat up immensely, eventually leading to the formulation of an Agreement for the CCJ.<sup>36</sup>

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be utilized to interpret Treaty and Protocols that establish CSME and that such original jurisdiction is absolutely essential to integrity of integration process).

32. See Judicial Committee Act 1833, ch. 44(1) (Eng.). Chapter 44(1) provides:

The President for the time being of His Majesty's Privy Council . . . (words repealed by Statute Law Revision (No.2) Act 1888, ch. 57) and such of the members of His Majesty's Privy Council as shall from time to time hold any of the offices following, that is to say, the office of lord keeper or first lord commissioner of the great seal of Great Britain . . . (words repealed by Statute Law Revision (No.2) Act 1888, ch. 57) and also all persons, members of His Majesty's Privy Council, who shall have been President thereof . . . (words repealed by Statute Law Revision (No.2) Act 1888, ch. 57) or shall have held any of the other offices herein before mentioned, shall form a committee of His Majesty's said Privy Council, and shall be styled "The Judicial Committee of the Privy Council": Provided nevertheless, that it shall be lawful for His Majesty from time to time, as and when he shall think fit, by his sign manual, to appoint any two other persons, being privy councillors, to be members of the said Committee.

*Id.*

33. See Helfer, *supra* n.3, at 1865 (explaining that each Caribbean State retained Privy Council as highest court of appeal). See also Reid, *supra* n.2, at 290 (describing Privy Council as being at apex of Jamaica's court system).

34. See ANTOINE, *supra* n.13, at 230 (stating that Privy Council's jurisdiction is severely limited and only functions as Court of Appeal in very restricted sense). See, e.g., *Re Dillet*, 12 AC 459, 467 (1887) (establishing strict review for criminal proceedings).

35. See Salmon, *supra* n.24, at 233 (stating that despite conviction expressed by governments since 1970, during initial urgings of Caribbean Bar Association and Government of Jamaica, debate on establishment of CCJ still continued). See also RAWLINS, *supra* n.2, at 10-14 (discussing various opinions, both for and against establishment of CCJ).

36. See De La Bastide, *supra* n.4, at 404 (acknowledging *Pratt & Morgan* as most important and controversial recent Privy Council decision). See also Reid, *supra* n.2, at 302 (discussing Agreement Establishing the Caribbean Court of Justice [hereinafter AECCJ], and listing other instruments for establishing CCJ). The AECCJ is the main instrument for establishing the CCJ. *Id.*

## 1. The Privy Council

The Privy Council was formally established by the Judicial Committee Act in 1833.<sup>37</sup> It was derived from the residuary jurisdiction, which the British Sovereign, as the fountain of justice, possessed over all British subjects.<sup>38</sup> In its early years, the Privy Council was directly responsible for a majority of the administrative functions of the English government, and it conducted its work using a system of committees.<sup>39</sup> Judicial disputes from the overseas empire that were referred to the Sovereign were handed down to the Judicial Committee.<sup>40</sup> In 1640, during the English Civil War, the Judicial Committee was limited to the purpose of hearing appeals from these overseas possessions.<sup>41</sup> As the British Empire expanded, and courts were set up in various colonies, it became the norm to include in their Charters — which gave the right of settlement — provisions establishing local courts with a right of appeal to the Privy Council.<sup>42</sup>

In 1833, judicial powers were effectively transferred from the Privy Council to its judicial branch, i.e., the Judicial Commit-

37. See Judicial Committee Act 1833, *supra* n.32 (providing that certain members of Privy Council will now form Judicial Committee of the Privy Council). See also RAWLINS, *supra* n.2, at 9 (stating that judicial arm of Privy Council was only formally established by Judicial Committee Act in 1833). The decisions of the Judicial Committee of the Privy Council were reported as early as 1829. *Id.*

38. See RAWLINS, *supra* n.2, at 9 (stating that Privy Council was derived from residuary jurisdiction which British Sovereign possessed over all of Britain). See also Bryan, *supra* n.11, at 183 (explaining that Privy Council was derived from residuary jurisdiction which British Sovereign possessed over British subjects).

39. See RAWLINS, *supra* n.2, at 9 (stating that Privy Council conducted work through system of Committees). One of these Committees was the Committee of Trade and Foreign Plantations, which oversaw petitions from what became known as the “British Empire.” *Id.* See also HAMILTON, *supra* n.16 (noting that Privy Council is comprised of several miscellaneous Committees dealing with scientific research, universities, granting of charters, and other matters).

40. See RAWLINS, *supra* n.2, at 9 (explaining that petitions from British Empire were directed to Judicial Committee). See also Bryan, *supra* n.11, 183-84 (stating that judicial disputes from overseas empire were first referred to Sovereign and then passed on to Judicial Committee).

41. See RAWLINS, *supra* n.2, at 9 (explaining that Privy Council lost its function as court in England during 1640 Civil War in England). See also Bryan, *supra* n.11, at 184 (maintaining that Civil War in 1640 confined Privy Council’s judicial function to determining overseas petitions).

42. See RAWLINS, *supra* n.2, at 9 (stating that local courts in colonies customarily included right of appeal to Privy Council in Charters). See also Bryan, *supra* n.11, at 184 (stating that it became common practice for local courts to appeal to Privy Council as British Empire expanded).

tee.<sup>43</sup> The Judicial Committee has since maintained its status as an independent court of law with a minimal connection to the Privy Council, its parent administrative body.<sup>44</sup> The 1833 Act, as well as Acts passed in 1844 and 1871, provided for the composition of the Privy Council.<sup>45</sup> Pursuant to these Acts, the Privy Council is composed of select members of the higher judiciary in England, as well as senior members of the judiciary of other Commonwealth countries.<sup>46</sup>

## 2. The Post-Colonial Reluctance To Sever Legal Ties

Even though the Caribbean States gained their political independence from the U.K. beginning in the 1960s, they still chose to maintain their legal ties with the Privy Council.<sup>47</sup> Consequently, all Commonwealth Caribbean jurisdictions today, except Guyana, show deference to the Privy Council as their high-

43. See Bryan, *supra* n.11, at 184 (stating that Judicial Committee Act 1833 effectively transferred judicial powers from Privy Council to Judicial Committee). See also RAWLINS, *supra* n.2, at 9 (stating that 1833 legislation formally established Judicial Committee as independent court of law).

44. See RAWLINS, *supra* n.2, at 9 (stating that Judicial Committee consistently guards and maintains its independent legal status and nominal connection with Privy Council). Since the passing of the 1833 legislation, the Judicial Committee has resembled an open court. *Id.* (noting that Privy Council's judgments were read in open court, and did not admit dissenting opinions until 1966). See also Bryan, *supra* n.11, at 184 (stating that since 1833 Act, Judicial Committee has operated as independent court of law, separate from rest of Privy Council).

45. See Bryan, *supra* n.11, at 184 (stating that Judicial Committee Acts of 1833, 1844, and 1871 delineated composition of Privy Council). See also RAWLINS, *supra* n.2, at 9 (stating that 1833 Act along with series of subsequent Acts provided for composition of Privy Council).

46. See Bryan, *supra* n.11, at 184 (stating that based on Acts, Privy Council is to be comprised of selected members of higher judiciary in England, as well as senior members of judiciary of other Commonwealth countries). See also RAWLINS, *supra* n.2, at 20 n.10 (stating that members also include other persons who hold or have held high judicial office, as well as retired Queen-appointed judges of superior Commonwealth Courts). For instance, Sir Hugh Wooding, the late Chief Justice of Trinidad and Tobago, Sir William Douglas, former Chief Justice of Barbados, and Sir Vincent Floissac, the Chief Justice of the Organization of Eastern Caribbean States Supreme Court have all sat with the Privy Council and delivered judgments in Privy Council cases. *Id.* Usually, a panel for the hearing of matters in the Privy Council consists of five judges. *Id.*

47. See Helfer, *supra* n.3, at 1865 (stating that Caribbean States did not sever ties with Privy Council upon gaining independence). See also Reid, *supra* n.2, at 290 (stating that in addition to Privy Council, Caribbean countries, like Jamaica, also maintained a monarchical system of government along with formal written Constitution as supreme law of land; Queen of England as Head of State, but not head of government; Prime Minister as head of government presiding over Cabinet of Ministers; and Governor-General as representative of Queen).

est appellate body.<sup>48</sup> Accordingly, any decision the Privy Council makes when hearing a case for a particular Caribbean country is binding.<sup>49</sup>

Given this court's stronghold over Caribbean legal systems, it is curious as to why the Caribbean States refused to sever legal ties with the Privy Council in the first place. There were several practical reasons that dissuaded the States from severance: instances of Privy Council review were infrequent;<sup>50</sup> over the years, the court developed doctrines to limit the exercise of its appellate jurisdiction, particularly in criminal cases;<sup>51</sup> and filing appeals in London was costly for litigants.<sup>52</sup> These factors caused a reduction in the number of cases heard on appeal by the Privy Council from local Caribbean courts, thereby limiting its ability to alter the Caribbean legal landscape.<sup>53</sup> From a more political

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48. See Helfer, *supra* n.3, at 1865 (stating that in addition to local trial and appellate courts, each Caribbean State retained Privy Council as highest court of appeal). See also Reid, *supra* n.2, at 290 (describing court system for most States as having Privy Council at top, Courts of Appeal next, and then High Courts last). There are a total of seven Courts of Appeal throughout the Caribbean, and the High Courts all possess unlimited jurisdiction over civil and criminal matters. *Id.* Other countries have a Magistracy Court that is limited to civil and criminal jurisdiction. *Id.* See also ANTOINE, *supra* n.13, at 229 (stating that Republic of Guyana exercised its constitutional right to sever legal ties with Privy Council).

49. See Reid, *supra* n.2, at 291 (stating that Privy Council makes binding decisions for any case in particular Caribbean country). Moreover, a ruling issued by the Privy Council in one Commonwealth Caribbean country is persuasive over decisions on similar cases in other Commonwealth Caribbean countries, given that the Privy Council is made up of the same physical members who will most likely come to the same decision based on the same facts. *Id.* See also ANTOINE, *supra* n.13, at 106 (stating that decisions of Privy Council originating from one Commonwealth Caribbean jurisdiction will usually bind other jurisdictions). Yet, there is support for the view that a Court of Appeal could refuse to follow these Privy Council precedents if the decision is felt to be wrong. *Id.*

50. See Helfer, *supra* n.3, at 1866 (noting that instances of Privy Council review were infrequent even when they were available in theory). See also Bryan, *supra* n.11, at 186-87 (analyzing number of cases going to Privy Council for ten year period of 1985-1994, and finding that number of appeals to Privy Council was relatively low).

51. See Helfer, *supra* n.3, at 1866 (stating that Privy Council developed doctrines to limit appellate jurisdiction, especially in criminal cases). See also ANTOINE, *supra* n.13, at 230 (stating that Privy Council's jurisdiction is severely limited).

52. See Helfer, *supra* n.3, at 1866 (stating that filing appeals in London was costly for litigants). See also De La Bastide, *supra* n.4, at 401 (noting costly procedure of filing with Privy Council, e.g., paying fees, at London rates, to English solicitors and counsel, or paying to transport own attorney to England).

53. See Helfer, *supra* n.3, at 1866 (stating that number of cases that Privy Council decided on appeal from local Caribbean courts was reduced because of practical factors, and limited its ability to alter Caribbean legal landscape). From 1985 to 1994,

standpoint, reasons for not severing ties with the Privy Council were: newly independent Caribbean governments were most likely enticed by the cheaper Privy Council review paid for by the U.K.;<sup>54</sup> the Caribbean public believed that the court was incorruptible and uninfluenced by local pressures;<sup>55</sup> and Caribbean legal elites supported the Privy Council based on the staff of able common law judges.<sup>56</sup>

### 3. The Current Caribbean Appellate Process

The Privy Council's appellate jurisdiction is severely limited.<sup>57</sup> As such, a State may appeal to the Privy Council in the following ways: "as of right" from final judgments in civil disputes, where the value of the dispute is more than a stated

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there were 214 appeals from Commonwealth Caribbean courts to the Privy Council. *Id.* at n.150. *See also* De La Bastide, *supra* n.4, at 402-03 (stating that within ten year period, 163 appeals were filed with Privy Council after a hearing, and sixty-eight of them were dismissed without a hearing). During the same period, litigants filed 292 petitions for special leave to appeal. Of these, the court granted only eighty-seven. *Id.* *See also* Privy Council Office, *Key Statistics*, at <http://www.privy-council.org.uk/output/page34.asp> (providing updated information on appeal and petition statistics).

54. *See* Helfer, *supra* n.3, at 1867 (stating that Privy Council review, which is paid for by Britain, was cheap for Caribbean governments). This explains why Caribbean governments, overseeing new Nations with many demands on the public fisc, supported the Privy Council. *Id.* *See also* ANTOINE, *supra* n.13, at 238 (recognizing argument that Privy Council costs nothing since it is supported by British taxpayers).

55. *See* Helfer, *supra* n.3, at 1867 (stating that Privy Council is perceived to be incorruptible and aloof from local pressures). This explains why the Caribbean public supported the court. *Id.* *See also* ANTOINE, *supra* n.13, at 238 (recognizing argument that Privy Council judges are men of judicial eminence, and are removed from and uninfluenced by pressures of local, social, and political forces).

56. *See* Helfer, *supra* n.3, at 1867 (stating that Privy Council was believed to be staffed by able common law judges). This explains why Caribbean legal elites supported it. *Id.* *See also* ANTOINE, *supra* n.13, at 238 (stating argument that Privy Council is far more likely to be continuously staffed with high quality judges).

57. *See* ANTOINE, *supra* n.13, at 230 (stating that Privy Council's jurisdiction is severely limited, and only functions as appellate court in a restricted sense). Under common law, an appeal must be specially conferred. *Id.* Early appeals to the Privy Council were entertained as a matter of grace, but it later became the practice to include a right of appeal to the Privy Council in colonial territories, with or without leave of the Colonial Court. *Id.* This eventually evolved into the two methods of appeal to the Privy Council that is still evident in Caribbean legal systems today, *viz.*, "of right" and "special leave." *Id.* These two methods, however, are further limited by the Privy Council itself when hearing appeals of criminal cases. *Id.* at 232. It exercises its discretion to grant leave sparingly and will not act as a Court of Criminal Appeal unless some serious injustice can be shown. *Id.* *See also* *Re Dillet*, 12 AC at 467 (establishing that Privy Council will not review criminal proceedings unless miscarriage of justice is brought about by disregard of forms of legal process, or by some violation of principles of natural justice, or otherwise).

amount;<sup>58</sup> by “special leave” of the Privy Council,<sup>59</sup> and at the discretion of a local court in interlocutory matters or matters of great public importance or constitutional matters.<sup>60</sup> Given this limited jurisdiction, it is apparent that the Privy Council does not actually operate as a full appellate court.<sup>61</sup> With respect to constitutional issues, however, the jurisdiction of the Privy Council is more generous, as there is no strict requirement for leave to appeal.<sup>62</sup>

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58. See PRIVY COUNCIL OFFICE, JURISDICTION OF JUDICIAL COMMITTEE (Mar. 2000), available at <http://www.privy-council.org.uk/output/Page32.asp> [hereinafter PRIVY COUNCIL OFFICE] (stating that appeals may be made by leave of local Court of Appeal as of right from final judgments in civil disputes where value of dispute is more than certain amount). See, e.g., CONST. OF JAMAICA, sec. 110(1) (1962) (amended 1999). Section 110 provides:

- (1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases —
  - (a) where the matter in dispute on the appeal to Her Majesty in Council is of the value of one thousand dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of one thousand dollars or upwards, final decisions in any civil proceedings;
  - (b) final decisions in proceedings for dissolution or nullity of marriage;
  - (c) final decisions in any civil, criminal or other proceedings on questions as to the interpretation of this Constitution; and
  - (d) such other cases as may be prescribed by Parliament.

*Id.*

59. See PRIVY COUNCIL OFFICE, *supra* n.58 (stating that appeal may be made by special leave of Her Majesty in Council). See, e.g., CONST. OF JAMAICA, sec. 110(3) (providing that nothing in section shall affect any right of Her Majesty to grant special leave to appeal from decisions of Court of Appeal to Her Majesty in Council in any civil or criminal matter).

60. See Reid, *supra* n.2, at 291 (stating that Constitutions of West Indian States entrench right of appeal in certain specified matters — usually in cases involving constitutional rights and freedoms). See also PRIVY COUNCIL OFFICE, *supra* n.58 (stating that some courts also have discretion to grant leave in interlocutory matters or matters of great public importance or constitutional matters).

61. See ANTOINE, *supra* n.13, at 234 (stating that Privy Council does not actually operate as full appellate court). Under the limited boundaries of its jurisdiction, petitions for leave may be dismissed, not because they have no substantive merit, but because they fall outside the narrow bounds of the jurisdiction. *Id.* See, e.g., De La Bastide, *supra* n.4, at 402-03 (calculating that during the ten year span between 1985 and 1994, only 163 appeals were made and sixty-eight of them were dismissed without a hearing).

62. See ANTOINE, *supra* n.13, at 234 (stating that there is no strict requirement for leave to appeal with respect to Constitutional issues). For example, an individual challenging the abrogation of his fundamental rights can appeal to the Privy Council provided that all local remedies to redress such rights have been exhausted. *Id.* See also CONST. OF JAMAICA, sec. 110(1)(c) (providing that appeals can be made in any civil, criminal, or other proceedings where interpretation of Constitution is in question).

#### 4. The Development of a Concept for the CCJ

The Sixth Meeting of the Heads, held in Kingston, Jamaica, in 1970, marked the establishment of a Committee of Attorneys-General to consider the question of creating a final appellate Court in the Caribbean.<sup>63</sup> These Attorneys-General drafted a Report for the Organization of Commonwealth Caribbean Bar Associations (the "OCCBA"), which this organization discussed and studied during a meeting held in Guyana, on September 4, 1971.<sup>64</sup> This debate fully erupted, however, when the Privy Council handed down controversial and unpopular decisions that directly affected Caribbean States.<sup>65</sup>

#### 5. Pratt & Morgan v. Attorney General of Jamaica

The Privy Council decision in the Jamaican case of *Pratt & Morgan*,<sup>66</sup> ranks as one of the most notable and controversial decisions of the Privy Council.<sup>67</sup> In this consolidated case, two Jamaicans, Earl Pratt and Ivan Morgan, were convicted of a mur-

63. See RAWLINS, *supra* n.2, at 10 (stating that Sixth Meeting of Heads urged establishment of Committee of Attorneys-General to consider implementation of CCJ). See also *The History of CARICOM*, *supra* n.17 (noting that very first Heads of Government Conference, held in July 1963, in Trinidad and Tobago, focused on establishment of CARICOM); *Communique Issued At The Conclusion Of The Second Conference Of Heads Of Government Of Commonwealth Caribbean Countries, 13-17 January 1964, Kingston, Jamaica*, at <http://www.caricom.org/archives/communiques-hgc/2hgc-1964-communique.htm> (reporting that Second Heads Conference in Kingston, Jamaica, in January 1964, addressed air and sea communication issues, and other intra-State and international issues of education and trade); *Communiques Issued by Meetings of Commonwealth Caribbean/CARICOM Heads of Government, 1964*, at <http://www.caricom.org/archives/communiques-hgc/index-communiques-hgc.htm> (providing a list of reports detailing most of Heads' past and current Conferences and Meetings).

64. See RAWLINS, *supra* n.2, at 10 (stating that Attorneys-General submitted Draft Report to Organization of Commonwealth Caribbean Bar Association (the "OCCBA"), and reviewed it during meeting on September 4, 1971). Various opinions, both for and against the establishment of the CCJ, were developed after this meeting. *Id.* at 10-14 (discussing various newspaper articles, speeches, and essays, spanning from first half of 1970s to 1988, regarding establishment of CCJ and reflecting different sides of debate over establishment of CCJ).

65. See *id.* at 15 (analyzing emotional reactions of people to *Pratt & Morgan* decision). See also De La Bastide, *supra* n.4, at 404-28 (examining various Privy Council cases that fueled debate for establishing CCJ).

66. 43 W.I.R. 340 (PC 1993).

67. See Bryan, *supra* n.11, at 188 (stating that *Pratt & Morgan* was notable and controversial recent decision of Privy Council). See also De La Bastide, *supra* n.4, at 404 (acknowledging that *Pratt & Morgan* was probably most important, and most controversial, recent Privy Council decision).



der committed in 1977, and sentenced to death in 1979.<sup>68</sup> Their petitions to the Jamaican Court of Appeal were dismissed in December 1980, yet due to an oversight, the Court did not issue an opinion with its reasons for the dismissal until four years later, in 1984.<sup>69</sup> In 1986, the defendants' petition for a special leave to appeal to the Privy Council was refused; yet, a year later, they were issued a stay of execution pending a review of their case by two human rights commissions: the Inter-American Commission on Human Rights ("IACHR") and the United Nations Human Rights Committee ("UNHRC").<sup>70</sup>

For fourteen years, Pratt and Morgan had death warrants read to them on at least three different occasions and were moved to cells right beside the gallows.<sup>71</sup> The Privy Council finally heard their appeal in 1993 and held that an unconscionable delay in carrying out a death sentence constitutes a contravention of Section 17(1) of the Jamaican Constitution.<sup>72</sup> The ap-

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68. See Reid, *supra* n.2, at 293 (stating that Pratt & Morgan were convicted of murder committed in 1977 and sentenced to death in 1979). *Accord De La Bastide, supra* n.4, at 404 (stating that murder of which appellants were convicted was committed in 1977) with Helfer, *supra* n.3, at 1869 (stating that in January 1979, Earl Pratt and Ivan Morgan were convicted of murder and sentenced to death).

69. See Reid, *supra* n.2, at 293 (stating that Court of Appeal did not issue reasons for dismissing appeal until 1984). See also De La Bastide, *supra* n.4, at 404 (stating that the Jamaican Court of Appeal had, due to oversight, failed to give reasons for its dismissal of the appellants' appeal for nearly four years).

70. See Reid, *supra* n.2, at 293 (stating that in 1986, prisoners petitioned Inter-American Commission on Human Rights ("IACHR") and United Nations Human Rights Committee ("UNHRC") under International Covenant on Civil and Political Rights). Pratt first petitioned to the IACHR in June 1981, complaining about various unspecified procedural errors during his capital trial and appeal. Helfer, *supra* n.3, at 1869. Subsequently, this claim was rejected by the IACHR in October 1984. *Id.* It did, however, ask Jamaica to commute Pratt's death sentence on humanitarian grounds. *Id.* In January 1986, both Pratt and Morgan petitioned the UNHRC, alleging a number of violations of the International Covenant on Civil and Political Rights ("ICCPR"), including a claim based on the death row phenomenon. *Id.* Seven months later, the UNHRC issued an interim decision requesting that Jamaica stay the executions of Pratt and Morgan pending a review of their allegations. *Id.* at 1870. See also De La Bastide, *supra* n.4, at 404 (stating that basis for Privy Council's decision was four-year delay of Jamaican Court of Appeal to give reasons for dismissal of appellants' appeal — omission was claimed to be breach of ICCPR).

71. See *Pratt & Morgan*, 43 W.I.R. at 343 (reporting that Pratt and Morgan had death warrants read to them on three different occasions, and were moved to condemned cells immediately adjacent to gallows all within span of fourteen years). See also De La Bastide, *supra* n.4, at 404-05 (stating that death warrant was read to appellants on no less than three occasions).

72. See *Pratt & Morgan*, 43 W.I.R. at 360 (holding that unconscionable delay in implementing death sentence constitutes infringement of Section 17(1) of Jamaican

plicable section provides for the prevention of tortuous, inhuman, or degrading punishment.<sup>73</sup>

The Privy Council based its decision on three factors that punishment must satisfy to be deemed lawful: (1) it must be an act done under the authority of law;<sup>74</sup> (2) it must be an act involving the infliction of punishment of a description authorized by the law in question — here, it would be a description of punishment which was lawful in Jamaica immediately before the appointed day;<sup>75</sup> and (3) it must not exceed in extent the description of punishment so authorized.<sup>76</sup> The Privy Council concluded that the appellate system itself, and not the prisoner, should be held responsible for the mistake of creating an appellate procedure that enables a prisoner to prolong appellate hearings over a period of years.<sup>77</sup>

Pratt's and Morgan's sentences were commuted to life imprisonment.<sup>78</sup> In addition, the Privy Council established a

Constitution). Moreover, the Privy Council found the impact of the appellants' circumstances to be a sufficient account of the agony of mind that they must have suffered. *Id.* at 343.

73. See CONST. OF JAMAICA, sec. 17(1). Section 17(1) provides that "[n]o person shall be subjected to torture or to inhuman or degrading punishment or other treatment." *Id.* See also CONST. OF JAMAICA, sec. 17(2). Section 17(2) provides:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorise the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day.

*Id.*

74. See *Pratt & Morgan*, 43 W.I.R. at 354 (holding that punishment must be within authority of law). See also Reid, *supra* n.2, at 294 (listing lawful act as first factor of allowable punishment rationalized by Privy Council).

75. See *Pratt & Morgan*, 43 W.I.R. at 354 (holding that infliction of punishment must be described as lawful under law in question). See also Reid, *supra* n.2, at 294 (listing second factor of Privy Council as authorized description of punishment under law in question).

76. See *Pratt & Morgan*, 43 W.I.R. at 354 (holding that punishment must not exceed description authorized). See also Reid, *supra* n.2, at 294 (listing third factor of Privy Council as punishment not exceeding authorized description).

77. See *Pratt & Morgan*, 43 W.I.R. at 359 (holding that if appellate procedures enable prisoners to prolong appellate hearings over period of years, then fault should be attributed to appellate system that permits such delay and not prisoner who takes advantage of it). See De La Bastide, *supra* n.4, at 406 (reporting that Privy Council included time taken to appeal to local Appellate Court and then to Privy Council when determining whether delay was so great as to render carrying out of sentence unconstitutional).

78. See Reid, *supra* n.2, at 295-96 (stating that Privy Council commuted Pratt & Morgan's sentences to life imprisonment). See also De La Bastide, *supra* n.4, at 404

twelve-month target to hear a capital appeal after conviction, and then an additional twelve months for the determination of the appeal to the Privy Council, thus completing the entire domestic appeal process within two years.<sup>79</sup> It also set a five-year deadline between sentence and execution, and held that any case in which execution takes place more than five years after the sentence, warrants sufficient grounds for a finding of inhuman or degrading punishment.<sup>80</sup>

The effects of this ruling reverberated throughout the Caribbean.<sup>81</sup> In Trinidad and Tobago, fifty-three death row inmates had their sentences commuted to life imprisonment because more than five years had elapsed since their sentences were imposed.<sup>82</sup> Such instances intensified the debate surrounding the establishment of the CCJ and the abolishment of appeals to the Privy Council.<sup>83</sup>

## 6. The Agreement Establishing the Caribbean Court of Justice

CARICOM has drafted several instruments for establishing the CCJ; yet, the most significant of these instruments is the

(discussing Privy Council's decision to commute appellants' death sentences to life imprisonment).

79. See *Pratt & Morgan*, 43 W.I.R. at 361 (setting forth appellate process for domestic appeals that would be complete within two years). See also *De La Bastide*, *supra* n.4, at 407 (stating that Privy Council set targets of twelve months to hear capital appeals after conviction, and additional twelve months for determination of further appeal to Privy Council).

80. See *Pratt & Morgan*, 43 W.I.R. at 362 (setting forth five-year deadline for execution to take place without infringing on prisoner's constitutional rights). See also *Reid*, *supra* n.2, at 295 (stating Privy Council's holding regarding five-year time limit for execution); *Bryan*, *supra* n.11, at 189-90 (summarizing Privy Council's holding with respect to execution deadline).

81. See *De La Bastide*, *supra* n.4, at 407 (stating that effect of Privy Council's rulings was immediate and far-reaching). See also *Bryan*, *supra* n.11, at 190 (stating that effects of *Pratt & Morgan* were both immediate and far-reaching).

82. See *De La Bastide*, *supra* n.4, at 407 (reporting that fifty-three persons had death sentences commuted because more than five years had elapsed). Other work of Trinidad and Tobago's Court of Appeal has been largely put aside so that the Court can concentrate almost exclusively on the hearing of appeals in capital cases. *Id.* The inevitable result is that all other appellants apart from convicted murderers are subject to a further delay in having their appeals determined. *Id.* See also *Bryan*, *supra* n.11, at 190 (stating that Privy Council commuted two death sentences on grounds of unconscionable delay in Barbados based on precedent set by *Pratt & Morgan*).

83. See *RAWLINS*, *supra* n.2, at 6 (stating that debate on establishment of CCJ intensified after *Pratt & Morgan* decision). See also *Reid*, *supra* n.2, at 297 (arguing that Privy Council's decision renewed open debate about abolishing appeals).

Agreement Establishing The Caribbean Court of Justice (the "AECCJ").<sup>84</sup> According to the AECCJ, the CCJ shall consist of a President and no more than nine other Judges, three of whom must possess expertise in international law, including international trade law.<sup>85</sup> All judges are to be appointed by a Regional Judicial and Legal Services Commission, which will be composed of the President of the CCJ, the Secretary-General of the Caribbean Community, persons nominated by the Bar Association and the Dean of the Faculty of Law of some Caribbean universities, and members of the national States' government.<sup>86</sup>

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84. See RAWLINS, *supra* n.2, at 14-15 (stating that West Indian Commission, commission established under Grand Anse Declaration, created various proposals and reports containing recommendations for establishment of CCJ). See also Reid, *supra* n.2, at 302 (stating that Agreement Establishing Caribbean Court of Justice (the "AECCJ") is main instrument for establishing CCJ); *Establishment of the CARICOM Single Market and Economy Key Elements*, 2 (2003), at <http://www.caricom.org/expframes2.htm> [hereinafter *Key Elements*] (reporting that AECCJ has been signed by twelve States thus far, ratified by seven, and enacted into legislation by none).

85. See AECCJ, art. IV(1), available at <http://www.caricom.org/expframes2.htm> (stating that Judges of CCJ shall include President and not more than nine other Judges of whom at least three will possess expertise in international law including international trade law).

86. See *id.* at art. V(1)(a)-(g). Article V(1)(a)-(g) provides:

There is hereby established a Regional Judicial and Legal Services Commission which shall consist of the following persons:

- (a) the President who shall be the Chairman of the Commission;
- (b) two persons nominated jointly by the Organisation of the Commonwealth Caribbean Bar Association (OCCBA) and the Organisation of Eastern Caribbean States (OECS) Bar Association;
- (c) one chairman of the Judicial Services Commission of a Contracting Party selected in rotation in the English alphabetical order for a period of three years;
- (d) the Chairman of a Public Service Commission of a Contracting Party selected in rotation in the reverse English alphabetical order for a period of three years;
- (e) two persons from civil society nominated jointly by the Secretary-General of the Community and the Director General of the OECS for a period of three years following consultations with regional non-governmental organizations;
- (f) two distinguished jurists nominated jointly by the Dean of the Faculty of Law of the University of the West Indies, the Deans of the Faculties of Law of any of the Contracting Parties and the Chairman of the Council of Legal Education; and
- (g) two persons nominated jointly by the Bar or Law Associations of the Contracting Parties.

*Id.* See also *id.* at art. V(2). Article V(2) provides that if:

... any person or body required to nominate a candidate for appointment to the Regional Judicial and Legal Services Commission in accordance with paragraph 1, fails to make such nomination within thirty (30) days of a written

To qualify as a judge, one must have at least five years judicial experience, as well as good moral standing.<sup>87</sup> These requirements help ensure a certain degree of independence of the judiciary, so as to quash any fears of judges being subject to undue political influence.<sup>88</sup> The President of the CCJ is appointed by a three-fourths majority vote of the States upon the recommendation of the Commission.<sup>89</sup> In order to further guarantee the independence and integrity of the judiciary, the time of office of the judges is not limited (apart from an age limit of seventy-two years).<sup>90</sup>

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request in that behalf, the nomination shall be made jointly by the heads of the judiciaries of the Contracting Parties.

*Id.*

87. *See id.* at art. IV(10)-(11). Article IV(10)-(11) provides:

10. A person shall not be qualified to be appointed to hold or to act in the office of Judge of the Court, unless that person satisfies the criteria mentioned in paragraph 11 and –

(a) is or has been for a period or periods amounting in the aggregate to not less than five years, a Judge of a court of unlimited jurisdiction in civil and criminal matters in the territory of a Contracting Party or in some part of the Commonwealth, or in a State exercising civil law jurisprudence common to Contracting Parties, or a court having jurisdiction in appeals from any such court and who, in the opinion of the Commission, has distinguished himself or herself in that office;

or

(b) is or has been engaged in the practice or teaching of law for a period or periods amounting in the aggregate to not less than fifteen years in a Member State of the Caribbean Community or in a Contracting Party or in some part of the Commonwealth, or in a State exercising civil law jurisprudence common to Contracting parties, and has distinguished himself or herself in the legal profession.

11. In making appointments to the office of Judge, regard shall be had to the following criteria: high moral character, intellectual and analytical ability, sound judgment, integrity, and understanding of people and society.

*Id.*

88. *See* Julia Lehmann, *An Outside View of the Caribbean Court of Justice*, 2 *CARIBBEAN L. REV.* 297, 306 (2000) (stating that method of appointment should ensure certain degree of independence of judiciary, given that undue political influence is major concern connected with establishment of CCJ). *See also* Reid, *supra* n.2, at 300-01 (discussing popular argument of Caribbean Judges being easily corrupted by politicians). *But see* AECCJ, *supra* n.85, at art. IV(7) (providing that judges other than President shall be appointed or removed by majority vote of all members of Commission, and not politicians).

89. *See* AECCJ, *supra* n.85, at art. IV(6). Article IV(6) provides that “[t]he 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.*

90. *See* Lehmann, *supra* n.88, at 306 (stating that unlimited time of office for judges further guarantees independence and integrity of judiciary). *See also Proposed Code of Judicial Conduct*, at <http://www.caricom.org/ccjconduct.htm> (1998) (setting

While the CCJ is meant to be an itinerant court, its seat and Commission will be located in Trinidad and Tobago.<sup>91</sup> The judgments made by the Court will be final,<sup>92</sup> and will constitute binding precedents.<sup>93</sup> These judgments will be enforced as if they were judgments of national courts.<sup>94</sup>

### B. *The CARICOM Single Market and Economy*

CARICOM was established on August 1, 1973.<sup>95</sup> Sixteen years later, the Heads agreed to work towards the establishment of the CSME, by way of the Grand Anse Declaration.<sup>96</sup> The CSME would amend the Treaty of Chaguaramas (the "Treaty") through various Protocols, particularly Protocol I, which ad-

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forth limits on any political, financial, business, or other dealings that would tend to reflect adversely on impartiality of CCJ judges).

91. See Reid, *supra* n.2, at 303 (stating that Court's seat and Commission will be located in Trinidad and Tobago despite its nomadic quality). See also ANTOINE, *supra* n.13, at 247 (stating that seat of Court will be in Trinidad and Tobago, as determined by qualified majority of Contracting Parties from time to time). The Court will also have authority to sit in the territory of any other Contracting Party, or even two divisions where it is constituted of at least ten members. *Id.*

92. See AECCJ, *supra* n.85, at art. III(2). Article III(2) provides that "[t]he decisions of the court shall be final." *Id.*

93. See *id.* at art. XXII. Article XXII provides that "[j]udgments of the Court shall be legally binding precedents for parties in proceedings before the Court." *Id.* But see *id.* at art. XX(1). Article XX(1) provides:

An application for the revision of a judgment of the Court in the exercise of its original jurisdiction may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and to the party claiming revision: provided always that such ignorance was not due to negligence on the part of the applicant.

*Id.*

94. See *id.* at art. XXVI(a). Article XXVI(a) provides:

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

*Id.*

95. See *The History of CARICOM*, *supra* n.29 (stating that CARICOM was established on August 1, 1973). See also CARICOM PROTOCOLS, *supra* n.20, at 1 (stating that CARICOM came into effect in 1973).

96. See *CARICOM Single Market and Economy*, *supra* n.21 (reporting that in 1989, during Tenth Conference in Grand Anse, Grenada, Heads agreed to work towards establishment of CSME). See also CARICOM PROTOCOLS, *supra* n.20, at 1 (stating that in 1989, Heads decided to work towards establishment of CSME by way of Grand Anse Declaration).

dresses the restructuring of the organs and institutions of CARICOM.<sup>97</sup> The CSME has yet to be established by the Member States, but the year 2005 has been set as a deadline.<sup>98</sup>

### 1. CARICOM

CARICOM was established on August 1, 1973, when Barbados, Guyana, Jamaica, and Trinidad and Tobago signed the Treaty.<sup>99</sup> The other CARICOM Member States joined the organization subsequent to this date.<sup>100</sup> From its inception, CARICOM has promoted both the integration of State economies,

97. See *CARICOM Single Market and Economy*, *supra* n.21 (explaining that Protocols are foundation of CSME). See also *CARICOM PROTOCOLS*, *supra* n.20, at 2 (discussing Protocol I, as setting out restructuring plan for organs and institutions in CARICOM).

98. See *Single Market On Fast Track*, JAMAICA GLEANER, July 2, 2001, available at <http://www.jamaica-gleaner.com/gleaner/20010702/business/business1.html> (revealing 2005 as deadline for establishment of CSME). See also *Caribbean Said to be on Track for Single Market and Economy by 2005 deadline*, CARIBBEAN MEDIA CORP. NEWS AGENCY, Oct. 31, 2002, available at 2002 WL 102328291 [hereinafter *Caribbean Said to be on Track*] (reporting that Desiree Field-Ridley, head of newly established Single Market Unit in Barbados, assured that 2005 would be deadline for CSME's establishment).

99. See *The History of CARICOM*, *supra* n.29 (stating that CARICOM was established when Barbados, Guyana, Jamaica, and Trinidad and Tobago signed Treaty of Chaguaramas (the "Treaty") on August 1, 1973). See also *CARICOM PROTOCOLS*, *supra* n.20, at 1 (stating that CARICOM established through Treaty, and came into effect in 1973, after Barbados, Guyana, Jamaica, and Trinidad and Tobago signed it); Lehmann, *supra* n.88, at 300 (stating that Treaty divided CARICOM into "Community" on one hand and "Common Market" on other). The main concerns of the Community were the coordination of foreign policies of the States, and functional cooperation among States. *Id.* It was also to play a passive role in developing economic integration among States through the establishment of the Common Market — yet, the role of actively promoting this objective was attributed specifically to the Common Market as a separate entity. See, e.g., Treaty Establishing the Caribbean Community, art. 4(a) (July 4, 1973), available at <http://www.caricom.org/treaty.html>. Article 4(a) provides that "the economic integration of the Member States by the establishment of a common market regime (hereinafter referred to as "the Common Market") in accordance with the provisions of the Annex to this Treaty with the following aims . . ." *Id.*

100. See *The History of CARICOM*, *supra* n.29 (stating that other members joined CARICOM subsequently). See also *The Caribbean Community Member Countries and Associated Members*, at <http://www.caricom.org/members.htm> (listing other current members of CARICOM: Antigua & Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts & Nevis, St. Lucia, St. Vincent & the Grenadines, Suriname, and Trinidad & Tobago). The Associate Members of CARICOM are: Anguilla, British Virgin Islands, Cayman Islands, and Turks and Caicos Islands. *Id.* Countries considered to be CARICOM Observers are: Aruba, Bermuda, Columbia, Dominican Republic, Mexico, Netherlands Antilles, Puerto Rico, and Venezuela. *Id.* See also *The History of CARICOM*, *supra* n.29 (stating that British Virgin Islands, as well as Turks & Caicos Islands, became Associated Members of CARICOM in July 1991).

and the coordination of State foreign policies in the area of functional cooperation.<sup>101</sup>

## 2. The Grand Anse Declaration

In 1989, CARICOM's integration objective was further developed at the Heads' Tenth Conference in Grand Anse, Grenada.<sup>102</sup> Consequently, by way of the Grand Anse Declaration, the Heads agreed to work towards the establishment of the CSME in response to the challenges and opportunities that the changes in the global economy presented.<sup>103</sup> The "Single Market" would allow for the movement of CARICOM goods, services, people, and capital throughout the Caribbean Community without tariffs/barriers or restrictions so as to provide for a single large economic space and one economic and trade policy for all States.<sup>104</sup> During their Thirteenth Conference in 1992, the Heads compiled the necessary technical work on, and conceptualization of, the CSME for its endorsement.<sup>105</sup> They agreed to

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101. See *The History of CARICOM*, *supra* n.29 (stating that CARICOM promoted both integration of State economies and coordination of State foreign policies from its inception). See also *CARIBBEAN COMMUNITY AND COMMON MARKET*, *supra* n.21 (stating that overall objectives of CARICOM are economic integration, foreign policy coordination and functional cooperation).

102. See *CARICOM Single Market and Economy*, *supra* n.21 (stating that at Tenth Conference, Heads declared intention to deepen integration process). See generally *Communiqués*, *supra* n.63 (giving detailed account of previous and subsequent Heads' Conferences and Meetings).

103. See *CARICOM Single Market and Economy*, *supra* n.21 (stating that Heads determined that Region would work towards establishment of CSME as one aspect of its response to challenges and opportunities presented by changes in global economy). See also *CARICOM PROTOCOLS*, *supra* n.20, at 1 (stating that in 1989, Heads decided to work towards establishment of CSME by way of Grand Anse Declaration); *CARIBBEAN COMMUNITY AND COMMON MARKET*, *supra* n.21 (stating that decision was driven by need to deepen integration process and strengthen Caribbean Community in all dimensions to respond to challenges and opportunities presented by changes in global economy). The kind of changes in the global economy included: the liberalization of trade and other economic activities; globalization; and the emergence and expansion of regional economic blocs. *Id.*

104. See *CARICOM PROTOCOLS*, *supra* n.20, at 1 (stating that "Single Market" allows CARICOM goods, services, people, and capital to move throughout Caribbean Community without restrictions so as to achieve single large economic space and provide for one economic and trade policy for all States). Additionally, the "Single Economy" would allow for the coordination of, *inter alia*, foreign exchange and interest rate policies, tax regimes, and laws and common currency. *Id.* This "Single Economy" would also achieve a more level economic performance across the States. *Id.*

105. See *CARICOM Single Market and Economy*, *supra* n.21 (stating that during Thirteenth Conference in 1992, necessary technical work on CSME was completed and



effect the CSME through nine Protocols to the Treaty, which will provide the legal basis for its operation.<sup>106</sup>

### 3. Protocol I

Protocol I addresses the restructuring of the organs and institutions of CARICOM in order to enable it to function more efficiently.<sup>107</sup> The Protocol collapses the Community and Common Market divisions of CARICOM into one entity called the "Community."<sup>108</sup> Moreover, the Conference of Heads of Government (the "Conference") is designated the highest decision-making organ of the Community; they will also be assisted by the "Community Council of Ministers," which will act as the second highest organ.<sup>109</sup> This amendment also affects the issue of deci-

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presented to Heads for endorsement). *See also Communiqué Issued at the Conclusion of the Thirteenth Meeting of the Conference of the Heads of Government of the Caribbean Community, 29 June–2 July, 1992, Port of Spain, Trinidad and Tobago, at <http://www.caricom.org/archives/communiqués-hgc/13hgc-1992-communicé.htm>* (stating that Heads registered acceptance and endorsement of main elements that comprise CSME as well as schedule for its implementation).

106. *See* CARICOM PROTOCOLS, *supra* n.20, at 1 (stating that nine Protocols amending the Treaty provide legal basis for establishment and operation of CSME). *See* CARIBBEAN COMMUNITY AND COMMON MARKET, *supra* n.21 (stating that all nine Protocols will be consolidated into single text, which will become formal framework and constituent elements of CSME). The nine protocols are: I — Restructuring of the Organs and Institutions of the Community; II — Right of Establishment, Provision of Services, and Movement of Capital; III — Industrial Policy; IV — Trade Policy; V — Agricultural Policy; VI — Transportation Policy; VII — Disadvantaged Countries, Regions, and Sectors; and VIII — Competition Policy, Consumer Protection, and Dumping & Subsidies; and IX — Dispute Settlement. *Id.*

107. *See* CARICOM PROTOCOLS, *supra* n.20, at 2 (stating that Protocol I deals with restructuring organs and institutions of CARICOM to enable it to play role required of it in single market and economy). *See also* CARIBBEAN COMMUNITY AND COMMON MARKET, *supra* n.21 (stating that Protocol I addresses reconstruction of CARICOM organs and institutions).

108. *See* Lehmann, *supra* n.88, at 301 (stating that Protocol I abolished division of CARICOM into two institutions, so that Common Market alone formed integral part of Community). *See also* Revised Treaty, *supra* n.22, at art. 2. Article 2 provides that "[t]he Community is hereby established and recognised in the Protocol hereto as successor to the Caribbean Community and Common Market." *Id.*

109. *See* CARIBBEAN COMMUNITY AND COMMON MARKET, *supra* n.21 (stating that Conference is highest decision-making organ, assisted by Community Council of Ministers). *See also* CARICOM PROTOCOLS, *supra* n.20, at 2 (stating that Conference is highest organ and is assisted by second highest organ, Community Council of Ministers). The other "lower-ranked" organs include: the Council for Finance and Planning (the "COFAP"); the Council for Foreign and Community Relations (the "COFCOR"); the Council for Trade and Economic Development (the "COTED"); and the Council for Human and Social Development (the "COHSOD"). *Id.*

sion-making.<sup>110</sup>

Protocol I modifies the unanimity rule for decision-making, which impeded prompt decision-making by the States in the past.<sup>111</sup> In view of forcing decisions upon States that voted against the majority (i.e., the one-fourth minority States), the Protocol also provides an "opt-out" possibility, where States can withdraw from obligations arising from the decisions as long as the withdrawal does not endanger the fundamental objectives of the Community.<sup>112</sup>

#### 4. CSME Establishment Update

The CSME has yet to be established, but CARICOM has set the deadline for before the year 2005, when the Free Trade Area of the Americas ("FTAA") is scheduled to come into being (assuming negotiations proceed as envisioned).<sup>113</sup> During an inaugural news conference, Desiree Field-Ridley, the head of the newly established "Single Market Unit" of Barbados, noted that despite serious economic challenges and a huge implementation workload for member governments, the majority of Member

110. See Protocol Amending the Treaty Establishing the Caribbean Community Signed at Chaguaramas on 4 July 1973, art. V, available at <http://www.caricom.org/protoc1.html> [hereinafter Protocol I] (providing for amendment of Articles 8 and 9 of Treaty, and replacing them with Article 7(a), which covers functions and powers of Conference). In particular, the amended Article 7(a)(4) provides that "[t]he Conference may take decisions for the purpose of establishing the financial arrangements necessary to defray the expenses of the Community and shall be the final authority on questions arising in relation to the financial affairs of the Community." *Id.*

111. See CARIBBEAN COMMUNITY AND COMMON MARKET, *supra* n.21 (stating that main feature of Protocol I is that it modifies unanimity rule, which impeded prompt decision-making by Member States). See also Lehmann, *supra* n.88, at 302 (stating that while decisions in Conference would still require unanimous vote, Council of Ministers, along with other Ministerial Councils, would only require "qualified majority" vote, which is three-fourths majority vote).

112. See Lehmann, *supra* n.88, at 302 (stating that rule provides for opt-out possibility where Member State can withdraw from obligations arising from decisions). See also The Revised Treaty, *supra* n.22, at art. 27(4). Article 27(4) provides that "subject to the agreement of the Conference, a Member State may opt out of obligations arising from the decisions of competent Organs provided that the fundamental objectives of the Community, as laid down in the Treaty, are not prejudiced thereby." *Id.*

113. See *Single Market On Fast Track*, *supra* n.98 (stating that deadline for establishment of CSME is 2005, before Free Trade Area of Americas (the "FTAA") is effected). Anthony Hylton, Jamaica's Foreign Trade Minister, emphasized that if the 2005 deadline passed without the integration of the regional economies, the region would have massive competition from other areas attacking the single economies. *Id.* See also *Caribbean Said to be on Track*, *supra* n.98 (reporting 2005 as deadline for CSME's establishment).

States were still on course for meeting the target date.<sup>114</sup> While Field-Ridley emphasized the signing of the Revised Treaty as a major step towards the establishment of the CSME, it is not the only step required of the States — States must also ratify the Revised Treaty, as well as enact it into domestic law, and all of the States have yet to satisfy these elements.<sup>115</sup>

## PART II: *EXAMINING THE HEAD AND THE HEART*

Legal experts have contended that many Caribbean States view the CCJ as a symbol of their efforts to assert their independence and unity, and believe that this opinion is the strongest grounds for abolishing appeals to the Privy Council.<sup>116</sup> Experts have also argued, however, that this sovereignty argument is often confused with the controversial death penalty debate, which, in turn, heightens the argument's popularity.<sup>117</sup> In contrast, other legal scholars have acknowledged that it is necessary to establish the CCJ to battle globalization through the CSME.<sup>118</sup>

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114. See *Caribbean said to be on Track*, *supra* n.98 (reporting Field-Ridley's comments about Member States being on course for meeting target date despite serious economic challenges faced by some member governments and huge implementation workload). Field-Ridley also stated that all except three States signed the Revised Treaty; the States that have been "lagging behind" are the Bahamas, Haiti, and Montserrat. *Id.* Some possible reasons for this delay were offered by Field-Ridley: the Bahamas does not participate in the common market arrangements; Montserrat has to get British government approval before acceding; and Haiti was only admitted as the 15th full member of CARICOM in July 4, 1997. *Id.* See also *Haiti*, at <http://www.caricom.org/archives/countryprofiles/haitiprofile.htm> (stating that Haiti accorded provincial membership of CARICOM on July 4, 1997).

115. See *Key Elements*, *supra* n.84, at 1 (reporting that currently no States have performed the required enactment of Revised Treaty). The ratification and accession of the Revised Treaty have been fulfilled by only one State, St. Vincent & the Grenadines. *Id.* In contrast, none of the States has enacted the Revised Treaty into their domestic law. *Id.* See also *CARICOM Single Market and Economy*, *supra* n.21 (stating that signature and ratification of Protocols will provide Treaty-basis for CSME).

116. See *RAWLINS*, *supra* n.2, at 44 (discussing argument that views CCJ as symbol of efforts to assert independence and unity). See also *Reid*, *supra* n.2, at 301 (stating that need for Jamaica and other independent Commonwealth Caribbean Nations to be truly independent is one of strongest arguments for abolishment of appeals to Privy Council).

117. See *RAWLINS*, *supra* n.2, at 31-32 (discussing debate on institution of CCJ as being distorted by persons who convey impression that death penalty issue is important). See also *ANTOINE*, *supra* n.13, at 244 (stating that common denominator of new move toward CCJ is to enable Caribbean governments and judges to hang prisoners on death row); *Bryan*, *supra* n.11, at 199 (stating that cases such as *Guerra and Wallen* helped swing public sentiment in favor of death penalty over last decade).

118. See *RAWLINS*, *supra* n.2, at 43-44 (arguing that transformation of CARICOM

### A. *The Heart: The Sovereignty Argument*

Scholars have found that constructing a working definition for sovereignty is no easy task.<sup>119</sup> Some scholars have identified common usages of the term.<sup>120</sup> Four such uses are: “domestic sovereignty,”<sup>121</sup> “interdependence sovereignty,”<sup>122</sup> “international legal sovereignty,”<sup>123</sup> and “Westphalian sovereignty.”<sup>124</sup> Many le-

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into single market and economy presents, perhaps, most compelling case for present need of CCJ). Further, the Court will perform a pivotal function in this endeavor, since it will have original and exclusive jurisdiction in the adjudication of cases requiring the interpretation or application of the Treaty of Chaguaramas and its Protocols. *Id.* See also Salmon, *supra* n.24, at 239 (stating that new dimension of integration process goes over and beyond other arguments for establishment of CCJ).

119. See Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT 574 (Henry J. Steiner & Philip Alston eds., 2d ed. 2000) (stating that sovereignty is not legal term with any fixed meaning). See also Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Arguments*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* (stating that it is notoriously difficult to pin down meaning of sovereignty).

120. See Stephen Krasner, *Sovereignty: Organized Hypocrisy*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* n.119, at 575 (discussing four different ways that sovereignty is commonly used: domestic, interdependence, international legal, and Westphalian). See also Robert A. Madsen, *The Struggle for Sovereignty Between China and Taiwan*, in PROBLEMATIC SOVEREIGNTY 142 (Stephen D. Krasner ed., 2001) (using tripartite definition of sovereignty derived from Krasner's common usage of term); ATHENA DEBBIE EFRAIM, SOVEREIGN (IN)EQUALITY IN INTERNATIONAL ORGANIZATIONS 52 (2000) (discussing origins and meaning of sovereignty and how concept has expanded throughout time).

121. See Krasner, *supra* n.120, at 575 (introducing domestic sovereignty as common use dealing with organization of authority within State and level of control enjoyed by State). See also PROBLEMATIC SOVEREIGNTY, *supra* n.120, at 7 (stating that domestic sovereignty involves both authority and control). The concepts of authority and control addressed by domestic sovereignty also affect the behavior of actors in social and political situations. *Id.* Authority is based on the mutual recognition that an actor has the right to engage in a specific activity, including the right to command others, yet this does not guarantee effective control. *Id.* Control, on the other hand, can be achieved through use of force as well as mutual recognition. *Id.* See also Madsen, *supra* n.120, at 142 (stating that attribute of domestic sovereignty is effectively controlling events within own borders).

122. See Krasner, *supra* n.120, at 575 (introducing interdependence sovereignty as common use concerned with issues like State's ability to regulate flow of goods, persons, pollutants, diseases, and ideas across territorial boundaries). See also PROBLEMATIC SOVEREIGNTY, *supra* n.120, at 8 (stating that interdependence sovereignty is matter of control and not authority); Madsen, *supra* n.120, at 142 (stating that international capital flows, information exchanges, and other forms of interdependence are controlled or regulated so as to prevent them from threatening State's viability).

123. See Krasner, *supra* n.120, at 576 (introducing international legal sovereignty as common use involved with status of political entity in international system — in other words, whether State is recognized by other States). See also PROBLEMATIC SOVEREIGNTY, *supra* n.120, at 9 (stating that basic rule for international legal sovereignty is that recognition is extended to States with territory and formal juridical autonomy). Historically,

gal experts in the Caribbean have argued that the need for true independence has been one of the strongest reasons for the abolishment of appeals to the Privy Council.<sup>125</sup> This type of argument has also been noted for being emotional at times.<sup>126</sup>

The sovereignty argument for the CCJ focuses on Caribbean States, as sovereign Nations, asserting their rights to determine their own pattern of development – i.e., imposing an obligation to chart one’s own destiny.<sup>127</sup> Some scholars assert that to fulfill

rulers have also invoked other conditions for recognition like the ability to defend territory and maintain order. *Id.*

124. See Krasner, *supra* n. 120, at 576 (stating that Westphalian sovereignty is based on two principles: territoriality and exclusion of external actors from domestic authority structures). This sovereignty is violated when external actors influence or determine domestic authority structures. *Id.* See also PROBLEMATIC SOVEREIGNTY, *supra* n.120, at 11 (stating that other States, markets, transnational corporations, or international financiers may limit options available to particular government, but government is still able to freely choose within constrained set); EFRAIM, *supra* n. 120, at 52 (stating that concept of sovereignty emerged along with Nation-State in sixteenth century and was crystallized in seventeenth century with writings of Grotius and Treaties of Westphalia). The 1648 Treaties of Westphalia put an end to the thirty-year power struggle between the State system, the Church, and the Holy Roman Emperor. *Id.* at 2 n.5. These treaties formally legalized the birth of new sovereign secular States and have been characterized as the first European Constitutional Charter. *Id.*

125. See Reid, *supra* n.2, at 301 (stating that need for Jamaica and the other independent Commonwealth Caribbean Nations to be truly independent is one of strongest arguments for abolishment of appeals to Privy Council). See also RAWLINS, *supra* n.2, at 44 (stating that viewing CCJ as symbol of independence and Caribbean unity is considered strongest ground by many for abolition of Privy Council).

126. See RAWLINS, *supra* n. 2, at 43 (describing sovereignty argument as both emotionally appealing, and rational). See also Malanczuk, *supra* n.119, at 574 (describing sovereignty as wholly emotive term).

Addressing the need for the CCJ, Hugh Salmon, former Assistant Attorney General for Jamaica, made an emotional sovereignty argument. Salmon, *supra* n.24, at 234. He states the following:

Why do we want this child to be born alive and vibrant? First of all, the quality of our lives, the nature of our relationship and the content of our lives must embody and reflect and be psychologically rooted in our own values and aspirations as a nation and as Caribbean peoples.

*Id.* Salmon further comments that the “continued existence of a final Court of Appeal located outside the region is an inhibiting factor to the development of an indigenous jurisprudence which is more responsive to the values within our society and our aims and aspirations as independent Caribbean Nations.” *Id.* He then concludes that the “Caribbean Court of Justice will serve to connect us to ourselves and fill that gap, which must be filled, as the law continues its relentless search to be of continued relevance to the society it serves.” *Id.*

127. See HAMILTON, *supra* n.16 (stating that CCJ is important in asserting right as sovereign Nation to determine own pattern of development). See also RAWLINS, *supra* n.2, at 44 (stating that independence imposes obligation to chart own destiny); Bryan, *supra* n.11, at 206 (stating that independence imposes an obligation on sovereign Na-

this obligation, the Caribbean people must create their own institutions.<sup>128</sup> Moreover, proponents argue that the process of appealing to the Privy Council is a remnant of the imperial past, which maintains the old colonial relationship with the U.K. and is inconsistent with the full attainment of political sovereignty and independence.<sup>129</sup> Scholars also note that cases like *Pratt and Morgan* demonstrate how the Privy Council can conflict with a Caribbean State's right to self-determination.<sup>130</sup> Thus, they conclude, the argument of sovereignty holds fast to this notion of identity, or self-worth, when addressing the establishment of a Caribbean court of last resort.<sup>131</sup>

Sovereignty arguments *against* the establishment of the CCJ usually focus on the fact that Caribbean States actually made

tions to be architects of own destiny); De La Bastide, *supra* n.4, at 431 (asking, rhetorically, whether it is not time to remove insidious and damaging belief from minds of Caribbean people, and give Judges opportunity to fulfill more effectively obligation assumed once oath of office taken).

128. See RAWLINS, *supra* n.2, at 44 (stating that it is necessary to create own institutions to chart own destiny). See also HAMILTON, *supra* n.16 (noting importance of Caribbean Nations controlling own legal, social, economic, and political destiny); Bryan, *supra* n.11, at 206 (noting that human aspirations and dignity are best achieved and satisfied by development of institutions created and managed by native people themselves).

129. See HAMILTON, *supra* n.16 (arguing that appeals to Privy Council maintain old colonial relationship with U.K.). See also Honourable Telford Georges, Address at the Caribbean Rights Symposium (1998), in RAWLINS, *supra* n.2, at 44 (stating that it is compromise of sovereignty to leave final determination of legal disputes to court which is part of former colonial hierarchy).

130. Reid, *supra* n.2, at 297 (noting that *Pratt & Morgan* demonstrates how Privy Council conflicts with Jamaica's right to self-determination). It also shows how the antiquated English common law influenced Jamaica through the Privy Council. *Id.* See also De La Bastide, *supra* n.4, at 407-08 (stating that *Pratt & Morgan* raises issue of whether these decisions should be made in London by judges who have no first hand contact with societies to whom their decisions apply).

131. See RAWLINS, *supra* n.2, at 46 (stating that nationalism and sovereignty are important factors CCJ debate). See also Lehmann, *supra* n.88, at 303 (noting that cutting remaining tie, through establishment of CCJ, that links States to former colonial period, will also boost regional self-confidence).

Another method for sovereign Nations achieving their own destiny is to show deference to their own domestic courts, which coincides with the Caribbean jurisprudence argument. *Id.* at 304. Rarely in Courts of Appeal throughout the Caribbean will lawyers cite or quote an appellate case from another Caribbean country, unless that case was decided before the Privy Council. Bryan, *supra* n.11, at 206 (stating that Caribbean lawyers commonly rely on cases from another Commonwealth jurisdiction such as New Zealand rather than on more persuasive cases from Caribbean countries because of stigma of inferiority that comes with cases decided by Caribbean jurists). Such reliance on the Privy Council creates a clear absence of precedents in the Caribbean. *Id.*

conscious decisions to retain the Privy Council upon their independence.<sup>132</sup> Opponents of the CCJ then continue to argue that the States' choice was, therefore, an exercise of their sovereign rights.<sup>133</sup> Additionally, some argue that a Caribbean State's Constitution also counteracts the sovereignty argument for the establishment of the CCJ, given its reference to the Queen of England as Head of State.<sup>134</sup>

Legal scholars, press, and politicians alike, have often placed the sovereignty argument at the forefront of their concerns mainly because of the controversy surrounding the death penalty.<sup>135</sup> The Privy Council and the U.K. in general have shown much distaste for Caribbean Nations' support of capital punishment.<sup>136</sup> On the other hand, nearly all Caribbean Nations practice the death penalty, given that it has been retained in their Constitutions.<sup>137</sup> Human rights groups have also spoken

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132. See Helfer, *supra* n.3, at 1865 (stating that Caribbean States did not sever legal ties to U.K. once political independence was gained). See also Georges, *supra* n.129, at 45 (stating that upon achieving independence, Caribbean countries had choice to either allow appeals to Privy Council or abolish them).

133. See Georges, *supra* n.129, at 45 (stating opponents' argument that continuing appeals to Privy Council would not be derogation from sovereignty because choice was exercise of sovereign right to begin with). See also HAMILTON, *supra* n.16 (stating that choice to retain Privy Council is no less sovereign than choice to retain ties to International Monetary Fund ("IMF")).

134. See JAMAICANS FOR JUSTICE, GUIDE SHEET ON THE PRIVY COUNCIL AND THE PROPOSED CARIBBEAN COURT OF JUSTICE, available at <http://www.jamaicansforjustice.org/guide.htm> (2002) (arguing that sovereignty is not compromised by appealing to Privy Council because, under present Jamaican Constitution, Queen of England is Head of State). See also CONST. OF JAMAICA, sec. 68(1). Section 68(1) provides that the "executive authority of Jamaica is vested in Her Majesty." *Id.*

135. See ANTOINE, *supra* n.13, at 244 (stating that common denominator of new move toward CCJ is to enable Caribbean governments and judges to hang prisoners on death row). See also Leonard E. Birdsong, *Is There A Rush to the Death Penalty in the Caribbean: The Bahamas Says No*, 13 TEMP. INT'L & COMP. L.J. 285 (1999) (discussing issue of death penalty in context of CCJ debate). *But see* RAWLINS, *supra* n.2, at 28 (discussing misconception of death penalty as reason for CCJ); Bryan, *supra* n.11, at 199 (stating that cases such as *Guerra & Wallen* helped swing public sentiment in favor of death penalty over last decade).

136. See De La Bastide, *supra* n.4, at 408-09 (discussing Privy Council's distaste for capital punishment as implied by language of *Pratt & Morgan* decision). See also Helfer, *supra* n.3, at 1896-97 (discussing U.K.'s pressure on Caribbean Nations to abolish capital punishment).

137. See CONST. OF JAMAICA, sec. 14(1). Section 14(1) provides that "[n]o person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted." *Id.* See also Helfer, *supra* n.3, at 1897 (discussing Caribbean States' unified resistance in response to British and European pressures).

out against the Caribbean Nations' support of the death penalty, and played a very active role in the Privy Council's *Pratt & Morgan* decision.<sup>138</sup>

B. *The Head: The CARICOM Single Market  
and Economy Argument*

The CSME argument is centered on the notion of the CCJ's original jurisdiction.<sup>139</sup> Recommendations for the conferment of original jurisdiction upon what was to be the CCJ were made as early as 1972.<sup>140</sup> The purpose of the CCJ's original jurisdiction is to maintain a stable and predictable economy, which allows for the free flow of goods and services within the CSME.<sup>141</sup> This jurisdiction, however, is in no way unlimited, given that the CCJ must adhere to the Revised Treaty in its decisions, as will be codified once Protocol IX of the amendments to the Treaty is effected.<sup>142</sup> While the CSME is a response to the effects of

138. See Birdsong, *supra* n.135, at 286-88 (discussing debate between human rights groups and government proponents in Caribbean Nations over death penalty). See also Heller, *supra* n.3, at 1869 (discussing involvement of IACHR and UNHRC in *Pratt & Morgan*).

139. See Cox, *supra* n.23 (arguing that CCJ's original jurisdiction will play fundamental role in success of CSME). See also Lehmann, *supra* n.88, at 307 (stating that CCJ, as viable dispute settlement mechanism, is indispensable for goals of CSME to be actualized).

140. See RAWLINS, *supra* n.2, at 56 (stating that as early as 1972, Report of the Representative Committee of OCCBA on the Establishment of a Caribbean Court of Appeal In Substitution for The Judicial Committee of the Privy Council, or what is called the "Fraser Report," recommended conferment of original jurisdiction on CCJ). See also Lehmann, *supra* n.88, at 305 n.32 (stating that suggestion for original jurisdiction was first made at beginning of 1970s by OCCBA).

141. See Cox, *supra* n.23 (arguing that purpose of CCJ's original jurisdiction is connected to stability and predictability within economy). See also Menon, *supra* n.23, at 204 (asserting that without minimum standard of systematic order and reasonable predictability, economic activity and political stability of any society will hardly be carried on effectively).

142. See ANTOINE, *supra* n.13, at 248 (stating that CCJ's original jurisdiction is severely limited to interpretation of Revised Treaty). See also Protocol IX: Disputes Settlement, art. XXVIII, available at <http://www.caricom.org/protocolix.htm> [hereinafter Protocol IX]. Article XXVIII provides that "[t]he Court shall have compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Treaty." *Id.* See also CARICOM PROTOCOLS, *supra* n.20, at 7 (listing disputes that can properly be heard by CCJ in accordance with Protocol IX as including the following: inconsistency with objectives of Community within Member State; injury or prejudice suffered by Member State, or lack in benefits expected from CSME; illegal acts or organ or body of Community; and frustration or prejudice as result of object or purpose of Treaty); Protocol IX, *supra* n.142, at art. XXVIII (limiting CCJ's original jurisdiction to Revised Treaty).



globalization, many commentators have argued over whether these effects, as applied to countries in need of development,<sup>143</sup> are positive or negative.<sup>144</sup>

### 1. The History of Original Jurisdiction

As early as 1972, recommendations were made for the conferment of an original jurisdiction upon a Caribbean Court to replace the Privy Council.<sup>145</sup> In 1991, Sir Roy Marshall, the then Vice-Chancellor of the University of the West Indies, advocated a similar jurisdiction with respect to disputes which arise under the Treaty.<sup>146</sup> One year later, the West Indian Commission, a body established under the Grand Anse Declaration and Work Programme for the Advancement of the Integration Movement of 1989<sup>147</sup> and mandated to formulate proposals to advance the regional integration movement, afforded an unreserved endorsement of the establishment of a Caribbean Court, primarily on the ground that such a Court is essential for deepening the

143. See The Revised Treaty, *supra* n.20, at art. 4. Article 4 provides:

For the purpose of this Treaty the States specified in sub-paragraphs 1(b), (c), (g), (h), (m) and (n) of Article 3 shall be more developed countries and the remainder listed in the said paragraph shall be less developed countries.

*Id.* See also *id.* at art. 3(1)(a), (d), (e), (f), (i), (j), (k), (l) (listing States as: Antigua and Barbuda, Belize, Dominica, Grenada, Montserrat, St. Kitts and Neavis, Saint Lucia, and St. Vincent and Grenadines).

144. See IMF Staff, *Globalization: Threat or Opportunity?* (Apr. 12, 2000), at <http://www.imf.org/external/np/exr/ib/2000/041200.htm> (reporting positive effect of globalization in Asian developing countries and negative effects in Africa). See also JAN AART SCHOLTE, *GLOBALIZATION: A CRITICAL INTRODUCTION* 6 (2000) (stating that globalization widened opportunity gaps between so-called First and Third worlds).

145. See RAWLINS, *supra* n.2, at 56 (stating that Fraser Report recommended conferment of original jurisdiction on CCJ as early as 1972). See also Lehmann, *supra* n.88, at 305 (stating that initially, CCJ was supposed to be Caribbean Supreme Court vested with competencies for appellate jurisdiction only).

146. See RAWLINS, *supra* n.2, at 56 (stating that Marshall advocated conferment of similar original jurisdiction with respect to disputes arising under Treaty). On that date, while delivering the inaugural Anthony Bland Memorial Lecture at the Cave Hill Campus of the University of the West Indies, Sir Roy suggested that a Caribbean final court could perhaps be established as a Court in the future to function as an arbiter with respect to the Treaty, a Human Rights Treaty, and the miscellany of cases which are now appealable to the Privy Council. *Id.* at 12. See also Draft Enabling Bill to Implement the Agreement Establishing the Caribbean Court of Justice, para. 5 (1999) (suggesting that CCJ have original jurisdiction).

147. See Grand Anse Declaration and Work Programme for the Advancement of the Integration Movement (1989), available at <http://www.caricom.org/archives/grandanse.htm> [hereinafter Grand Anse].

regional integration process.<sup>148</sup> Finally, in July 1998, at the Nineteenth Meeting of the Heads' Conference in Castries, St. Lucia, the Heads decided to invest the CCJ with original jurisdiction that would allow it to adjudicate trade disputes and make decisions with respect to the interpretation and application of the Treaty and its Protocols.<sup>149</sup> Thus, the CCJ holds exclusive competencies over disputes arising between two or more States and those arising between the Community and a State.<sup>150</sup>

## 2. The Purpose of Original Jurisdiction

The purpose of the CCJ's original jurisdiction lies within the

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148. See *Communique Issued At The Conclusion Of The Tenth Meeting Of The Conference Of Heads Of Government Of The Caribbean Community, 3-7 July 1989, Grand Anse, Grenada*, at <http://www.caricom.org/archives/communiqués-hgc/10hgc-1989-communique.htm> (reporting acceptance of proposal for establishment of Commission of eminent West Indians to promote purposes of Treaty with special emphasis on process of public consultation and involvement of peoples of CARICOM through leaders, teachers, writers, intellectuals, creative artists, businessmen, sportsmen, trade unionists, religious and other community organizations). See also RAWLINS, *supra* n.2, at 56 (stating that West Indian Commission endorsed establishment of CCJ on grounds that Court is essential for deepening regional integration); AECCJ, *supra* n.85, pmb. (stating that Contracting Parties are aware that establishment of CCJ is further step towards deepening regional integration process).

149. See RAWLINS, *supra* n.2, at 57 (stating that in 1998, at Nineteenth Meeting of Heads, decision was made to confer original jurisdiction on CCJ). By virtue of this jurisdiction, the Court will adjudicate trade disputes and make decisions with respect to the interpretation and application of the Revised Treaty. *Id.* See also *Communique Issued At The Conclusion Of The Nineteenth Meeting Of The Conference Of Heads Of Government Of The Caribbean Community, 30 June-4 July 1998, Castries, Saint Lucia*, at <http://www.caricom.org/archives/communiqués-hgc/19hgc-1998-communique.htm> (reporting that Heads decided to invest CCJ, *inter alia*, with original jurisdiction in respect of interpretation and application of Treaty).

150. See Lehmann, *supra* n.88, at 306 (stating that CCJ will hold exclusive competencies over disputes between two or more Member States, or between Community and State). The Community or States can also request advisory opinions regarding the interpretation and application of the Treaty. *Id.*

It is interesting to note that the Heads took approximately twenty-six years to decide to invest the CCJ with an original jurisdiction (from 1972-1998). RAWLINS, *supra* n.2, at 56-57 (discussing Fraser Report's recommendation of conferring original jurisdiction on CCJ in 1972, and Nineteenth Meeting of Heads' Conference where final decision to confer original jurisdiction on CCJ was made, in 1998). There is no set reason for this delayed decision, but a possibility could lie in the ideological concept of the CCJ itself, in that the nature, status, and jurisdiction of the anticipated CCJ were to be carbon copies of the Privy Council's in all respects, except for the nationality of its judges. ANTOINE, *supra* n.13, at 249. Yet, the Privy Council is strictly limited to cases with specific appellate features and does not possess original jurisdiction; thus, a reluctance to stray from this ideological structure might have been at hand. *Id.* at 230.

need for stability and predictability.<sup>151</sup> Scholars note that for investors and individuals to be able to take advantage of the potential for economic advancement, it is necessary that a stable and predictable environment be maintained.<sup>152</sup> Such stability is necessary for reasonable assessments of the risks involved when making confident decisions to engage resources.<sup>153</sup>

Legal scholars note that in relation to the law, any rights and privileges giving rise to opportunities for economic establishment will naturally flow from a regulatory framework established according to legal principles and with the force of law.<sup>154</sup> These scholars further reason that within this framework, clear guidelines must be established along with prescribed sanctions for breaches, to which investors and individuals may take reference to determine their rights and responsibilities.<sup>155</sup> Thus, legal scholars conclude that where a dispute arises between States — e.g., between a community national and a State — as to the extent of their rights and responsibilities, the CCJ must interpret the relevant provision of the Revised Treaty and determine what

151. See Cox, *supra* n.23 (arguing that purpose of CCJ's original jurisdiction is connected to stability and predictability within economy). Cf. ANTOINE, *supra* n.13, at 230 (stating that Privy Council is now considered highest court of *each individual* independent territory's judicial system; yet, before independence, Privy Council's function was to promote uniformity in common law throughout former British Empire) (emphasis added).

152. See COX, *supra* n.23 (stating that stable and predictable environment is needed for investors and individuals to take advantage of potential economic advancement). See also Menon, *supra* n.23, at 204 (stating that economic activity and political stability of any society can hardly be effectively carried on without minimum standard of systematic order and reasonable predictability).

153. See COX, *supra* n.23 (stating that stability will yield reasonable assessments of investment risks). See DUKE POLLARD, THE CARIBBEAN COURT OF JUSTICE IN REGIONAL ECONOMIC DEVELOPMENT, at <http://www.caricom.org/archives/ccjregionalecondevdp.htm> [hereinafter 3 POLLARD] (stating that stability in social and macro-economic environment issuing from efficient justice sector lowers incidence of investment risks and price of capital to borrowers and entrepreneurs).

154. See COX, *supra* n.23 (stating that regulatory framework will generate rights and privileges giving rise to opportunities for economic establishment according to legal principles). See also 3 POLLARD, *supra* n.153 (noting that law is basic and essential catalyst for social and economic activity). In the modern State, nearly all regulated social and economic activities are conducted within parameters established by law. *Id.*

155. See COX, *supra* n.23 (stating that clear guidelines must be established so investors and individuals can refer to them when determining rights and responsibilities). See also 3 POLLARD, *supra* n.153 (stating that efficient and effective justice sector instills confidence in general populace and stimulates conditions of stability advantageous to predicting consequences of critical decision-making, particularly in area of investments).

rights and responsibilities apply to whom and in what circumstances.<sup>156</sup> The CSME argument for the establishment of the CCJ therefore proposes that the CCJ be vested with the power to interpret the provisions of the Revised Treaty and render the intention and meaning of the provisions in a clear, consistent, and uniform manner.<sup>157</sup> Consequently, individuals and investors will be able to plan their activities by making the reasonable assessments needed and with the necessary confidence to move around within the single economic space.<sup>158</sup>

### 3. The Limitations on Jurisdiction of the CCJ

The CCJ will have a severely limited original jurisdiction, as it is restricted to the interpretation of the Revised Treaty, which, in turn, lays down its sphere of operation pursuant to Protocol IX.<sup>159</sup> Protocol IX of the amendments to the Treaty addresses

156. See Cox, *supra* n.23 (stating that when disputes arise between States, CCJ will interpret relevant provision of Revised Treaty and determine rights and responsibilities). See also Lehmann, *supra* n.88, at 307 (discussing high likelihood of disputes among States in CSME, given that some States will be forced to accept decisions they voted against because of new voting procedures set out in Revised Treaty).

157. See Cox, *supra* n.23 (stating that CCJ will be vested with power to interpret Revised Treaty in clear, consistent, and uniform manner). See also 3 POLLARD, *supra* n.153 (stating that status of CSME as association of sovereign States, coupled with requirement for every State to enact Revised Treaty into local law, subjects Revised Treaty to as many interpretations as there are national jurisdictions, thereby increasing probability of legal uncertainty). Investing the CCJ with compulsory and exclusive jurisdiction with respect to issues relating to the interpretation and application of the Revised Treaty will help avoid this uncertainty. *Id.*

158. See Cox, *supra* n.23 (stating that with CCJ's power to interpret Revised Treaty, individuals and investors will be able to plan activities according to reasonable assessments and necessary confidence within CSME space). See also 3 POLLARD, *supra* n.153 (stating that social stability in national environment, coupled with plausible assurances of protection for life and limb of individuals, impacts favorably on tourism industry, which is largest generator of foreign exchange in economies of most Member States). Moreover, lower transaction costs will impact positively on production costs resulting in an enhanced competitive position for businesses. *Id.*

159. See ANTOINE, *supra* n.13, at 248 (discussing limitations of CCJ's original jurisdiction with regard to Revised Treaty). See, e.g., Protocol IX, *supra* n.142, at art. XXIX (amending art. 12 of the Treaty). Article XXIX provides:

Subject to the Treaty, the Court shall have exclusive jurisdiction to hear and deliver judgment on:

- (a) disputes between Member States parties to the Agreement;
- (b) disputes between Member States parties to the Agreement and the Community;
- (c) referrals from national courts of Member States parties to the Agreement;
- (d) applications by persons in accordance with Article XLI, concerning the interpretation and application of the Treaty.

the vital issue of dispute settlement.<sup>160</sup> It originated from the obligation undertaken by States under Article 33 of the Charter of the United Nations<sup>161</sup> (the “Charter”) to settle disputes peacefully.<sup>162</sup> It also adopted the six modes of dispute settlement set out by the Charter: arbitration, adjudication, conciliation, consultations, good offices, and mediation.<sup>163</sup> Furthermore, disputes that can properly be heard in accordance with this Protocol must arise from the following: inconsistency with the objectives of the Community of an actual or proposed measure of another State;<sup>164</sup> injury or prejudice suffered or likely to be suffered by a State, or lack of fall-off in benefits expected from the establishment and operation of the Single Market and Economy;<sup>165</sup> illegal acts of an organ or body of the Community;<sup>166</sup>

*Id.*

160. See CARICOM PROTOCOLS, *supra* n.20, at 7 (stating that Protocol IX deals with dispute settlement issues). See also CARIBBEAN COMMUNITY AND COMMON MARKET, *supra* n.21 (commenting on Protocol IX’s focus on dispute settlement).

161. See U.N. CHARTER art. 33, paras. 1-2. Article 33(1)-(2) provide:

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

*Id.*

162. See CARICOM PROTOCOLS, *supra* n.20, at 7 (stating that Protocol IX originated from Article 33 of Charter of United Nations (the “Charter”). See also CARIBBEAN COMMUNITY AND COMMON MARKET, *supra* n.21 (stating that Article 33 of Charter influenced development of Protocol IX).

163. See CARICOM PROTOCOLS, *supra* n.20, at 7 (stating that Protocol IX adopted six modes of dispute settlement: arbitration, adjudication, conciliation, consultations, good offices, and mediation). See also U.N. CHARTER art. 33, para. 1. Article 33, paragraph 1 provides:

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

*Id.*

164. See CARICOM PROTOCOLS, *supra* n.20, at 7 (stating that dispute must arise from inconsistency with objectives of Community of another Member State). See also Protocol IX, *supra* n.142, at art. IV(a) (amending Article 2 of the Caribbean Common Market Annex to the Treaty). Article IV(a) provides that Protocol IX will apply to the settlement of disputes concerning “allegations that an actual or proposed measure of another Member State is, or would be, inconsistent with the objectives of the Community.” *Id.*

165. See CARICOM PROTOCOLS, *supra* n.20, at 7 (stating that dispute must arise

and frustration or prejudice as a result of an object or purpose of the Treaty.<sup>167</sup>

Article XXVIII of Protocol IX provides the CCJ with compulsory and exclusive jurisdiction over disputes relating to the Revised Treaty.<sup>168</sup> Article XXIX elaborates upon the nature of the actual disputes over which the Court will have jurisdiction.<sup>169</sup> In essence, this Article illustrates the several means by which the original jurisdiction of the CCJ will serve the purpose of promoting stability and uniformity.<sup>170</sup>

from injury or prejudice suffered by Member State, or lack of fall-off in benefits expected from CSME). See also Protocol IX, *supra* n.142, at art. IV(b). Article IV(b) provides that disputes arising from "allegations of injury, serious prejudice suffered or likely to be suffered, nullification or impairment of benefits expected from the establishment and operation of the CARICOM Single Market and Economy (CSME)" will be properly heard under Protocol IX. *Id.*

166. See CARICOM PROTOCOLS, *supra* n.20, at 7 (stating that illegal acts of organ or body of Community will warrant proper dispute hearing). See also Protocol IX, *supra* n.142, at art. IV(c). Article IV(c) provides that disputes are properly heard where there are "allegations that an organ or body of the Community has acted *ultra vires*." *Id.*

167. See CARICOM PROTOCOLS, *supra* n.20, at 7 (stating that dispute hearings can arise from frustration or prejudice under Treaty). See also Protocol IX, *supra* n.142, at art. IV(d). Article IV(d) provides that disputes regarding "allegations that the purpose or object of the Treaty is being frustrated or prejudiced" will be properly heard. *Id.*

168. See CARIBBEAN COMMUNITY AND COMMON MARKET, *supra* n.21 (stating that compulsory and exclusive jurisdiction is set forth in Article XXVIII of Protocol IX). See also Protocol IX, *supra* n.142, at art. XXVIII (amending Article 11 of the Caribbean Common Market Annex). Article XXVIII provides that "[t]he Court shall have compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Treaty." *Id.*

169. See Protocol IX, *supra* n.142, at art. XXIX (amending Treaty by inserting an additional article, Article 12). Article XXIX provides:

1. Subject to the Treaty, the Court shall have exclusive jurisdiction to hear and deliver judgment on:
  - a) disputes between Member States parties to the Agreement;
  - b) disputes between Member States parties to the Agreement and the Community;
  - c) referrals from national courts of Member States parties to the Agreement; and
  - d) applications by persons in accordance with Article XLI concerning the interpretation and application of the Treaty.

*Id.*

170. See COX, *supra* n.23 (discussing how four categories of persons promote stability and uniformity). See also AECCJ, *supra* n.85, at art. XII, para. 1(a)-(d). Article XII, para. 1(a)-(d) provide:

- Subject to the Treaty, the Court shall have exclusive jurisdiction to hear and deliver judgment on:
- a) disputes between Contracting Parties to this Agreement;
  - b) disputes between any Contracting Parties to this Agreement and the Community;

Article XXXII of Protocol IX deals with the notion of referrals.<sup>171</sup> The functioning of this Article also compliments the notion of uniformity, in that it basically confers upon National State Courts the power to refer particular issues to the CCJ for clarification or interpretation.<sup>172</sup> The CCJ will submit its decision back to the national court, and that national court, in turn, will apply the principles issuing from the CCJ to arrive at a final decision.<sup>173</sup> As such, Caribbean legal experts have argued that the notion of uniformity and stability, as set out in Protocol IX, is at the very heart of the purpose for the CCJ's original jurisdiction, thereby revealing a close relationship between the CCJ and the CSME.<sup>174</sup>

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c) referrals from national courts or tribunals of Contracting Parties to this Agreement; and

d) applications by nationals in accordance with Article XXIV concerning the interpretation and application of the Treaty

*Id.*

171. See COX, *supra* n.23 (discussing notion of referrals under Article XXXII — formerly IX(c) — of Protocol IX). See also Protocol IX, *supra* n.142, at art. XXXII. Article XXXII provides:

Where a national court or tribunal of a Member State is seized of an issue whose resolution involves a question concerning the interpretation or application of the 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.

*Id.*

172. See COX, *supra* n.23 (stating that Article XXXII compliments uniformity notion because it gives States power to refer issues to CCJ for clarification). It is, in fact, essential that those national courts and tribunals of Contracting Parties make use of this power to refer matters to the CCJ, if the purpose of the Article is to be fulfilled. *Id.* See also 2 POLLARD, *supra* n.20 (stating that when national courts are seized of an issue, they must accept jurisdiction and refer to CCJ for determination before delivering judgment which ultimately must respect CCJ's finding).

173. See COX, *supra* n.23 (stating that CCJ submits its decision back to national court, which, in turn, applies the ruling to arrive at a final decision). It is also possible for the CCJ to issue a decision upon a referral that may have the effect of finally disposing of the matter in the national court, or helping to settle a discrete and distinct issue, which is part of a number of other issues of which a national court is seized. *Id.* Thus, Treaty provisions will be uniformly applied on an ongoing basis. *Id.* Ultimately, an organic development of Treaty law within Member States will take place, extending uniformly to other Member States where national courts are seized of similar issues. *Id.* See also 2 POLLARD, *supra* n.20 (stating that Member States signing on to AECCJ agree to enforce its decisions in respective jurisdictions like decisions of own superior courts).

174. See COX, *supra* n.23 (stating that CCJ and CSME cannot exist without each other). The challenge facing the framers of the AECCJ is constructing it so as to adequately address the demands of a stable economic environment, which is absolutely necessary for the success of the CSME. *Id.* The CCJ will play a decisive role in any

## 4. Globalization

The International Monetary Fund (the "IMF") has described globalization in reference to increased integration of economies around the world, particularly through trade and financial flows.<sup>175</sup> Legal scholars include more contemporary developments in their descriptions.<sup>176</sup> While much confusion surrounds the construction of an airtight definition of globalization,<sup>177</sup> analysts often discuss the negative and positive effects that the phenomenon has in countries in need of development.<sup>178</sup>

Many experts emphasize the negative effects of globaliza-

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future success of the CSME. *Id.* See also Salmon, *supra* n.24, at 239 (stating that CCJ's original jurisdiction is absolutely essential to integrity of integration process).

175. See IMF Staff, *supra* n.144 (stating that globalization refers to increasing integration of economies around the world, especially in trade and financial flow). See also David Held, *et al.*, *Global Transformations*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* n.119, at 1307 (stating that globalization reflects widespread perception that world is rapidly being molded into shared social space by economic and technological forces, and that developments in one region of world can have profound consequences for life chances of individuals or communities on other side of globe).

176. See ROBERT K. SCHAEFFER, UNDERSTANDING GLOBALIZATION: THE SOCIAL CONSEQUENCES OF POLITICAL, ECONOMIC, AND ENVIRONMENTAL CHANGE 1 (2d ed. 2003) (stating that some analysts argue that globalization should also refer to contemporary developments, such as spread of environmental pollution, commercialization of culture and languages, cross border migration of people, spread of drugs and narcotics, and emergence of social and political protest movements opposed to globalization). See also DAVID HELD & ANTHONY MCGREW, GLOBALIZATION/ANTI-GLOBALIZATION 3 (2002) (stating that "sceptic" analysis of globalization identifies current trends as reflecting process of internationalization).

177. See SCHOLTE, *supra* n.144, at 15 (stating that disputes and confusion about globalization often begin around issue of definition). See also Philip C. Aka, *The "Dividend of Democracy": Analyzing U.S. Support for Nigerian Democratization*, 22 B.C. THIRD WORLD L.J. 225, 263 (2002) (stating that globalization is difficult to describe, partly because the term is so loosely used and applied to so many different processes); Antony Anghie, *Time Present And Time Past: Globalization, International Financial Institutions, And The Third World*, 32 N.Y.U. J. INT'L L. & POL. 243, 243 (2000) (describing globalization as complex and contradictory phenomenon).

178. See IMF Staff, *supra* n.144 (reporting on globalization's positive effect in Asian developing countries and negative effects in Africa). Compare HELD & MCGREW, *supra* n.176, at 85 (arguing, from sceptic point of view, that globalization causes disproportionate flow of benefits, from trade and foreign investment, to major capitalist economies, thereby widening gap between rich and poor States) and SCHOLTE, *supra* n.144, at 6 (stating that accelerated globalization has widened gaps in opportunities between so-called First and Third worlds) with MOSES N. KIGGUNDU, MANAGING GLOBALIZATION IN DEVELOPING COUNTRIES AND TRANSITION ECONOMIES ix (arguing that globalization offers developing countries opportunity for economic, political, social, and cultural development).



tion on less developed countries.<sup>179</sup> One negative effect entails the crippling debts and other economic crises caused by global finance.<sup>180</sup> Scholars note that since the early 1980s, the debt crisis surrounding global loans to developing countries has hindered efforts to alleviate poverty in many countries.<sup>181</sup> By 1996, forty-one of the world's poorest countries had, between them, accumulated close to \$250 billion in transborder debts.<sup>182</sup>

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179. See SCHOLTE, *supra* n.144, at 28 (discussing criticisms of globalization in light of negative economic effects on security of poor countries). See also HELD & MCGREW, *supra* n.176, at 77-78 (reporting statistics of global inequality among developing countries as caused by neoliberal form of economic globalization); Dorith Grant-Wisdom, *Globalization, Structural Adjustment, and Democracy in Jamaica*, in *DEMOCRACY AND HUMAN RIGHTS IN THE CARIBBEAN* 195 (Ivelaw L. Griffith & Betty N. Sedoc-Dahlberg eds., 1997) (discussing negative effect of flow of information and information products through ever-expanding technology in Jamaica).

180. See SCHOLTE, *supra* n.144, at 28 (stating that global finance has produced crippling debts and further economic crises in both large and small countries in Southern and Eastern zones). Critics of globalization also claim that at the same time as this crippling effect, global competition pressures have reduced aid flows to poor countries. *Id.* See also HELD & MCGREW, *supra* n.176, at 78 (stating that economic globalization is fundamental force in shaping patterns of global inequality and exclusion when considering location and distribution of productive power and wealth in world economy). In terms of statistics, one expert noted that while the 900 million people residing in the Western zone of affluence were responsible for 86% of world consumption expenditures, 79% of world income, 58% of world energy consumption, 47% of all carbon emission, and 74% of all telephone lines, the poorest 1.2 billion people in the world's population had to share only 1.3% of world consumption, 4% of world energy consumption, 5% of world fish and meat consumption, and 1.5% of all telephone lines. *Id.* at 77-78.

181. See SCHOLTE, *supra* n. 144, at 215 (stating that debt crisis surrounding global loans to developing countries has severely undermined poverty alleviation efforts since early 1980s). As a result of this crisis, transborder debts of these countries grew sixteen-fold between 1970 and 1997, to almost \$2.2 trillion. *Id.* See also SCHAEFFER, *supra* n.176, at 95 (stating that sudden inability of countries to repay debts created debt crisis that threatened first and third world countries alike). Collectively, countries in Latin America, Africa, and Eastern Europe owed \$810 billion in 1983, which was a twelve-fold increase from the \$64 billion they owed in 1970. *Id.* See also Grant-Wisdom, *supra* n.179, at 197 (explaining that acute debt crisis provided means by which International Monetary Fund (the "IMF"), World Bank, and Interamerican Development Bank (the "IADB") played fundamental role in scope and direction of policy in Jamaica).

182. See SCHOLTE, *supra* n.144, at 216 (stating that forty-one of world's poorest countries accumulated some \$250 billion in transborder debts during 1996). See also Keith Griffin & A.R. Kahn, *Globalization and the Developing World*, in *INTERNATIONAL HUMAN RIGHTS IN CONTEXT*, *supra* n.119, at 1328-29 (stating argument that concessional loans and grants issued to developing countries from Organization for Economic Cooperation and Development (the "OECD"), and other rich countries, benefit donors more than they help recipients). One scholar notes that too much foreign aid serves no developmental purpose, but is instead used to promote exports of the donor country, to encourage the use of (imported) capital-intensive methods of production, or to strengthen the police and armed forces of the recipient country. *Id.*

Proponents of globalization emphasize the efficiency and economic growth that result from global trade in a single open marketplace.<sup>183</sup> In contrast to the debt crisis, scholars have noted that several initiatives in the 1990s managed to reduce some of the transborder debts in developing countries.<sup>184</sup> For example, in the mid-1990s, the IMF and the World Bank jointly formulated the Highly Indebted Poor Countries Initiative (the "HIPC") for relief on debt owed to multilateral institutions.<sup>185</sup> Another popular program in the 1990s was the debt-equity swaps program, which aimed at reducing debt loads of developing countries.<sup>186</sup>

Experts also discuss globalization's effect on a developing Nation's sovereignty.<sup>187</sup> Some scholars contend that contempo-

183. See SCHOLTE, *supra* n.144, at 27 (stating that enthusiasts emphasize gains in efficiency and economic growth that result once world becomes single open marketplace). Proponents also argue that global trade enhances consumer satisfaction because it results in more distribution to a greater number of people at a lower price. *Id.* See also SCHAEFFER, *supra* n.176, at 6 (quoting United Nations as stating that globalization opens many opportunities for millions of people around world); Director General Mike Moore, Trade, Poverty and the Human Face of Globalization, Address at the London School of Economics (June 16, 2000), available at [http://www.wto.org/english/news\\_e/spmm\\_e/spmm32\\_e.htm](http://www.wto.org/english/news_e/spmm_e/spmm32_e.htm) (stating that inefficiency is never good, and that maximizing efficiency means enabling people to fulfill their potential and helping countries make most of their resources and conserve their environment).

184. See SCHOLTE, *supra* n. 144, at 216 (stating that initiatives, taking place in 1990s, brought some reduction of debts). See generally KIGGUNDU, *supra* n.178, at 245 (stating that debt crisis has always been associated with active searches for different resolutions).

185. See SCHOLTE, *supra* n.144, at 216 (stating that Highly Indebted Poor Countries Initiative (the "HIPC") was jointly formed by IMF and World Bank in mid-1990s). The HIPC program was enhanced in 1999 by supplying indebted countries with larger funds, less stringent eligibility criteria, and faster delivery of relief. *Id.* But see SCHAEFFER, *supra* n.176, at 109 (stating that indebted countries managed to repay debts but found themselves deeper in debt). Between 1982 and 1990, lenders sent \$927 billion to borrowers, and within that same period, these borrowers repaid lenders \$1,345 billion in principal and interest. *Id.* Indebted countries, therefore, paid \$418 billion more than they received. *Id.*

186. See KIGGUNDU, *supra* n.178, at 245-50 (discussing the debt-equity swap program and how it planned on reducing debt loads). This program was introduced through the 1989 "Brady Plan." *Id.* Debt-equity swaps is a process by which a debt instrument of a debtor country, denominated in foreign exchange, is converted into an equity investment in that country. *Id.* Thus, under this program, an indebted country's loan could be converted into equity shares of a company in that country. *Id.* See also SCHOLTE, *supra* n.144, at 216 (stating that fifteen governments between 1989 and 1996 engaged in "Brady deals" where some of their bank debt was converted into bonds at lower interest rates).

187. See Grant-Wisdom, *supra* n.179, at 194-95 (discussing globalization and Nation-State sovereignty). See also SCHOLTE, *supra* n. 144, at 308-09 (addressing sovereignty

rary globalization makes a State's sovereign governance impracticable.<sup>188</sup> As such, they argue that developing countries have allowed large industrialized countries and international financial institutions such as the World Bank, the IMF, the Inter-American Development Bank, and the Asian Development Bank, to dictate economic policies to them.<sup>189</sup> They further argue that State politicians, civil servants, and armed forces around the world have vested interests in sustaining the notion that full and final authority lies with their own national governments.<sup>190</sup> Experts also note that the effectiveness of sovereignty is largely dependent on a State's command over economic power and resources.<sup>191</sup>

### PART III: *HEADS UP AND DOWNHEARTED*

Both the sovereignty and CSME arguments make strong

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as major challenge to implementation of ambitious reformism); HELD & MCGREW, *supra* n.176, at 23-24 (discussing challenges of States' sovereignty and legitimacy in contest global and regional interconnectedness, along with supranational, intergovernmental, and transnational forces).

188. See SCHOLTE, *supra* n.144, at 308 (stating that globalization made State sovereignty impracticable). See also Bunn, *supra* n.22, at 1464 (stating that globalization places limits on freedom of action State governments have in setting own economic policies, and diminishes predictability of economic conditions in general). In 1998, the Committee on Economic, Social and Cultural Rights held a general session on globalization and its impact on economic and social rights. *Id.* The Committee concluded that the process of globalization risks downgrading the central place accorded to human rights by the U.N., unless it is complemented by additional policies. *Id.* Specific rights at risk include the right to work, the right to just and favorable working conditions, the right to unionize, and the right to have social security. *Id.*

189. See Frank B. Rampersad, *Coping with Globalization: A Suggested Policy Package for Small Countries*, 570 ANNALS AM. ACAD. POL. & SOC. SCI. 115, 116 (2000) (stating that developing countries have allowed their economic policies to be dictated to them by industrialized countries and international financial community). See also Anghie, *supra* n.177, at 244 (arguing that globalization, by way of international finance institutions, may have adverse consequences for vast majority of third world countries).

190. See SCHOLTE, *supra* n.144, at 308 (stating that millions of politicians, civil servants, and armed forces working within centralized State apparatuses, have vested interest in maintaining notion that full and final authority lies with national government). See also HELD & MCGREW, *supra* n.177, at 126 (stating that many States still retain ultimate legal claim to effective supremacy over what occurs within own territories).

191. See Grant-Wisdom, *supra* n.176, at 193 (stating that effective power bestowed by sovereignty is largely dependent on economic power and resources that State can command). This relationship arises from the historical link between the exercise of sovereignty and the accumulation and expansion of capital, as well as the concomitant structure of power relations. *Id.* See also HELD & MCGREW, *supra* n. 177, at 46 (stating that while most States rely on international flows of trade and finance to ensure national economic growth, limits to and constraints on national economic autonomy and sovereignty become more visible).

cases for the establishment of the CCJ.<sup>192</sup> Sovereignty, while a difficult term to define,<sup>193</sup> speaks to a Caribbean State's right to independence.<sup>194</sup> In contrast, the CSME argument focuses on developing a more predictable and stable economy, where people are able to make reasonable and confident assessments of investment risks.<sup>195</sup> The question, then, is why should the sovereignty argument be put ahead of the CSME argument in the CCJ debate?<sup>196</sup> Both of these concepts, sovereignty and economy, seem to be equally valuable to a State's well-being; however, this is only if one believes these concepts to be valuable in and of themselves. An analysis of the underlying values of these concepts will reveal two main points: first, the two arguments eventually overlap with one another, and second, the CSME argument should not be marginalized in the CCJ debate.

Caribbean sovereignty identifies with two of the common usages of sovereignty.<sup>197</sup> The first usage is domestic sovereignty.<sup>198</sup> Advocates of the CCJ argue that Caribbean States need to create their own institutions and chart their own destiny<sup>199</sup> — in other words, they wish to organize and control their own legal authority.<sup>200</sup> The second usage is Westphalian sovereignty.<sup>201</sup> Arguments for the establishment of the CCJ pertaining to the Privy Council's effect on domestic Caribbean courts fall within this category of sovereignty.<sup>202</sup> Placing the sov-

192. See *supra*, nn.119-91 and accompanying text (discussing sovereignty and CSME arguments).

193. See *supra* n.119 and accompanying text (discussing difficulty of defining sovereignty).

194. See *supra* n.116 and accompanying text (discussing sovereignty in context of independence).

195. See *supra* nn.152-53 and accompanying text (discussing need for stable economy that will lead to reasonable assessments of investment risks).

196. See *supra* nn.17, 20 and accompanying text (discussing popularity of sovereignty argument and marginalization of CSME argument).

197. See *supra* nn.120-24 and accompanying text (discussing common usages of sovereignty).

198. See *supra* n.121 and accompanying text (discussing domestic sovereignty usage).

199. See *supra* nn.127-28, and accompanying text (discussing Caribbean States' need to chart own destiny and create own institutions).

200. See *supra* n.121 and accompanying text (describing domestic sovereignty as dealing with States' organization and control of authority).

201. See *supra* n.124 and accompanying text (discussing Westphalian sovereignty).

202. See *supra* nn.126, 130 and accompanying text (discussing Salmon's argument against Court of Appeal located outside Caribbean region, and Privy Council's effect on Caribbean through *Pratt & Morgan* decision respectively).

ereignty argument within these categories, however, does not answer the question of what makes the concept of sovereignty itself so valuable.

According to Caribbean legal experts, sovereignty is what brings a sense of pride, self-confidence, and self-worth to the people.<sup>203</sup> It is cutting the remaining string of an oppressive past and building a future based on one's own domestic values and culture.<sup>204</sup> To these experts, sovereignty means more than merely fighting for the right to exercise the death penalty whenever it seems fit.<sup>205</sup> Sovereignty is what will make Caribbean States whole — it is a gap-filler.<sup>206</sup>

The CSME argument advocates a stable and predictable economy through the CCJ's original jurisdiction.<sup>207</sup> Laws, or a legal institution, regulating a stable and predictable economy will, in turn, create more economic activity among Caribbean States<sup>208</sup> as well as foreign investors.<sup>209</sup> While building a stronger economy is valuable to a State, it is not the underlying reason for the CSME argument. The underlying value for forming a stronger economy among Caribbean States, is survival and the advantage gained from globalization.

As some commentators have argued, the phenomenon of globalization can be a very deadly movement towards a virtual extinction of developing countries through debt crises.<sup>210</sup> In contrast, others argue that globalization encourages economic growth through global trade.<sup>211</sup> Whatever effect globalization

203. *See supra* n.131 and accompanying text (discussing sovereignty in context of self-worth and self-confidence).

204. *See id.* and accompanying text (discussing severing remaining tie to colonial past, and need for dependence on own domestic courts to develop own jurisprudence). *See also supra* n.129 and accompanying text (discussing argument that Privy Council is remnant of imperial past).

205. *See supra* nn.135-38 and accompanying text (discussing argument that sovereignty centers around States' right to exercise death penalty).

206. *See supra* n.126 and accompanying text (discussing Salmon's view that CCJ will serve to fill gap that must be filled and connect people to themselves).

207. *See supra* nn.151-58 and accompanying text (discussing CSME in context of stable and predictable economy provided by CCJ).

208. *See supra* nn.154-55 and accompanying text (discussing CCJ's ability, through original jurisdiction, to encourage economic activity).

209. *See supra* n.158 and accompanying text (discussing how law will bring social stability which impacts favorably on tourism industry).

210. *See supra* nn. 180-82 and accompanying text (discussing negative impact of debt crises, produced by globalization, on less developed countries).

211. *See supra* n.183 and accompanying text (discussing benefits of globalization).

has on Caribbean States, the CSME is meant to both neutralize the crippling effect of debt crises, and take advantage of the many opportunities emerging from global trade.<sup>212</sup> And as the argument goes, none of this will take effect without the establishment of the CCJ. The CCJ will provide the stable and predictable economy necessary for investors to take advantage of opportunities produced by globalization.<sup>213</sup> Thus, there is a biconditional relationship between the CSME and the CCJ:<sup>214</sup> without the CCJ, the CSME will not be an effective tool to tackle globalization, and without the CSME, the CCJ will be a superfluous institution, given that States will be burdened with debt crises, an unpredictable market in which no one will care to invest, and missed opportunities in the global market.

While the underlying values of these two arguments have been discussed, the questions still remain as to how the sovereignty and CSME arguments eventually overlap, and why the CSME argument should be placed at the forefront of the CCJ debate. First, the CSME can itself be categorized as a type of sovereignty. Interdependence sovereignty is concerned with a State's ability to regulate flow of persons, goods, pollutants, diseases, and ideas across territorial boundaries.<sup>215</sup> The CSME is also concerned with the free flow of CARICOM people, goods, services, and capital throughout Caribbean States, without tariffs/barriers or restrictions.<sup>216</sup> It basically looks to gain control of its own economy. Thus, the CSME is not only a response to globalization, but it is also an advocate for sovereignty. Additionally, international sovereignty, another common usage of the term, is also present in the CSME argument, given the CSME's encouragement of foreign investment through tourism.<sup>217</sup>

The CSME's relation to the sovereignty argument raises the

212. *See supra* n.103 and accompanying text (discussing CSME as response to challenges and opportunities of globalization).

213. *See supra* n.152 and accompanying text (discussing need for predictable environment to take advantage of economic advancement).

214. *See supra* nn.25, 174 and accompanying text (discussing biconditional relationship between CCJ and CSME).

215. *See supra* n.122 and accompanying text (discussing interdependence sovereignty).

216. *See supra* n.104 and accompanying text (describing function of Single Market and Single Economy in CSME).

217. *See supra* n.123 and accompanying text (discussing international sovereignty as State's need to be recognized by other States).

second question of why the CSME argument should be at the forefront of the CCJ debate. Although the two arguments are closely intertwined, their underlying values differ. The sovereignty argument is concerned with making the Caribbean States whole by filling the gaps caused by a lack of self-confidence and self-worth. The CSME argument, in contrast, is concerned with the good and bad effects of globalization on Caribbean economies, and gaining more control over these economies. Observing the CSME argument, it seems to perform a double duty by showing concern for both the economy and sovereignty. Thus, this one argument covers both issues. The issues of self-worth and confidence, however, appear to be lost in the type of sovereignty covered by the CSME, since interdependence sovereignty only contains the issue of control, while domestic sovereignty includes both control and authority.<sup>218</sup> Such an argument assumes, however, that controlling one's own economy will have no effect on people's self-worth and confidence, which is hard to believe. Granted, interdependence sovereignty is not as glamorous or patriotic as domestic sovereignty, but it is sovereignty nonetheless.

Importantly, the effects of globalization also stretch to a developing Nation's sovereignty.<sup>219</sup> International finance institutions and industrialized countries have been noted to dictate how developing countries should run their economies.<sup>220</sup> This is a direct threat to a developing country's interdependence sovereignty, and it is this problem that the CSME argument addresses. Moreover, the effectiveness of sovereignty is directly related to a State's economic power and resources,<sup>221</sup> which are also within the realm of the CSME argument. A kind of dependency, then, is formed between the two arguments, given that sovereignty will only be effective if the economic power of a State is strong. Thus, while the sovereignty argument concerns itself with making States whole and filling gaps, the CSME argument focuses on

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218. See *supra* nn.121-22 and accompanying text (discussing issues of authority and control in context of domestic and interdependence sovereignty).

219. See *supra* n.187 and accompanying text (discussing globalization's effect on developing countries' sovereignty).

220. See *supra* nn.188-89 and accompanying text (discussing international finance institutions' effect on developing countries).

221. See *supra* n.191 and accompanying text (discussing sovereignty's effectiveness is dependent on economic power).

sustaining this sovereignty's effectiveness, through its concern for the economy and globalization. The CSME argument should therefore take precedence over the CCJ debate, given its underlying value pertaining to both the economy and sovereignty.

### CONCLUSION

The above quote by Jonathan Swift is most accurate; it is, indeed, wise to keep issues of money in one's head and not in one's heart.<sup>222</sup> Sovereignty is undoubtedly important to any Nation's existence. Without it, there is no way to define oneself, or even respect oneself. Such an argument, however, is more of an emotional plea, and does not deal with the pressing issues surrounding Caribbean economies. In contrast, the CSME argument actually spans across both the economy and sovereignty of the Caribbean. Thus, the more prudent CSME argument addresses the issues posed by both arguments. Given the expanding world economy, it would therefore be more useful to ignore the valuable argument of sovereignty and focus on the CSME argument. This is not to suggest that sovereignty is to be fully disregarded; it simply means that sovereignty should not be at the forefront of the CCJ debate when the CSME argument addresses the more important issue of the effects of an expanding globalization on Caribbean economies and sovereignty.

Working within the context of the CCJ, the phenomenon of globalization is no more than the proverbial elephant in the room: people are aware of its existence but choose to ignore it. Using an emotional plea, like the sovereignty argument, to deal with this phenomenon will not be as effective as using the more prudent approach of establishing the CSME. Thus, now is the time to pull on the trunk of this elephant to show people that it does exist, and that it can be quite big and nasty. Aside from the fact that pulling on an elephant's trunk, in reality, would be a bad idea, in the context of the CCJ, it simply means using one's head to sustain one's heart.

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222. *See supra* n.1 and accompanying text.