

The Caribbean Court of Justice: A Horizontally and Vertically Comparative Study of the Caribbean's First Independent and Interdependent Court

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I. Background to the Caribbean and Introduction to the Caribbean Court of Justice

The islands of the Caribbean, and many nations surrounding them, were subject to a rich history of European colonization.¹ Spain led the colonization in 1493 and remained relatively unchallenged for over one hundred years.² However, in the 1600s, Britain began its colonization of the Caribbean in full force, starting in the 1620s with unclaimed islands, and then moving on to seize possession of claimed islands from Spain in 1655.³ Holland and France also played a role in Caribbean colonization, but their presence in the region paled in comparison to Britain's.⁴

Britain remains a key player in the region today: six "British Overseas Territories" still exist within the Caribbean.⁵ Many Overseas Territories have a domestic government, but that government is still accountable to the Queen.⁶ Other Caribbean islands still voluntarily retain strong links to the Crown by retaining membership in the Commonwealth.⁷ Perhaps the most visible of these links are the ties between Caribbean domestic judiciaries and the Judicial Committee of the Privy Council (Privy Council), the British court of highest instance.⁸ Both independent territories, such as Jamaica, and independent republics, such as Trinidad and Tobago, continue to allow the Privy Council to hear appeals from their domestic courts and render a final binding decision on criminal and civil issues.⁹ Currently, fourteen Caribbean territories cede full appellate jurisdiction to the Privy Council.¹⁰

1. See B.W. HANGMAN, *A CONCISE HISTORY OF THE CARIBBEAN* 54 (2011).

2. See FACTS ON FILE, INC., *ENCYCLOPEDIA OF WORLD GEOGRAPHY* 145 (Robert W. McColl ed., 1st ed. 2005).

3. See *Caribbean Timeline*, WORLD ATLAS, <http://www.worldatlas.com/webimage/countrys/america/caribb/caribtimeln.htm> (last visited May 7, 2014).

4. See *Reaching Out*, CARIBBEAN-GUIDE. INFO, <http://caribbean-guide.info/past.and.present/history/european.colonies/> (last visited May 7, 2014); JAMES FERGUSON, *A TRAVELER'S HISTORY OF THE CARIBBEAN* 72 (2d ed. 2008).

5. See *List of Commonwealth Countries, British Oversea Territories, British Crown Dependencies and EU Member States*, LEEDS. GOV. UK, <http://www.leeds.gov.uk/docs/List-of-eligible-countries.pdf> (last visited May 7, 2014) (current Caribbean territories are Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Montserrat and Turks and Caicos).

6. *Queen and Overseas Territories*, THE OFFICIAL WEBSITE OF THE BRITISH MONARCHY, <http://www.royal.gov.uk/MonarchAndCommonwealth/Queen%20and%20overseas%20territories/Queen%20and%20overseas%20territories.aspx> (last visited May 7, 2014).

7. See *Our History*, THE COMMONWEALTH, <http://thecommonwealth.org/our-history> (last visited May 7, 2014).

8. See *generally Role of the JCPC*, JUDICIAL COMM. OF THE PRIVY COUNCIL, <http://www.jcpc.uk/about/role-of-the-jcpc.html> (last visited May 7, 2014) (ten Caribbean nations are currently part of the Commonwealth).

9. *Id.* (the standard for a domestic court granting a petitioner leave for appeal for criminal matters is much higher than that for civil matters).

10. *Id.* (Antigua and Barbuda, Bahamas, Grenada, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, Dominica, Anguilla, British Virgin Islands, Turks and Caicos, Cayman Islands, and Montserrat are the fourteen Caribbean territories that currently have appellate access to the Privy Council).

Since the British legacy is strong in large parts of the Caribbean, many states began advocating for increased independence from their former colonizers and increased connection with their island neighbors.¹¹ This movement manifested itself in multiple ways, a major one being the formation of the Caribbean Community and Common Market (CARICOM).¹² In 1973, four major Caribbean countries signed the Treaty of Chaguaramas to create CARICOM, a regional organization with the goal of fostering a common market, increasing the economic independence of member states and strengthening trade between those states.¹³ CARICOM later revised its formative treaty to include the CARICOM Single Market and Economy goal, thereby shifting the organization away from a common market and towards a more cohesive single market.¹⁴

However, despite the broad goals of CARICOM, many states sought to take regional independence further and sever the last vestiges of colonialism from their local judiciaries; this desire was channeled into the Caribbean Court of Justice (CCJ).¹⁵ The CCJ officially came into being in 2001 as the product of consensus among twelve CARICOM member states that joined together to sign the Agreement Establishing the Caribbean Court of Justice.¹⁶ Under the agreement, jurisdiction would be available to any member of CARICOM as well as any other state that CARICOM should choose to invite.¹⁷

One of the most striking aspects of the CCJ is that it holds both appellate and original jurisdiction.¹⁸ Under its original jurisdiction, the court could hear matters regarding international law, most notably matters of

11. See *History of the Caribbean Community*, CARIBBEAN CMTY. SECRETARIAT, <http://www.caricom.org/jsp/community/history.jsp?menu=community> (last visited May 7, 2014).

12. See *id.* Oddly enough, the major impetus for forming CARICOM was the failure of the British West Indies Federation, Britain's attempt to bring Caribbean nations together under Crown supervision. See *A Brief History of the Caribbean Community*, CARIBBEAN CMTY. SECRETARIAT, http://www.caricom.org/jsp/community/caricom_history.jsp?menu=community (last visited May 7, 2014).

13. See Treaty Establishing the Caribbean Community, Chaguaramas art. 4, July 4, 1973, available at http://www.caricom.org/jsp/community/original_treaty-text.pdf [hereinafter Treaty of Chaguaramas].

14. See Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy, July 5, 2001, available at http://www.caricom.org/jsp/community/revised_treaty-text.pdf.

15. See generally Désirée P. Bernard, *The Caribbean Court of Justice: A New Judicial Experience*, 37 INT'L J. LEGAL INFO. 219, 220–21 (2009) (describing the Caribbean Court of Justice as a “culmination of aspirations” to create a court of last resort in the Caribbean and a replacement for the “legac[y] of British colonialism bequeathed to its former colonies”).

16. See *About the CCJ: FAQs*, THE CARIBBEAN COURT OF JUSTICE, <http://www.caribbeancourtofjustice.org/about-the-ccj/faqs> (last visited May 7, 2014). Although the court was technically established in 2001, it would not begin operating until April, 2005. *Id.*

17. Agreement Establishing the Caribbean Court of Justice art. II, Feb. 14, 2001, available at http://www.caricom.org/jsp/secretariat/legal_instruments/agreement_ccj.pdf.

18. See *id.* art. III.

regional law pertaining to the Revised Treaty of Chaguaramus.¹⁹ Here, unlike many general international tribunals, the jurisdiction of the court is compulsory— judgments rendered by the court are automatically binding and require no pre-existing agreement.²⁰ Under appellate jurisdiction of the CCJ, the court could operate as a traditional court of final instance, with appeal by right for certain limited issues and appeal by permission of the court for any criminal or civil matter.²¹ However, states must voluntarily sign on to the court for it to have appellate jurisdiction.²² Issues between member states, between CARICOM nationals, or between nationals and the state are all justiciable under the CCJ.²³

CARICOM had lofty ambitions for both original and appellate jurisdiction under the CCJ, but member states have been slow to enact domestic legislation that would give mandatory appellate jurisdiction to the court.²⁴ As of 2014, only Barbados, Guyana and Belize have enacted such legislation.²⁵ In fact, even Trinidad and Tobago, the nation that hosts the seat of the court,²⁶ has yet to allow the CCJ full appellate jurisdiction.²⁷ This hesitancy may be an inauspicious sign for growth of the CCJ. Member states may be delaying severing ties with the Privy Council for fear of scaring away foreign investors who may not yet have confidence in the legitimacy or power of the CCJ.²⁸ Despite these lingering dark clouds, many still have great hope for the CCJ.²⁹

19. See Sheldon A. McDonald, *The Caribbean Court of Justice: Enhancing the Law of International Organizations*, 27 *FORDHAM INT'L L.J.* 930, 931 (2004).

20. See Agreement Establishing the Caribbean Court of Justice, *supra* note 17, art. XVI.

21. See Agreement Establishing the Caribbean Court of Justice, *supra* note 17, art. XXV (appeals by right are for issues including, but not limited to, those relating to marriage, interpretation of domestic constitutions and any matter with a value of over \$25,000 Eastern Caribbean Currency).

22. See Agreement Establishing the Caribbean Court of Justice, *supra* note 17, art. XXV.

23. See Agreement Establishing the Caribbean Court of Justice, *supra* note 17, art. XII.

24. See Bernard, *supra* note 15, at 223.

25. *About the CCJ: FAQs*, *supra* note 16. However, both Barbados and Guyana have been using the court to its fullest. Bernard, *supra* note 15, at 223.

26. See Agreement Establishing the Seat of the Caribbean Court of Justice and the Offices of the Regional Judicial and Legal Services Commission between the Government of Trinidad and Tobago and the Caribbean Community preamble, Apr. 30, 1999, available at http://www.caricom.org/jsp/secretariat/legal_instruments/ccj_seat.jsp?menu=secretariat&prnf=1. Note, however, that the court is itinerant and may travel to any country that falls under its jurisdiction. See *About the CCJ: FAQs*, *supra* note 16.

27. See Sir Ronald Sanders, *Trinidad and the CCJ - Still Loitering*, CARIBBEAN 360.COM (Apr. 26, 2012), <http://www.caribbean360.com/index.php/opinion/573091.html#axzz28MbRtHsi>.

28. See *id.*

29. See, e.g., *All Eyes on CCJ, Says EU Trade Law Expert*, TRINIDAD GUARDIAN (Sept. 28, 2012), <http://www.guardian.co.tt/news/2012-09-27/all-eyes-ccj-says-eu-trade-law-expert> (“People around the world are looking at this court with great interest, mixed jurisdictions, trade, private law and appeal jurisdictions, plus some constitutional authority. It’s a remarkable creation coming out of Caricom. I think it has the potential for helping to assist Caricom states in further promoting . . . integration.”).

This Note will aim to analyze the efficacy of the CCJ from a comparative perspective. Part I of this Note will take a vertically comparative stance, comparing the CCJ as a court of appellate jurisdiction with the Privy Council to show that the new court can offer a superior judicial option. Part II will take a horizontally comparative stance, using a political lens to juxtapose the CCJ with the European Court of Justice (ECJ), as an example of a relatively successful regional court, and the South African Development Community Tribunal (SADCT), as an example of a relatively unsuccessful regional court. This Part posits that the efficacy of the CCJ currently lies at a midpoint on the spectrum set by these two regional courts, but that mechanisms exist that can allow the CCJ to grow towards the success of the ECJ. The analysis will focus on the CCJ, ECJ and SADCT as regional courts from the viewpoints of (1) political sustainability, (2) economic sustainability and (3) rate of growth and efficacy. Part III offers a conclusion.

II. The CCJ Measured Against the Privy Council

A. Structural Issues

Although CARICOM created the CCJ as a replacement for the Privy Council, it did not fully replicate the British system; instead it chose to copy certain practices while creating other divergent ones. As for the basic structure of the court, both the CCJ and the Privy Council mandate that there be a President of the court,³⁰ and both expect a smaller selection of judges to be called from a larger pool of eligible judges for any particular case³¹ (as opposed to “en banc” courts like the United States Supreme Court,³² where all nine judges ordinarily sit for every case³³). Five judges normally sit on the Privy Council for Commonwealth appeals,³⁴ while three to five usually sit on the CCJ for CARICOM appeals.³⁵

Even though the number of deciding judges on both courts may be similar, large differences exist between the pools of jurists from which the two courts may call judges. CARICOM established an initial limit to the number of judges that may be a part of the pool: no more than nine judges may serve at any time, not including the President.³⁶ In order to become a

30. See Agreement Establishing the Caribbean Court of Justice, *supra* note 17, art. IV; Judicial Committee Act, 1833, 3 & 4 Will. 4, c. 1 (Eng.).

31. See Agreement Establishing the Caribbean Court of Justice, *supra* note 17, art. XI; JUDICIAL COMM. OF THE PRIVY COUNCIL, PRACTICE DIRECTION 1, § 1 (2009), available at <http://www.jcpc.uk/docs/practice-direction-01.pdf>.

32. See Marcel Berlins, *The Number of Judges in the Privy Council*, THE GUARDIAN (Mar. 27, 2004, 9:27 PM), <http://www.guardian.co.uk/world/2004/mar/23/law.theguardian1>.

33. FED. LAW ENFORCEMENT TRAINING CTR., LEGAL DIVISION HANDBOOK 221 (2012).

34. JUDICIAL COMM. OF THE PRIVY COUNCIL PRACTICE DIRECTION 1, *supra* note 31, §1.

35. See *Appellate Jurisdiction Judgments*, THE CARIBBEAN COURT OF JUSTICE, <http://www.caribbeancourtofjustice.org/judgments-proceedings/appellate-jurisdiction-judgments> (last visited May 7, 2014).

36. See Agreement Establishing the Caribbean Court of Justice, *supra* note 17, art. IV. Currently, however, the president of the CCJ is only accompanied by 5 other justices.

part of the CCJ jurist pool, an individual must be appointed by a simple majority of the Regional Judicial and Legal Services Commission, an eleven member board made up of relatively independent individuals appointed by CARICOM states.³⁷

The Privy Council, on the other hand, employs a different system. The legislation that enabled the court imposes no explicit limit on the number of judges that may serve as part of the pool of eligible jurists.³⁸ The combination of the enabling legislation made under it means that not only are U.K. judges part of the pool, but, technically, the Chief Justice of the highest courts in certain Caribbean Commonwealth countries are as well.³⁹ In fact, determining the exact number of judges at any particular time can be difficult: one estimate in 2009 placed the number of Privy Council judges at ninety-five, three of whom were Caribbean judges.⁴⁰ Despite this, the major decision makers in the pool are the Privy Councilors who also serve as judges on the U.K. Supreme Court and, in fact, are the only ones listed on the Privy Council website.⁴¹

The Privy Council has attracted a lot of criticism for the fact that it encompasses such a large number of judges and only uses a fraction of them for any one appeal.⁴² Thus, the decision for any one case depends, to a large extent, on the judges called; the number of combinations of judges available means that different decisions could be rendered for very similar fact patterns.⁴³ This issue becomes especially relevant when an appeal comes from a Caribbean country. With only roughly three Caribbean Privy Councilors⁴⁴ and a panel of at least five judges sitting for appeals from the Caribbean,⁴⁵ simple math dictates that it is difficult for the Caribbean voice to gain a majority. This problem becomes compounded, and eventually insurmountable, when the panel calls for more than five judges,

See Judges of the Caribbean Court of Justice, THE CARIBBEAN COURT OF JUSTICE, <http://www.caribbeancourtofjustice.org/about-the-ccj/judges> (last visited May 7, 2014). The lack of a full court is not for lack of appointment: three judges voluntarily resigned, one being the first President of the court. *Id.*

37. *See Agreement Establishing the Caribbean Court of Justice*, *supra* note 17, art. IV. The makeup of the Commission is an interesting one: it includes permanent slots reserved for nominees from two Caribbean bar associations, jurists nominated by the deans of Caribbean law schools and “two persons from civil society.” *Id.* art. V.

38. *See Privy Council—The Pool of Judges*, UKSC BLOG (Oct. 11, 2009), <http://ukscblog.com/privy-council-the-pool-of-judges> (“Although . . . [the] website only covers 11 Supreme Court Justices, the available pool of judges is, in fact, much larger. The precise number is not listed and is not easy to determine.”).

39. *See id.* (explaining that the head judges of the superior courts in Trinidad and Tobago, Barbados, the Bahamas and Jamaica are part of the pool).

40. *See id.*

41. *See Biographies of the Justices*, JUDICIAL COMM. OF THE PRIVY COUNCIL, <http://www.jcpc.uk/about/biographies-of-the-justices.html> (last visited May 7, 2014).

42. *See, e.g., Berlins*, *supra* note 32.

43. *See id.* (“How many times have I heard, ‘If only Lord G had been there instead of Lord T, the result would have been the opposite?’”).

44. *See Privy Council—The Pool of Judges*, *supra* note 38.

45. *See JUDICIAL COMM. OF THE PRIVY COUNCIL PRACTICE DIRECTION 1*, *supra* note 31.

as it does in some cases.⁴⁶

The concern that the structure of the Privy Council stifles the voice of Caribbean interests has spurred severe criticism from Caribbean jurists.⁴⁷ Of course, because the CCJ chooses panels of three to five from a body now comprising six judges, the choice of judges, and the political and ideological standpoints they bring with them, will affect the holding of any case. However, with a limit of nine judges, this role is much less influential than in the Privy Council. Moreover, with CARICOM and its appointees selecting judges for the CCJ, Caribbean critics should have a lot less to say about their ultimate arbiters not reflecting the values of Caribbean society.

Although Caribbean ideals now had a voice, a major concern arose regarding the CCJ as a regional body: Caribbean judges would be more susceptible to corruption than the predominantly British judges in the Privy Council.⁴⁸ This concern was born from a view among Caribbean residents that their national judiciaries had failed as independent bodies and were subject to political influence.⁴⁹ CARICOM sought to combat this perception, and perhaps reality, by incorporating mechanisms into the CCJ to ensure the independence of its judges.⁵⁰

The first way CARICOM sought to isolate judges from political influence was by ensuring that their salaries, as well as funds required for maintenance of the court, do not flow directly from any one contracting state.⁵¹

46. See, e.g., *Pratt v. Att'y Gen. for Jam.*, [1993] 2 A.C. 1 (P.C.) (appeal taken from Jam.) (seven judges sat for this appeal).

47. See, e.g., Hugh M. Salmon, *The Caribbean Court of Justice: A March with Destiny*, 2 FLA. COASTAL L.J. 231, 235 (2000) (citing the following question that had been printed in a major Caribbean newspaper and answering it in favor of the CCJ: "Who, after all, is best suited to Judge us - the Privy Council judges, who are certainly remote from our experience and who, by definition, are not au courant either with our society or our social mores or local magistrates and judges who are steeped in the society's particular modes and expression and behavior?").

48. See, e.g., Sir Dennis Byron & Maria Dakolias, *The Regional Court Systems in the Organization of Eastern Caribbean States and the Caribbean*, in SMALL STATES, SMART SOLUTIONS: IMPROVING CONNECTIVITY AND INCREASING THE EFFECTIVENESS OF PUBLIC SERVICES 91, 114 (Edgardo M. Favaro, ed. 2008).

49. See U.N. DEV. PROGRAMME, *Caribbean Human Development Report 2012: UNDP Citizen Sec. Survey 2010: Summary of Findings*, 31 (2012), available at http://www.undp.org/content/dam/undp/library/corporate/HDR/Latin%20America%20and%20Caribbean%20HDR/C_bean_HDR_Jan25_2012_3MB.pdf [hereinafter *UNDP Report*] (stating that a staggering 52.5% of the Caribbean public, an average that includes 70.2% of the Trinidadian public, believe that "politically connected criminals go free," that 37.2% of the Caribbean public believe that their judges are corrupt and that 49.6% of the Caribbean public believe that their entire justice system is corrupt); see also Seanna Annisette, *CCJ President Stresses the Importance of a Quality Judiciary*, GRENADA BROADCAST (Aug. 22, 2012), <http://grenadabroadcast.com/news/all-news/14180-caribbean-court-of-justice>. The President of the CCJ has stated that, although the public perception may be "harsh and inaccurate," Caribbean judiciaries must respond to this perception by setting procedural safeguards to ensure judicial independence and by training judges to identify and overcome their unconscious biases. *Id.*

50. See, e.g., Agreement Establishing the Caribbean Court of Justice, *supra* note 17, art. XXVI, XXX (requiring member states to help enforce the court's judgments).

51. See Revised Agreement Establishing the Caribbean Court of Justice Trust Fund art. IV-V, Jan. 13-27, 2004 [hereinafter Agreement Establishing CCJ Trust Fund].

Instead, all contracting states were required to make an initial payment into a trust fund and commit to making subsequent payments into that fund,⁵² with an agreement establishing monetary penalty for non-payment.⁵³ Contracting states were required to submit payment without reservation to the way in which the money was spent.⁵⁴ Moreover, the fund could not solicit or accept any extra donations unless all contracting states agreed to do so.⁵⁵

The members of the board of trustees who were chosen to administer the fund were also chosen with the intent of dampening political influence.⁵⁶ Rather than appoint governmental representatives or private financial experts, CARICOM chose to staff the board with leaders of nine Caribbean institutions that represent both public and private interests;⁵⁷ for example, CARICOM's interest is represented by the Secretary General of the body, a scholarly interest is represented by the Vice Chancellor of the University of the West Indies, and a financial interest is represented by the President of the Association of Indigenous Banks of the Caribbean.⁵⁸ Any decision regarding the fund requires consensus or, if not, two-thirds majority.⁵⁹ The combination of the composition of the board and the procedures in place to limit its members' actions makes it difficult for any government to improperly affect CCJ decision making.⁶⁰

Overall, the structure of the CCJ seems to have adequately assessed and addressed the needs of the Caribbean region. It has created a model somewhat inspired by, but altogether different from, its colonial predecessor.

B. Practical Issues: Individual and State Costs

Sitting as courts of appellate jurisdiction, the CCJ and the Privy Council have similar procedure, but key differences exist that could affect a litigant's choice of forum and a country's choice in deciding whether or not to cede jurisdiction away from the Privy Council and to the CCJ. A large part of these differences manifest themselves in money and time related costs.

For the individual litigant, a switch to the CCJ means, almost always, a reduction in the fixed costs associated with court filing expenses and variable costs associated with legal fees. As a starting point for fixed costs, the cost of filing an appeal with the Privy Council is more than five times

52. See *id.* Annex.

53. *The Caribbean Court of Justice Background Paper*, CARICOM SECRETARIAT (Oct.20, 2000), http://www.caricom.org/jsp/community_organ/caribbean_court.jsp?menu=cob [hereinafter *CCJ Background Paper*].

54. Agreement Establishing CCJ Trust Fund, *supra* note 51, art. IV, § 8.

55. *Id.* art. IV, § 2.

56. See *id.* art.VI.

57. See *id.*

58. *Id.* (the list also includes a legal interest represented by the President of the Organization of Commonwealth Caribbean Bar Associations, and a labor interest represented by the President of the Caribbean Congress of Labor).

59. *Id.* art. VIII, §§5-6.

60. See McDonald, *supra* note 19, at 1010.

greater than filing an appeal with the CCJ.⁶¹ A comparison of other associated filing costs for both courts reveals a similar ratio; however, the CCJ does list multiple marginal fees for smaller court transactions whereas the Privy Council lists no such fees at all.⁶² But, the biggest advantage of the CCJ is that the court has been willing to grant appeals in forma pauperism, waiving all filing costs when it deems them too burdensome on an individual litigant.⁶³ Though the Privy Council does allow appeals in forma pauperism, it does so on a more limited basis.⁶⁴

The real expense for the litigant, however, comes with the practical effect of having to litigate a case in the U.K.⁶⁵ Litigants must either buy plane tickets for themselves or find and hire an English licensed barrister; in some cases they must do both.⁶⁶ Additionally, litigants must pay a travel visa application fee to the U.K. embassy, and must also pay for accommodations in the U.K. that last for the duration of the litigation.⁶⁷ All of this produces a very expensive appeals process: one estimate places the average total cost at around \$65,000 USD.⁶⁸ This cost becomes even more prohibitive when one considers the relative weakness of Caribbean currencies in comparison to the British Pound.⁶⁹ This means that the

61. *Compare The Judicial Committee (Appellate Jurisdiction) Rules Order 2009*, 16 (Feb. 11, 2009), available at http://www.legislation.gov.uk/ukxi/2009/224/pdfs/ukxi_20090224_en.pdf (stating a cost of £220, or roughly \$350 USD in 2013, for filing an application for permission to appeal along with the actual notice of appeal), with *The Caribbean Court of Justice (Appellate Jurisdiction) Rules*, 58 (June 24, 2005), available at <http://www.caribbeancourtofjustice.org/wp-content/uploads/2011/06/ccjapprules.pdf> (requiring no fee for filing an application for permission to appeal and stating a cost of \$60 USD for filing a notice of appeal).

62. *Compare The Judicial Committee (Appellate Jurisdiction) Rules Order 2009*, *supra* note 61, at 16 (listing only basic costs associated with initial filing), with *The Caribbean Court of Justice (Appellate Jurisdiction) Rules*, 2005, *supra* note 61, at 58 (requiring payment to the court for transactions such as “notice of appointment of attorney-at-law” and “acknowledgement of service [for each respondent]”).

63. Duke E.E. Pollard, *The Caribbean Court of Justice (“the CCJ”): Who Stands to Gain*, Presented at the Fifteenth Public Lecture of Management Institute for National Development (MIND), 21(Mar. 13, 2008), available at http://chooseavirb.com/ccj/wp-content/uploads/2011/papers_addresses/The%20CCJ%20-%20Who%20Stands%20to%20Gain.pdf (the author of this paper was a Justice of the CCJ at the time it was written).

64. *Id.*

65. *See The Privy Council vs. The Privileges of the CCJ*, 7 NEWSBELIZE.COM (May 13, 2010), <http://www.7newsbelize.com/sstory.php?nid=16886>.

66. *See id.* One Jamaican appellant reported paying roughly \$270,000 USD in legal fees to a British law firm. Daraine Luton, *Closer to Quitting the Queen*, THE JAMAICA GLEANER (July 27, 2012), <http://jamaica-gleaner.com/gleaner/20120727/lead/lead6.html>.

67. *See Luton, supra* note 66.

68. *See Court of Appeal*, LEXPRESS.MU (Sept. 13, 2007), <http://www.lexpress.mu/services/archive-93766-the-privy-council-should-hold-sittings-in-mauritius-as-from-next-september.html>; *see also We Cannot Wait Until Everything is State of the Art*, JAMAICA GLEANER (Dec. 14, 1999), <http://jamaica-gleaner.com/gleaner/19991214/f4.html> (citing statement made by Attorney General of Jamaica that an appeal to the Privy Council from Jamaica would cost at least \$87,500 USD).

69. *See, e.g., British Pound Exchange Rate*, EXCHANGERATES.ORG.UK, <http://www.exchangerates.org.uk/British-Pound-GBP-currency-table.html> (last visited May 7, 2014)

Privy Council is accessible only to two major groups: the very wealthy and certain inmates on death row who are able to secure pro bono legal service from British lawyers.⁷⁰

The CCJ, in most cases, offers a much less expensive option to litigants.⁷¹ First, the very motivation behind the formation of CARICOM means that litigants will not have to exhaust resources pursuing a visa to travel to any CARICOM state where the CCJ sits.⁷² Second, by reason of sheer distance, travel to Trinidad, the current seat of the CCJ, is much cheaper than travel to the U.K.⁷³ Moreover, since the court is itinerant, it can travel to signatory states to hear cases, lessening the need for litigants to travel at all.⁷⁴ In fact, physical travel itself may become obsolete because of the court's e-filing system that has been hailed as "impressive."⁷⁵ The seat of the court has already begun utilizing the system to conduct hearings electronically.⁷⁶ Other CARICOM signatories have installed teleconferencing equipment similar to that of the seat of the court; this lessens the need for travel for procedures like depositions and testimony.⁷⁷ Finally, because of the relatively small difference between exchange rates in the Caribbean,⁷⁸ the average cost of Caribbean legal counsel proves cheaper than British counsel.⁷⁹

Although a switch from the Privy Council to the CCJ would likely mean reduced costs to an individual litigant, it also means increased costs

(stating exchange rates of 3:1 for the Barbadian dollar; 10:1 for the Trinidad Tobago dollar; and 186:1 for the Jamaican dollar).

70. See Anthony Gifford, *The Death Penalty: Developments in Caribbean Jurisprudence*, 37 INT'L J. OF LEGAL INFO., 195, 202 (2009).

71. See *Vasciannie Says No to Jamaican Final Court, Backs CCJ*, JAMAICA OBSERVER (June 18, 2012), http://www.jamaicaobserver.com/news/Vasciannie-says-no-to-Jamaican-final-court-backs-CCJ_11717888 [hereinafter *Vasciannie Backs CCJ*].

72. See *Free Movement in the CARICOM Single Market and Economy (CSME)*, CARICOM SECRETARIAT, http://www.caricom.org/jsp/single_market/skill.jsp?menu=csme (last visited May 7, 2014).

73. See *Vasciannie Backs CCJ*, *supra* note 71.

74. See *Agreement Establishing the Caribbean Court of Justice*, *supra* note 17, art. III; see also *About the CCJ: FAQs*, *supra* note 16 (more explicitly stating that the court could travel to any contracting state).

75. See Maya Wolfe-Robinson & Owen Bowcott, *The Global Fight to End Capital Punishment*, THE GUARDIAN (May 6, 2012), <http://www.guardian.co.uk/world/2012/may/06/global-fight-end-capital-punishment>.

76. See, e.g., *Caribbean Court of Justice Stops Government from Selling B.T.L. Shares*, NEWS 5 (Aug. 16, 2011), <http://edition.channel5belize.com/archives/59636>; *CCJ Teleconference Sitting*, CARIBBEAN COURT OF JUSTICE BLOG (Jan. 21, 2008), http://caribbeancourtofjustice.blogspot.com/2008_01_01_archive.html.

77. See *Privy Council Does Cost Something*, CARIBBEAN COURT OF JUSTICE BLOG (Jan. 9, 2012), <http://caribbeancourtofjustice.blogspot.com/2012/01/privy-council-does-cost-something.html>.

78. See, e.g., *Trinidad Tobago Dollar Exchange Rate Table*, EXCHANGERATES.ORG.UK, <http://www.exchangerates.org.uk/Trinidad-Tobago-Dollar-TTD-currency-table.html> (last visited May 7, 2014) (stating exchange rates of Trinidad Tobago Dollars, including 3:1 for Barbadian Dollars, 3:1 for Belize Dollars, and 1:17 for Jamaican Dollars).

79. See IMMIGRATION AND NATIONALITY DIRECTORATE HOME OFFICE, U.K., *Jamaica Country Report*, 5.43 (Apr., 2005) (reporting a statement printed in a Trinidadian newspaper).

to a contracting state. One of the major benefits of the Privy Council was that it did not require Caribbean states to pay to maintain the court even though they could access it;⁸⁰ instead, the Privy Council acted as a form of “pro bono service.”⁸¹ The CCJ on the other hand, requires contracting states to collectively pay to fully finance the court, including employees’ salaries and maintenance of the seat of the court.⁸² Contracting states do not pay equal shares, but instead contribute based on the “public revenues” of the state.⁸³ Jamaica and Trinidad and Tobago are the highest contributors,⁸⁴ committing roughly \$3,000,000 USD to the court each year.⁸⁵ Other countries, including Dominica, Grenada and St. Lucia, only commit about \$220,000 USD per year.⁸⁶

As discussed earlier, a state’s contributions to the CCJ do not flow directly from the state’s budget to the court; instead states pay into a trust fund administered by a board of trustees.⁸⁷ The court is then funded by the money contributed to the trust as well as any profits the trust produces through financial investments conducted by the board.⁸⁸ CARICOM’s hope was that the expenses of the CCJ would be entirely offset by income generated from the fund.⁸⁹ Thus, contracting states must still pay their annual dues even if the trust fund generates profits. In fact, each contracting state, on signing the Revised Treaty, was mandated to make provisions in its national budget for payment for the first five years of the plan.⁹⁰ To reinforce this provision, each state was also required to individually post a bond worth five times the value of its annual payment.⁹¹ Failure of a state to meet future payments would result in incomplete forfeiture of the bond.⁹²

The trust fund system makes for an expensive burden on a contracting state. States are bound to their initial agreements and face forfeiture of a large sum of money should they become unwilling or unable to finance the CCJ. Also, because CARICOM set the value of the trust fund at

80. See Robert Collie, *Use CCJ Funding to Improve Our Own Courts*, JAMAICA GLEANER (Jan. 5, 2012), <http://jamaica-gleaner.com/gleaner/20120105/cleisure/cleisure4.html>.

81. See *Privy Council’s Complaint*, BBC CARIBBEAN.COM, http://www.bbc.co.uk/caribbean/news/story/2009/09/090922_privyccjphillips.shtml (last updated Sept. 24, 2009).

82. Agreement Establishing the Caribbean Court of Justice, *supra* note 17, art. XXVIII.

83. *Id.*

84. See Agreement Establishing CCJ Trust Fund, *supra* note 51, Annex.

85. See Rickey Singh, *The ‘Catastrophe’ Warning on CCJ*, JAMAICA OBSERVER (Mar. 27, 2011), http://www.jamaicaobserver.com/columns/The-catastrophe-warning-on-CCJ_8576237.

86. See Agreement Establishing CCJ Trust Fund, *supra* note 51, Annex.

87. *Id.* art. IV-V.

88. *Id.* art. IV.

89. See *CCJ Trust Fund*, THE CARIBBEAN COURT OF JUSTICE, <http://www.caribbeancourtofjustice.org/about-the-ccj/ccj-trust-fund> (last visited May 7, 2014).

90. See *CCJ Background Paper*, *supra* note 53.

91. See *id.*

92. See *id.*

\$100,000,000 USD,⁹³ states must contribute their share for at least nine years to meet the Board's target. Moreover, if investments under the trust fund generate losses instead of profits, as they did in 2009, the nature of contracting states' obligations becomes unclear.⁹⁴

Fundamentally, the CCJ trust scheme means that the bill previously footed by the Privy Council shifts directly to the governments of contracting Caribbean states and consequently burdens those states. Litigants, on the other hand, benefit from the switch, as they gain a more physically and financially accessible court. And, in fact, contracting governments may save resources when they act as parties to litigation,⁹⁵ and can offset costs by utilizing the CCJ in place of the Privy Council. Also, though the trust fund, like any investment, may pose risk to the initial contributions of contracting states, it can prove to be fruitful. In 2006 and 2007, before the global financial crisis, investments from the fund were able to generate profits of about \$5,000,000 USD each year.⁹⁶

Accordingly, a switch from the Privy Council to the CCJ yields three overall effects regarding money and time related resources: (1) a net benefit to litigants, (2) a net loss to Caribbean governments, albeit a loss that is capable of being offset, and (3) a large net benefit to the Privy Council itself.⁹⁷

C. Jurisprudential Issues

This Note, having dealt with base concerns regarding the general structure of the CCJ and its physical cost, will now move on to a more intangible issue: the extent to which the CCJ has been able to replicate the judicial efficacy of the Privy Council. The following analysis proceeds by inspecting (1) the effect of the court on the development of the Caribbean legal community, and (2) the extent to which the court is actually being utilized.

Regarding the court's impact on the Caribbean legal community, the CCJ has enabled the legal community to grow in ways unprecedented for

93. See *CCJ Trust Fund*, *supra* note 89.

94. See *Global Crisis Hits CCJ Trust Fund*, CARIBBEAN 360 (July 6, 2009), <http://www.caribbean360.com/news/global-crisis-hits-ccj-trust-fund> (noting that the Jamaican prime minister's ambiguous statement that CARICOM member states were now on notice to "review the state of the fund").

95. See, e.g., *Pratt v. Att'y Gen. for Jam.*, [1993] 2 A.C. 1 (P.C.) (appeal taken from Jam.).

96. CARIBBEAN COURT OF JUSTICE TRUST FUND, *Report of the Board of Trustees*, 5(2006), available at http://www.caribbeancourtofjustice.org/trustees/annual_report06/page_2-5.pdf; CARIBBEAN COURT OF JUSTICE TRUST FUND, *Report of the Board of Trustees*, 5(2007), available at http://chooseavirb.com/ccj/wp-content/uploads/2011/06/CCJTf_Annual_Report_2007.pdf. But see CARIBBEAN COURT OF JUSTICE TRUST FUND, *Report of the Board of Trustees*, 8(2008), available at <http://chooseavirb.com/ccj/wp-content/uploads/2011/06/CCJTf-Annual-Report-2008.pdf> (declaring a loss of almost \$25,000,000 USD).

97. See *Privy Council's Complaint*, *supra* note 81. The U.K. Chief Justice, himself a Privy Councilor, expressed a desire for Caribbean territories to wean themselves off of the Privy Council, since cases originating from the Caribbean were consuming a disproportionate amount of court time and resources. *Id.*

the region. As stated in the prior subsection, Caribbean appellants to the Privy Council were usually either the very rich or those sentenced to death.⁹⁸ While this posed an accessibility problem, it also posed a jurisprudential one as well: the range of precedent generated by the highest court for the Caribbean was restricted to narrow categories.⁹⁹ The area of law encompassed by the wide gap between capital punishment and high finance was left primarily to small domestic courts of individual Caribbean nations. As a result, different decisions were more likely to be rendered for similar fact patterns, creating an inconsistency that becomes especially troublesome when Caribbean-wide CARICOM laws are at issue.¹⁰⁰ The CCJ has addressed this problem by providing a forum to create jurisprudence in the midground of Caribbean law where the Privy Council was previously unable to tread. In the three years following the CCJ's inception, civil appeals petitioned to the court outnumbered criminal appeals petitioned by almost seven to one, whereas, under the Privy Council, civil appeals had never outnumbered criminal appeals.¹⁰¹ Half of the civil petitions filed in the CCJ were from appellants the CCJ deemed too poor to pay filing costs and roughly one third of these petitions were granted.¹⁰²

The combination of the CCJ's lower cost and the court's willingness to grant *forma pauperis* has allowed the court to hear the types of Caribbean cases that the Privy Council had never known. The issues in these cases have included a property dispute between two indigent tenants,¹⁰³ a public housing agency's contractual obligation to a signatory's next of kin,¹⁰⁴ the admissibility of a police officer's testimony in a case of child molestation,¹⁰⁵ a governmental taking,¹⁰⁶ and a civil servant employee's dismissal through the statutory abolishment of his position.¹⁰⁷ The CCJ also continues to hear the former Privy Council appeal specialties—capital punishment¹⁰⁸ and high finance¹⁰⁹—as well.

98. See Gifford, *supra* note 70, at 202.

99. See *Privy Council Does Cost Something*, *supra* note 77 (stating that the cost of appeals to the Privy Council limits the number of people who can appeal, leaving the appeals process to wealthy individuals and big businesses).

100. See Karen E. Bravo, *CARICOM, the Myth of Sovereignty, and Aspirational Economic Integration*, 31 N.C. J. INT'L L. & COM. REG. 145, 196-97 (2005).

101. See POLLARD, *supra* note 63, ¶ 3.2, at 21.

102. See *id.*

103. *Ross v. Sinclair*, CCJ Appeal No. CV 13 of 2007, ¶ 1-6 (Caribbean Ct. Just. 2008) (describing appellant as "blind and virtually penniless" before approving *forma pauperis*).

104. See *id.* ¶ 6-7.

105. *Thomas v. State*, CCJ Appeal No CR 3 of 2006, ¶ 14 (Caribbean Ct. Just. 2008) (addressing an appellant who faced a ten-year prison sentence).

106. *Toolsie Persaud Ltd. v. Andrew James Investments Ltd.*, CCJ Appeal No CV 1 of 2007, ¶ 1-3 (Caribbean Ct. Just. 2008).

107. *Campbell v. Att'y Gen. for Barb.*, CCJ Appeal No CV 2 of 2008, ¶ 2-4 (Caribbean Ct. Just. 2009).

108. *Grazette v. The Queen*, CCJ Appeal No. CR1 of 2009, ¶ 1 (Caribbean Ct. Just. 2009).

109. *L.O.P. Inv. Ltd. v. Demerara Bank Ltd.*, CCJ Appeal No CV 4 of 2008, ¶ 6-9, 11 (Caribbean Ct. Just 2009) (involving a claim made by an investment company against a bank for roughly \$490,000 USD).

The diversity of cases being handled by the CCJ has started to address the perceived need, among Caribbean citizens, for a body of jurisprudence tailored to the nuances of Caribbean society.¹¹⁰ This development of law is not only beneficial to the legal community in the abstract sense of refining Caribbean law, but also in the sense that it has given Caribbean legal professionals an opportunity to hone their skills outside of the limited,¹¹¹ domestic context.¹¹² Nearly all the lawyers arguing cases in front of the CCJ have been Caribbean citizens.¹¹³

Even given all the benefits afforded by the CCJ, the court is only truly beneficial if litigants actually use it. An initial glance at the CCJ's judicial history appears to illustrate this point. In the first seven years during which the court operated, it only pronounced a total of seventy-three judgments: sixty of them under appellate jurisdiction¹¹⁴ and thirteen under original jurisdiction.¹¹⁵ For appellate cases, this seeming disuse has not been a product of litigants failing to use the court, but rather of states failing to enact domestic legislation that would allow its citizens to appeal to the CCJ instead of the Privy Council.¹¹⁶ Only Barbados, Guyana and Belize have enacted such enabling legislation.¹¹⁷ If the analysis ended here, it would seem to suggest that, practically, the CCJ has failed as a replacement for the Privy Council; however, a deeper analysis reveals that this is not as damning a fact as it seems.

First of all, citizens within the three states that have ceded appellate jurisdiction to the CCJ are appealing to the court more than they did to the Privy Council.¹¹⁸ For example, the Privy Council heard eight appeals

110. See, e.g., Michael Anthony Lilla, *Promoting the Caribbean Court of Justice as the Final Court of Appeal for States of the Caribbean Community*, 66 (2008), available at http://www.ncsc.org/-/media/Files/PDF/Education%20and%20Careers/CEDP%20Papers/2008/Lilla_CaribJustAsFinalCtAppeal.ashx (quoting a Caribbean lawyer lobbyist: "What is the 'reasonable man' test in the Caribbean? Acts of provocation in England and the Caribbean may not be the same. . . .In the Caribbean, even express words may have different connotations.").

111. See, e.g., *The World Factbook*, CIA.GOV, <https://www.cia.gov/library/publications/the-world-factbook/fields/2119.html> (last visited May 7, 2014) (stating that Montserrat has a population of roughly 5,000 people).

112. See Byron Buckley, *Jamaica Must Get on Board CCJ*, JAMAICA GLEANER (July 1, 2012), http://jamaica-gleaner.com/gleaner/20120701/focus/focus2.html#.T_MhtMU7Jzc.blogger (stating that Jamaican lawyers have been practicing before the CCJ even though Jamaica has yet to enact CCJ enabling legislation with respect to appellate jurisdiction).

113. See generally *Appellate Jurisdiction Judgments*, *supra* note 35 (listing each appellate judgment of the CCJ separately; an internet search of the lawyers listed within the judgments reveals Caribbean based lawyers and law firms).

114. *Id.*

115. *Original Jurisdiction Judgments*, THE CARIBBEAN COURT OF JUSTICE, <http://www.caribbeancourtofjustice.org/judgments-proceedings/original-jurisdiction-judgments> (last visited May 7, 2014).

116. See *About the CCJ: FAQs*, *supra* note 16.

117. *Id.*

118. *Compare Appellate Jurisdiction Judgments*, *supra* note 35, with *Privy Council Appeal Statistics*, THE NATIONAL ARCHIVES, <http://webarchive.nationalarchives.gov.uk/20101103140224/http://www.privycouncil.org.uk/output/Page34.asp> (last visited May 7, 2014).

from Barbados during the five years immediately before the state ceded jurisdiction to the CCJ;¹¹⁹ in the five years immediately after, the CCJ has heard twelve appeals from Barbados.¹²⁰ Guyana proves to be a more difficult comparison, since it had abolished appeals to the Privy Council in 1970,¹²¹ but it has been appealing to the CCJ at an exponentially increasing rate since it enacted domestic enabling legislation.¹²² Finally, Belize, which ceded appellate jurisdiction to the CCJ in 2010,¹²³ has appealed to the court four times in 2012, twice in 2013, and already three times in the first five months of 2014,¹²⁴ whereas it appealed to the Privy Council roughly twice year before that.¹²⁵

Thus, although the CCJ has not been able to instantly gain jurisdiction over all the islands of the Caribbean, it has begun the process and its numbers have been growing, both in terms of an increasing number of appeals and an increasing number of states that have ceded jurisdiction to the court.

D. Summary

The Privy Council served as a viable and useful mechanism during the Caribbean's colonial phase, and even during the infancy of its independent phase. Now, however, CARICOM has provided a more suitable option in the form of the CCJ. Although, the court requires Caribbean states to fund and manage their own avenue for appeals, each state gains much from their investment: a regional court with careful checks and balances on its neutrality, a modern and efficient process, reduced costs to litigants, and the creation of a body of Caribbean jurisprudence.

III. The CCJ Measured against the ECJ and the SADCT

A. Introduction to Sustainability and Efficacy

This Note will attempt to evaluate the success of a regional court based on three factors: (1) political sustainability, (2) economic sustainability, and (3) rate of growth and efficacy. Political sustainability will be used to describe the extent to which the governments and citizens of member states are satisfied by the performance of a regional court. Since regional entities require the accession and support of member states, no regional

119. See *Privy Council Appeal Statistics*, *supra* note 118.

120. *Appellate Jurisdiction Judgments*, *supra* note 35.

121. See Byron & Dakalias, *supra* note 48, at 123 n.18 (the domestic court of appeals in Guyana became the country's highest court).

122. *Appellate Jurisdiction Judgments*, *supra* note 35 (with one, then three, then twelve appeals in each of the three years immediately following Guyana's enabling legislation).

123. See *Good Bye: Belize Abolishes All Appeals to Privy Council*, DOMINICA NEWS ONLINE (May 13, 2010), <http://dominicanewsonline.com/news/homepage/news/crime-court-law/good-bye-belize-abolishes-all-appeals-to-privy-council/>.

124. *Appellate Jurisdiction Judgments*, *supra* note 35.

125. See *Privy Council Appeal Statistics*, *supra* note 118; MINISTRY OF JUSTICE, *Judicial and Court Statistics 2009*, 160 (2010), available at <http://www.justice.gov.uk/downloads/statistics/mojstats/jcs-stats-2009-211010.pdf>.

court can be successful unless it sufficiently pleases its constituents. Economic sustainability will be used to describe the way a regional court generates income to fund its processes. Lastly, though a regional court's sustainability and continued existence is important, it must exist in a meaningful way. The last factor will thus give credit to the reach and effect of a regional court's jurisdiction to determine its efficacy in creating a binding standard of law among member states.

B. The ECJ

1. Introduction

This section will neither attempt to fully analyze the ECJ's history and relationship with the European Union (EU) nor examine the various branches of the court; rather, this section will highlight certain aspects of the ECJ's general sustainability to create a benchmark from which to analyze the relative sustainability of the CCJ. As will be explained, the ECJ carries with it high political and economic sustainability, yet it does not sacrifice efficacy as a regional court. As a result, it will be used to set a high bar for regional courts.

2. Political Sustainability

The political sustainability of a regional court depends on the sense of legitimacy and authority it can cultivate among the individuals within its jurisdiction and, more importantly, the extent to which its performance satisfies the governments of its constituent states. This Note will attempt to understand these abstract concepts by examining three factors: (1) the court's system for appointing and removing judges, (2) the court's system for rendering judicial decisions, and (3) the nature of the judicial decisions ultimately rendered.

Regarding the first factor, the ECJ's enabling treaties offer only a bare outline for judicial appointments.¹²⁶ This outline requires only that there be a lack of overlap between judicial and political or administrative office,¹²⁷ as well as a mandate for judges who "possess the qualifications required for appointment to the highest judicial offices in their respective countries," and those whose "independence is beyond doubt."¹²⁸ In fact, until the Treaty of Lisbon was signed in 2007,¹²⁹ the requirement of at least one judge per member state was not listed in any treaty at all.¹³⁰ Thus, the selection process is very open to the discretion of the EU states

126. See Consolidated Version of The Treaty on the Functioning of the European Union art. 253-55, Mar. 30, 2010, 2010 O.J. (C 83) 47 [hereinafter *Consolidated Treaty of the EU*]; Protocol on the Statute of the Court of Justice of the European Union art. 4, Dec. 16, 2004, 2004 O.J. (C 310) 210 [hereinafter *Protocol Statute of ECJ*].

127. *Protocol Statute of the ECJ*, *supra* note 126, art. 4.

128. *Consolidated Treaty of the EU*, *supra* note 126, art. 253.

129. Treaty of Lisbon amending the treaty on European Union and the Treaty establishing the European Community art. 9F, Dec. 17, 2007, 2007 O.J. (C 306) 22.

130. See Paul Craig, *The Jurisdiction of the Community Courts Reconsidered*, 36 TEX. INT'L L. J. 555, 568 (2001) (noting, however, that the requirement of at least one judge per state was followed through long-standing practice).

and can be partially masked behind a veil of secrecy.¹³¹ Moreover, although ultimate appointment is subject to “common accord” of all the member states,¹³² each individual state usually nominates its own representative through internal processes,¹³³ further subtracting from overall transparency.

The ECJ’s structure, though, does supply a check on judicial appointment by creating an advisory panel whose job is to render opinions on the suitability of jurists being considered for admission to the court.¹³⁴ This panel is made up of seven members; eligibility is open to former members of the ECJ, members of national supreme courts, and “lawyers of recognized competence.”¹³⁵ However, this check appears to be structurally weak, employing loose guidelines.¹³⁶ Thus, in the ECJ, it appears that legitimacy of judicial appointments depends not on explicit law, but rather on more intangible enforcement mechanisms.

As for removal of judges, the ECJ employs better-defined mechanisms. Here, judges do not hold life tenure as U.S. federal judges do;¹³⁷ instead, appointment is for a renewable term of six years.¹³⁸ Besides expiration of term, a judge may exit the courting one of only three ways: (1) death, (2) voluntary resignation, or (3) removal by unanimous agreement of the court.¹³⁹

The interplay between the conditions for judicial appointment and the conditions for renewal create an interesting phenomenon. Judges are expected to be non-partisan and without bias towards their home countries, but are appointed through an opaque process that allows member states to exert political pressure upon their representatives both at appointment and renewal.¹⁴⁰ Although these circumstances do not seem to foster political sustainability, two complementary underlying processes do. First, the loosely codified formal requirements placate states in their fear of

131. See Ana Martins, *Size and Composition of Highest Courts - Selection of Judges*, in *THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPEKTIVE* 203, 209 (Ingof Pernice et al. eds., 2005).

132. *Consolidated Treaty of the EU*, *supra* note 126, art. 253.

133. See Martins, *supra* note 131, at 209. A state’s nominations are rarely ever challenged by the EU as a body, and so, one could argue that the decision primarily takes place at a national level. See Erik Voeten, *The Politics of International Judicial Appointments*, 9 *CHI. J. INT’L L.* 387, 401 (2008); but see *Judicial Reach: The Ever-Expanding European Court of Justice*, *WORLD AFFAIRS*, <http://www.worldaffairsjournal.org/article/judicial-reach-ever-expanding-european-court-justice> (last visited May 7, 2014) (stating that, in recent years, six candidates are publicly known to have been denied admission to the court).

134. *Consolidated Treaty of the EU*, *supra* note 126, art. 255.

135. *Consolidated Treaty of the EU*, *supra* note 126, art. 255.

136. See Martins, *supra* note 131, at 209.

137. U.S. CONST. art. III, § 1.

138. *Consolidated Treaty of the EU*, *supra* note 126, art. 253.

139. *Protocol Statute of the ECJ*, *supra* note 126, art. 5–6 (removal here is appropriate when the judge has been found to no longer “fulfill the requisite conditions” or “meets the obligations arising from his office”).

140. Kevin Andrew Swartz, *Powerful, Unique and Anonymous: The European Court of Justice and its Continuing Impact on the Formation of the European Community*, 3 *S. CAL. INTERDISC. L.J.* 687, 692 (1993).

losing sovereignty to a regional court.¹⁴¹ This, in turn, encourages more states to sign the treaty and place themselves within reach of the court, bolstering the court's perceived legitimacy in the eyes of individuals and states alike.¹⁴²

The second part of the answer to the legitimacy question lies in the way that judicial decisions are rendered. While member states are satisfied by having reasonable control over their representative judges, the judges themselves are insulated from excessive political pressure by having their individual decisions remain unknown.¹⁴³ Judicial decisions are written as though the court is speaking with one voice: opinions are released unsigned, without minority opinions, and without record of the number of judges that voted for the ruling and the number that voted against it.¹⁴⁴ In fact, the opinion itself is brief and written in a straightforward, syllogistic manner rather than a conversational one, negating any chance of deducing the writer from her style.¹⁴⁵ Thus, a state using political pressure to force a judge to rule a certain way would have minimal effect, since it would be difficult to determine whether or not the judge complied.

The last concern surrounding the political sustainability of the ECJ deals with the substantive nature of the decisions rendered by the court. In this regard, the ECJ has been able to appease member states. But, rather than striking a permanent balance between member state sovereignty and EU interests, the court has slowly and carefully advanced the primacy of EU law over a span of multiple decades.¹⁴⁶ When the ECJ was initially formed in 1952, its powers of original jurisdiction did not reach individual citizens, meaning it could only enforce EU law on member states themselves.¹⁴⁷ Eleven years later, the court determined that EU law protected citizens of member states as well.¹⁴⁸ Just one year after that, the court established the concept of supremacy, stating that EU law contravened the national law of any contrary member state.¹⁴⁹ Then, twenty-six years later, the court granted this supremacy power to member state national courts, allowing them to overrule national laws that violated EU laws.¹⁵⁰ Even

141. See WILLIAM R. SLOMANSON, *FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW* 437 (6th ed. 2011).

142. See, e.g., John Hart & Shannon Kile, *Preventing Mass-Destruction Terrorism and Weapons Proliferation*, 6 (2002), available at <http://cns.miis.edu/mnsg/pdfs/discuss.pdf> (suggesting movement toward fulfilling the goals of a treaty as more states sign on to it).

143. See Michael Rosenfeld, *Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court*, 4 *INT'L J. CONST. L.* 618, 635 (2006).

144. *Id.*

145. *Id.* at 634-35.

146. See, e.g., *Court of Justice of the European Union*, CIVITAS, <http://www.civitas.org.uk/eufacts/download/IN.5.ECJ.pdf> (last updated July 27, 2011) (discussing the landmark cases that led up to EU law primacy).

147. Treaty Establishing the European Coal and Steel Community art. 33, Apr. 18, 1951, 261 U.N.T.S. 140.

148. Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. I. 40.

149. Case C-6/64, *Costa v. ENEL*, 1964 E.C.R. 585.

150. Case C-213/89, *The Queen v. Sec'y of State for Transp. ex parte Factortame Ltd.*, 1990 E.C.R. I-2433.

now, the ECJ continues to strengthen the EU community by strengthening the law that binds member states to one another.¹⁵¹

Thus, for the ECJ, political sustainability does not lie in enforcing rigid rules and demanding transparency; it lies instead in the subtlety of giving each member state a means of protecting her own interests while still slowly advancing the interests of the group.

3. *Economic Sustainability*

The ECJ receives most of its funding directly from its parent entity, the EU,¹⁵² though it does generate some income from internal processes.¹⁵³ The EU itself derives funds from three main sources: (1) customs duties imposed on non-EU imports, (2) a partial levy on the Value Added Tax (VAT) received by each member state, and (3) a payment from each member state based proportionately on its Gross National Income (GNI) relative to other member states.¹⁵⁴ The last two sources, which come directly from member states, account for about 87% of the revenue.¹⁵⁵

The amount of funding the ECJ receives depends on the amount of funding the EU decides to allocate to the judicial branch in the administrative portion of its budget.¹⁵⁶ The Multiannual Financial Framework maps out the general framework of the budget and sets maximum expenditures for six-year periods,¹⁵⁷ while individual yearly budgets are scheduled to set more precise values.¹⁵⁸ As a result, the court could theoretically end up saddled with insufficient funding for a period of years if circumstances within Europe change too drastically. In fact, with the continuing enlarge-

151. For a discussion on whether the relationship between EU law and member state law is in fact a hierarchy or a more nuanced form of pluralism, see generally Pierre Brunet, *Pluralism, Values and the European Judge*, 5-7 (Feb. 21, 2011), available at http://www.booksandideas.net/IMG/pdf/20120221_BrunetANGL.pdf.

152. See *Definitive Adoption of the European Union's General Budget for the Financial Year 2012*, 2012 O. J. (L 56) 265 (Feb. 29, 2012), available at http://eur-lex.europa.eu/resource.html?uri=cellar:e648e711-9e69-4a8e-937c-e6b55791cf11.0009.02/DOC_1&format=PDF.

153. See 2013 EU Line-By-Line Budget Section 4, Title 5, <http://eur-lex.europa.eu/budget/data/DB/2013/en/SEC04.pdf> (last visited May 7, 2014) (these funds are generated through the sale and letting of property, through collecting on loans, and through receiving interest on accounts).

154. See *Where Does the Money Come From?*, EUROPEAN COMMISSION, http://ec.europa.eu/budget/explained/budg_system/financing/fin_en.cfm (last visited May 7, 2014). Note that cash injections from the EU can outweigh the GNI based payments from some countries. See *Who Pays What?*, BBC NEWS, http://news.bbc.co.uk/2/shared/spl/hi/europe/04/money/html/who_pays_what.stm (last visited May 7, 2014).

155. See *Revenue of EU Budget 2012*, EUROPEAN COMMISSION, http://ec.europa.eu/budget/financialreport/2012/revenue/index_en.html (last visited May 7, 2014).

156. See David Edward, *Reform of Article 234 Procedure: the Limits of the Possible*, in *JUDICIAL REVIEW IN EUROPEAN UNION LAW* 119, 138 (David O'Keefe ed., 2000) (noting that the court receives only 2.7% of the total administrative budget, which is itself only a small fraction of the EU budget as a whole).

157. See, e.g., *Multiannual Financial Framework 2014-2020 Roadmap*, EUROPA.EU, http://europa.eu/newsroom/highlights/multiannual-financial-framework-2014-2020/index_en.htm (last visited May 7, 2014).

158. See *id.*; *Financial Perspective 2000-2006*, BBC NEWS, <http://news.bbc.co.uk/2/shared/spl/hi/europe/04/money/html/financial.stm> (last visited May 7, 2014).

ment of the EU and the recent expansion of its powers through the Treaty of Lisbon, the ECJ has been burdened with a growing backlog of cases.¹⁵⁹ However, requests for additional funding to employ new judges have gone unanswered.¹⁶⁰

Despite the fact that funding may be vulnerable to temporary insufficiency, the court is still economically sustainable simply because of its ties to the powerful EU. Funding for the EU, and thus the ECJ, flows from the financial success of member states and the entity as a whole.¹⁶¹ While not all EU member states may currently be prosperous, the EU as a whole has been relatively so.¹⁶² In fact, although the EU has not responded to some requests for budget increases, it has consistently increased funding to the ECJ since its inception, and the budget grew by 42% in just the eight years leading up to 2014.¹⁶³ It seems that as long as the EU continues to prosper, the ECJ will remain economically sustainable.

4. Rate of Growth and Efficacy

The ECJ did not achieve its large jurisdiction overnight. The court now has jurisdiction over the twenty-seven states that make up the EU,¹⁶⁴ but when the EU's predecessor was initially formed in 1951, there were only six states within the supranational entity.¹⁶⁵ It would be twenty-two more years before any other states joined the entity, though three states would join at once.¹⁶⁶ After this initial addition, states started joining the group more quickly: eight years for the next one, five for the two after that, nine years for the next three states, and so on.¹⁶⁷ Here, states were simultaneously signing on to the supranational group and ceding jurisdiction to its court for the adjudication of European law.¹⁶⁸

As the number of countries under the ECJ's jurisdiction increased, the number of cases being brought before the court increased exponentially:

159. See Constant Brand, *Ministers Unsympathetic to ECJ's Plea for More Judges*, EUROPEAN VOICE (July 20, 2011), <http://www.europeanvoice.com/article/imported/ministers-unsympathetic-to-ecj-s-plea-for-more-judges/71671.aspx>.

160. See *id.*

161. See *Where does the Money Come From?*, *supra* note 154.

162. See Angeline Vachris, *Do the Recipient Countries of Cohesion Funds Need a "Get Out of Jail Free Card?"*, 11 CURRENTS: INT'L TRADE L.J. 86, 87 (2002).

163. See *Draft General Budget of the European Union for the Financial Year 2012/7*, EUROPEAN UNION (2011), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0300&qid=1418124208506&from=EN> (stating consistent yearly increases in the budget starting from _250,000,00 in 2006) and *The Court in Figures*, CURIA, http://curia.europa.eu/jcms/jcms/P_80908/ (last visited May 7, 2014) (stating a budget of _355,000,000 for 2014).

164. See Patrick Birkinshaw, *National Courts and European Union Courts*, in EUROPEAN UNION: BETWEEN SOVEREIGNTY AND SOLIDARITY 115, 127 (Jack Hayward & Rüdiger Wurzels eds., 2012).

165. See *The History of the European Union*, EUROPEAN UNION, http://europa.eu/about-eu/eu-history/index_en.htm (last visited May 7, 2014).

166. *Id.*

167. *Id.*

168. See *Consolidated Treaty of the EU*, *supra* note 126, art. 263 (stating that the ECJ "shall . . . have jurisdiction in actions brought by a member state").

the court's workload was 79 cases a year in 1970,¹⁶⁹ 623 cases were pending by 1997,¹⁷⁰ and 849 were pending by 2011.¹⁷¹ Of course, a large part of this likely resulted from the court giving member state citizens a cause of action against their government and other citizens for violation of EU law.¹⁷² Although the ECJ had a relatively slow start during its earlier years, the court has now grown into a powerful judicial body that Europeans take full advantage of.

5. Summary

The ECJ bears all the marks of success. It has satisfied its member states while still developing and strengthening itself as an entity. It has secured economic stability through the status of being attached to a powerful parent organization. It has grown consistently as a judicial body, both in terms of its size and the scope of jurisdiction. In short, the ECJ has set a high practical and ideological bar from which to measure other regional courts.

C. The SADCT

1. Introduction

The SADCT is the judicial body under the South African Development Community (SADC), an inter-governmental organization that connects fifteen South African states.¹⁷³ The general goals of the SADC, much like other regional organizations, are increasing the economic prosperity of the region (partially through promoting free trade) and promoting political, social and cultural cooperation.¹⁷⁴ The SADCT was created with the power to promote these goals by having original jurisdiction over disputes between member states,¹⁷⁵ individuals and member states,¹⁷⁶ member states and the SADC,¹⁷⁷ and individuals and the SADC.¹⁷⁸ Although the

169. See *Court of Justice of the European Union*, *supra* note 146.

170. See *Statistical Information on the Court of Justice 1997*, 3, CURIA (1998), available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/st97cr_2008-09-30_16-42-41_25.pdf.

171. See *Annual Report 2011*, 95, CURIA (2012), available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-06/ra2011_version_integrale_en.pdf.

172. See *Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. I. 40.

173. See *About the Tribunal*, S. AFR. DEV. CMTY. TRIBUNAL, http://www.sadc-tribunal.org/?page_id=1176 (last visited May 7, 2014); *Member States*, SOUTH AFRICAN DEVELOPMENT COUNCIL, <http://www.sadc.int/member-states> (last visited May 7, 2014) (listing current member states).

174. See Muna Ndulo, *African Integration Schemes: A Case Study of the South African Development Community (SADC)*, 7 AFR. Y.B. INT'L L. 3, 13-15 (1999).

175. S. AFRICAN DEV. CMTY. *Protocol on Tribunal and Rules of Procedure Thereof*, art. 15, (Aug. 7, 2000), available at http://www.sadc.int/files/1413/5292/8369/Protocol_on_the_Tribunal_and_Rules_thereof2000.pdf [hereinafter *SADCT Protocol*].

176. *Id.*

177. *Id.* art. 17 (stating that jurisdiction here would be exclusive).

178. *Id.* art. 18 (stating that jurisdiction here would be exclusive).

SADCT was established with these ambitious goals and others¹⁷⁹ in mind, its existence proved brief and tumultuous due to an absence of political and economic sustainability.

2. Political Sustainability

As stated above,¹⁸⁰ this Note will attempt to evaluate the political sustainability of a regional court through its system for judicial appointment and removal, its system of rendering decisions, and the substantive nature of the decisions themselves. Here, judicial eligibility is conditioned on loose requirements similar to those in the ECJ's system: SADCT jurists are eligible for judge hood if they do not hold political or administrative office¹⁸¹ and if they have the "qualifications required for highest judicial office" in their home state or are simply of "recognized competence."¹⁸² Also similar to the current process of the ECJ, each member state may nominate one of their citizens to serve as a judge of the court, with the SADC choosing the judges from the nominees.¹⁸³ No more than one judge from each member state can serve at a time.¹⁸⁴ Unlike the ECJ, however, the SADCT does not require one judge from each member state, and is considered full once it has at least ten members.¹⁸⁵

As for reappointment, SADCT judges serve for renewable terms of five years¹⁸⁶ and are thus vulnerable to the same sort of political pressure as ECJ judges.¹⁸⁷ Moreover, the SADC chooses the five permanent members of the court, adding an extra layer of pressure to the selection process.¹⁸⁸ Unlike the ECJ system, however, the SADCT's system for rendering decisions does not provide insulation from political pressure. Decisions of the court come with a majority opinion signed by the delivering justice, a list of the number of justices that voted for and against a ruling, and sometimes even signed dissenting opinions.¹⁸⁹ Most tellingly, among the twenty decisions listed in the SADCT's records,¹⁹⁰ only one has ever borne a dissent,¹⁹¹ and that came in the court's first year of operation; this suggests that judges may be hesitant to abandon the relative security of the

179. See, e.g., S. AFR. DEV. CMTY., *Protocol on Gender and Development*, art. 3 (Aug. 17, 2008), available at http://www.sadc.int/files/8713/5292/8364/Protocol_on_Gender_and_Development_2008.pdf (enacted with the goals of empowering women, eliminating discrimination and achieving gender equality).

180. See discussion *supra* Part III.A.2. .

181. See *SADCT Protocol*, *supra* note 175, art. 9.

182. See *id.* art. 3.

183. See *id.* art. 4.

184. See *id.* art. 3.

185. See *id.*

186. See *id.* art. 6.

187. See discussion *supra* Part III.A.2.

188. See *SADCT Protocol*, *supra* note 175, art. 3.

189. See, e.g. Mike Campbell (Pvt) Ltd. v. Republic of Zimb., SADC(T) Case No. 2/2007 (S. Afr. Dev. Cnty. Trib. 2007) [hereinafter *Campbell*].

190. See *Decisions*, S. AFR. DEV. CMTY. TRIBUNAL, http://www.sadc-tribunal.org/?page_id=1872 (last visited May 7, 2014).

191. *Campbell*, SADC(T) Case No.2/2007, at ¶¶ 90-95, ¶¶ 96-100 (two judges gave partial dissents).

majority decision and voice opinions that could cause them to be singled out.

Although its system for publishing opinions was troublesome, the nail in the SADCT's coffin was actually the substantive nature of its decisions. The SADCT's relative failure can be primarily traced back to the decision that bore the court's only published dissent.¹⁹² That decision dealt with a group of white farmers who brought suit against the government of Zimbabwe, claiming they were discriminatorily dispossessed of their land by the government's land program.¹⁹³ Although the SADCT did not have appellate jurisdiction, it did provide for parties to bring suits against member state governments for the purpose of enforcing SADC regional law when all of a party's local remedies had been exhausted.¹⁹⁴ Here, the court not only agreed to adjudicate the case, but it ultimately ruled against the Zimbabwean government in a way that attempted to establish primacy of SADC law over Zimbabwean local law. The court held that the Zimbabwean land program constituted *de facto* discrimination in direct breach of member state obligations under the SADC treaty,¹⁹⁵ and the court ordered the government to end the dispossession process and compensate those who had already been evicted.¹⁹⁶ The government ignored this ruling and evicted the farmers.¹⁹⁷ Soon after, Zimbabwe challenged the authority and legitimacy of the SADCT in front of the SADC, gaining support from other member states as well.¹⁹⁸ In the end, the SADC suspended the operations of the court.¹⁹⁹ Plans for the future of the court initially ranged from limiting the scope of its jurisdiction solely to disputes between member states—thus preventing individual citizens from having standing²⁰⁰—to disbanding the SADCT entirely.²⁰¹ Two years after the court's suspension, there have been no signs of restoration; the latter plan appears to have prevailed.

192. See *Zimbabwe Blamed for Collapse of SADC Tribunal*, COMMERCIAL FARMERS UNION OF ZIMBABWE (Aug. 28, 2012), <http://www.cfuzim.org/index.php/newspaper-articles-2/the-courts/2930-zimbabwe-blamed-for-collapse-of-sadc-tribunal>.

193. See Max du Plessis & Malebakeng Forere, *Enforcing the SADC Tribunal's Decisions in South Africa: Immunity*, 35 S. AFR. Y.B. INT'L L.J. 265, 265-66 (2010).

194. See *SADCT Protocol*, *supra* note 175, art. 15.

195. See du Plessis & Forere, *supra* note 193, at 265-66.

196. See *id.* at 266.

197. See *id.* The SADCT eventually found Zimbabwe in contempt of court for its willful dismissal of the court's order. *Id.*

198. See Cleophas Tsokodayi, *SADC Tribunal Decisions Null and Void*, THE EXAMINER (May 18, 2011), <http://www.examiner.com/article/sadc-tribunal-decisions-null-and-void-justice-ministers>.

199. See *id.*

200. See Catherine Sasman, *SADC Leaders Neuter Tribunal*, THE NAMIBIAN (Aug. 21, 2012), <http://allafrica.com/stories/201208220540.html>.

201. See Zvamaida Murwira, *Southern Africa: Regional Leaders Permanently Disband SADC Tribunal*, WALL AFRICA (Aug. 21, 2012), <http://allafrica.com/stories/201208210893.html>.

3. Economic Sustainability

Although the SADCT's major downfall flowed from its lack of political sustainability, the court also suffered from an absence of any checks to maintain its economic sustainability. The major source of the SADCT's funding problems was the court's dependence on a supranational parent entity that lacked the capacity to be financially independent: just over one-third of the SADC's yearly budget came from its member countries.²⁰² The majority of the funding for the SADC, and, therefore the SADCT, came from international donors.²⁰³ In fact, the EU was one of the biggest contributors to the SADCT itself.²⁰⁴

Though external funding may have posed theoretical problems regarding independence of the court, it was ultimately the SADC's disbursement of the funds, or lack thereof, which caused grave practical problems. When the SADC decided to suspend the SADCT, it agreed to let four judges remain to complete pending cases, though the court would be barred from taking on any new matters.²⁰⁵ At that time, there were four pending cases, most of which were brought by SADC-region individuals.²⁰⁶ However, the remaining members of the court were unable to complete those four final cases because of insufficient funds; judicial requests to the SADC for additional funding "fell on deaf ears."²⁰⁷ Remarkably, the SADCT's affairs were so handicapped that it did not even have enough remaining resources to hear cases aimed at challenging the SADC's decision to refuse to allow new petitions to reach the court.²⁰⁸

4. Rate of Growth and Efficacy

Unfortunately, the brief nature of the SADCT's existence means there is little to say about its growth. The SADC itself started in 1992, develop-

202. See *SADC Must Wean Itself from Donors, Control Own Budget*, THE HERALD ONLINE (Aug. 19, 2011), <http://www.herald.co.zw/sadc-must-wean-itself-from-donors-control-own-budget/> (noting that only \$31,000,000 USD of SADCT's \$83,000,000 USD 2011 budget came from SADC member states). This funding pattern was not an anomaly; the proposed budget for 2007 held a similar distribution. See *Mogae: Increase SADC Budget*, NEWS24 (Aug. 17, 2006), <http://www.news24.com/Africa/News/Mogae-Increase-SADC-budget-20060817>.

203. See *SADC Must Wean Itself from Donors, Control Own Budget*, *supra* note 202.

204. See Tichaona Zindoga, *SADC Should Put Its Money Where Its Mouth Is*, THE SOUTHERN TIMES (Aug. 31, 2012), http://www.southerntimesafrica.com/news_article.php?id=7429&title=SADC%20should%20put%20its%20money%20where%20its%20mouth%20is&type=83 (other contributors included individual European states like the U.K. and Germany).

205. See Ariranga Pillay, Former President, S. Afr. Dev. Cmty. Tribunal, *Addresses in Johannesburg and Windhoek: Tribunal Dissolved By Unanimous Decision of SADC Leaders*, 11 (July, 2011), available at <http://www.osisa.org/sites/default/files/article/files/Speech%20by%20former%20President%20of%20SADC%20Tribunal.pdf>.

206. See Catherine Sasman, *Kawana Defends SADC Tribunal Suspension*, THE NAMIBIAN (July 15, 2011), http://www.namibian.com.na/indexx.php?archive_id=82639&page_type=archive_story_detail&page=2229.

207. See Pillay, *supra* note 205, at 11.

208. See *id.*

ing out of an earlier South African organization in the region.²⁰⁹ Though the 1992 SADC enabling treaty technically created the SADCT,²¹⁰ judges were not appointed to the court until 2005.²¹¹ A fire in early 2007 further delayed the commencement of judicial work.²¹² Finally, more than fifteen years after the supposed creation of the court, the first dispute was filed in August 2007.²¹³ Less than four years later, in mid-2011, the SADC suspended the court.²¹⁴

Even during the fifteen years between the SADCT's "creation" and its first filing, the court's jurisdiction was growing. In 1992, only ten states were a part of SADC.²¹⁵ One more state joined in 1994, another in 1995, two more in 1997, and the last in 2005, bringing the total number of states to fifteen.²¹⁶ Although these states were signing on to a regional court's jurisdiction for matters of regional law, it was a court that had never rendered a decision. When the first unfavorable decision fell, the judgment was ignored and the court was essentially terminated.²¹⁷ The SADCT simply never had the chance to grow as a judicial body.

5. Summary

The SADCT boasted a progressive mentality and possessed judges unafraid of making unpopular decisions. From a theoretical perspective, the court was nobly designed and nobly effectuated. From a practical perspective, it may have been doomed to fail from the start. The SADCT ultimately collapsed due to an absence of checks in place to maintain political and economic sustainability. As a result, it will be used to set a practical low bar against which other regional courts can be evaluated.

D. The CCJ

1. Introduction

Now that a low and a high mark have been set for judging regional courts, this section will place the CCJ on the resulting spectrum. This section will attempt to show that the CCJ and CARICOM lack the immense strength of the ECJ and EU, but have created a framework built with great potential for growth and, more importantly, that is designed with checks in place to promote sustainability.

209. See Ndulo, *supra* note 174, at 8.

210. Treaty of the South African Development Community art 9, Aug. 17, 1992, available at http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf.

211. See *History of the Tribunal*, S. AFR. DEV. COUNCIL TRIBUNAL, http://www.sadc-tribunal.org/?page_id=1165 (last visited May 7, 2014).

212. *Id.*

213. See *id.*

214. See Pillay, *supra* note 205, at 6.

215. See Ndulo, *supra* note 174, at 11.

216. See *History and Treaty*, S. AFR. DEV. CMTY., <http://www.sadc.int/about-sadc/overview/history-and-treaty/> (last visited May 7, 2014).

217. See discussion *supra* Part III.B.2.

2. Political Sustainability

As before, the first stage of a political sustainability analysis will focus on the court's system for judicial appointment and removal. With regards to appointment, eligibility for the CCJ requires qualifications slightly more rigid than those required by the ECJ and SADCT. Beyond general requirements like "high moral character" and "integrity," a CCJ judge must have one of two kinds of experience: either (1) at least five years' experience in a court of unlimited jurisdiction in a Commonwealth country or contracting state, or (2) at least fifteen years practicing or teaching law in a contracting state or a state with a similar jurisprudence.²¹⁸

The framework of the CCJ also adds an extra check on appointment through the creation of the Regional Judicial and Legal Services Commission (the Commission).²¹⁹ Rather than allowing political pressure to reach judges through member state appointment, the CCJ-enabling statute instead created an independent eleven-person body to decide judicial admission.²²⁰ Even appointment to the Commission itself is handled by relatively independent jurists, including the deans of the law school at the University of the West Indies and other law schools in contracting states (jointly responsible for two nominations), as well as the Organization of the Commonwealth Caribbean Bar Association and the Organization of Eastern Caribbean States Bar Association (also jointly responsible for two nominations).²²¹ Moreover, the Commission does not consider potential judges by recommendations from contracting states, but by a prospective judge's individual application.²²²

The Commission's duties are not only limited to initial judicial appointment; it is also responsible for initiating proceedings to remove a judge (for inability to perform or misbehavior)²²³ and for recommending an increase in the number of judicial positions in the court.²²⁴ One point is important to note, however; there is a potential avenue for political influence through the President of the court. Unlike the other judges of the court, the President is appointed or removed by the majority vote of three quarters of contracting states, with the Commission only serving to make recommendations.²²⁵ The President also serves as the Chairman of the Commission, creating further possible issues.²²⁶ However, CARICOM placed a large check on this potential complication: while normal judges of

218. Agreement Establishing the Caribbean Court of Justice, *supra* note 17, art. IV.

219. *Id.* art.V.

220. See Philip Dayle, *Caribbean Court of Justice: A Model for International Courts*, THE GUARDIAN (Sept. 10, 2010), <http://www.guardian.co.uk/law/2010/sep/10/caribbean-court-judges-selection>.

221. Agreement Establishing the Caribbean Court of Justice, *supra* note 17, art.V.

222. See Mark Beckford, *CCJ Judges: Quality, Method of Appointment Debated*, JAMAICA GLEANER (Dec. 7, 2009), <http://jamaica-gleaner.com/gleaner/20091207/lead/lead7.html> (citing the statement of a Caribbean attorney who noted that, although the application process promoted transparency, he found it "demeaning" to judges).

223. Agreement Establishing the Caribbean Court of Justice, *supra* note 17, art. IX.

224. *Id.* art. IV.

225. *Id.*

226. *Id.* art.V.

the CCJ have life tenure until the age of seventy-two, the President of the court may only serve for one *non-renewable* seven year term.²²⁷ Thus, unlike the judges in the ECJ and the SADCT, judges of the CCJ are able to make decisions without considering judicial term renewal; one way or another, renewal is functionally non-existent.

The next stage in the analysis of political sustainability will explore the way in which the court renders its decisions. Three or five judges usually hear appellate jurisdiction cases²²⁸ while five judges will usually hear original jurisdiction cases.²²⁹ Decisions of the court are rendered with signed majority opinions, concurrences and dissents, as well as a record of which judges voted for the ruling and which voted against it.²³⁰ As a result, CCJ opinions do not shield judges behind a singular and collective “voice of the court” as the ECJ does;²³¹ however, this may actually help, by giving transparency to a regional court operating in a region where most of its citizens are distrustful of their local judiciaries.²³² So whereas transparency may have been a liability in the SADCT, it becomes a checking mechanism on judges in the CCJ, one that is aimed at inspiring a sense of legitimacy in the inhabitants of the region. And, while transparency keeps judges accountable to individuals, the combination of the Commission and lifetime tenure simultaneously act as a check on contracting state governments, creating a safeguard unavailable in the SADCT and the ECJ. CCJ judges are able to make their decisions in a visible way, yet are still insulated from governmental forces that may disagree with them.

The final, and most serious, aspect of political sustainability lies in the substantive nature of the decisions rendered by the CCJ. In the years leading up to the formation of the CCJ, the biggest question among Caribbean states and citizens was how the court would rule on cases challenging the death penalty.²³³ Human rights activists feared that the CCJ would become a “hanging court” as states ceded appellate criminal jurisdiction away from the Privy Council and to the CCJ.²³⁴ This concern was triggered by a string of Privy Council decisions in the last thirty years that limited Caribbean states in the way that they could exercise the death penalty.²³⁵ These decisions included a ruling that barred a mandatory death

227. *Id.* art. IX.

228. See *Appellate Jurisdiction Judgments*, *supra* note 35.

229. See *Original Jurisdiction Judgments*, *supra* note 115.

230. See, e.g., *Boyce v. Barbados*, CCJ Appeal No CV 2 of 2005 (Caribbean Ct. Just. 2006) (all seven of the presiding judges rendered separate opinions).

231. See discussion *supra* Part III.B.2.

232. See *UNDP Report*, *supra* note 49, at 31.

233. See David Simmons, *The Caribbean Court of Justice: A Unique Institution of Caribbean Creativity*, 29 *NOVA L. REV.* 171, 186 (2005).

234. See, e.g., Wolfe-Robinson & Bowcott, *supra* note 75.

235. See AMNESTY INT’L, *Death Penalty in the English-Speaking Caribbean: A Human Rights Issue*, 16-17 (2012), available at <http://www.amnesty.org/en/library/asset/AMR05/001/2012/en/e17a43ad-54d7-4ea2-b93a-9c4d0b4821c1/amr050012012en.pdf>.

penalty in Jamaica²³⁶ and one that found that executions meant to take place more than five years after sentencing were inhumane enough to warrant mitigation of the sentence to life imprisonment.²³⁷ But, due largely to the fact that murders rates are very high in the Caribbean,²³⁸ the populations of most states in the region overwhelmingly support capital punishment.²³⁹ The Privy Council decisions were, therefore, very unpopular.²⁴⁰ In fact, some scholars believed the CCJ was created to enforce the death penalty laws that the Privy Council began to disallow.²⁴¹

The CCJ has responded carefully to allegations of it being a “hanging court.” Formal statements by CCJ judges have been vague, alluding to the fact that while the court would balance international concerns with local needs,²⁴² it was not ruling out the death penalty entirely.²⁴³ The actions of the court, while seemingly equally nuanced, hint at a clearer trend. In 2006, Barbados lodged an appeal with the CCJ essentially challenging the Privy Council’s ruling that executions must take place within five years sentencing or not at all.²⁴⁴ Barbados sought to overturn the Privy Council’s reduction of a death sentence to life imprisonment in these scenarios and reinstate capital punishment.²⁴⁵ The court, however, ruled against Barbados, upholding the principles stated by the Privy Council years before.²⁴⁶ Thus, it seems that the CCJ is making sure that it proceeds slowly in what is surely dangerous territory. The court has not yet advanced any controversial goals that would step too heavily on the sovereignty of contracting states, but it has been careful to not take any steps back from the foundation that was laid by the Privy Council.

It appears that the court is more closely following in the footsteps of the ECJ than the SADCT. Perhaps the major downfall of the SADCT was that it stepped too far too quickly, provoking member states under its jurisdiction in only its first year of operation.²⁴⁷ The ECJ, on the other hand,

236. *Lambert Watson v. The Queen* (Att’y Gen. for Jam. Intervening), [2005] 1 A.C. 472 (P.C.) (appeal taken from Jam.).

237. *Pratt v. Att’y Gen. for Jam.*, [1993] 2 A.C. 1 (P.C.) (appeal taken from Jam.). In a way, this meant barring the death penalty entirely, since appeals to the Privy Council often took more than five years. See *Hanging Them High*, THE ECONOMIST (Dec. 30, 2008), <http://www.economist.com/node/12855409>.

238. See *Hanging Them High*, *supra* note 237.

239. See Therese Mills, *Letter: Colonial Power over the Death Penalty*, BBC NEWS, <http://news.bbc.co.uk/2/hi/americas/4185745.stm> (last updated Jan. 19, 2005).

240. See Robert Verkaik, *Law: Last Appeal to a Lost Empire*, THE INDEPENDENT (May 25, 1999), <http://www.independent.co.uk/arts-entertainment/law-last-appeal-to-a-lost-empire-1095796.html>.

241. See Weston Eidson, *The Caribbean Court of Justice: An Institution Whose Time Has Come*, 8 CHI.-KENT J. INT’L & COMP. L. 166, 197 (2008).

242. See, e.g., Wolfe-Robinson & Bowcott, *supra* note 75.

243. See, e.g., Megan Reynolds, *Caribbean Court of Justice Maintains ‘Balanced’ Approach to Death Penalty*, THE TRIBUNE, Jan. 29, 2010, at 3, available at <http://ufdcimages.uflib.ufl.edu/UF/00/08/42/49/01495/00001-29-2010.pdf>.

244. See *Boyce v. Barbados*, CCJ Appeal No CV 2 of 2005 (Caribbean Ct. Just. 2006).

245. See *A Landmark Death Penalty Ruling by the Caribbean Court of Justice*, FIDH (Nov. 17, 2006), <http://www.fidh.org/en/americas/Barbados>.

246. *Id.*

247. See discussion *supra* Part III.B.2.

moved slowly, waiting eleven years before it attempted to increase its regional authority and taking rare incremental steps over the course of several decades after that.²⁴⁸ Similarly, the CCJ is standing firm and is still subtly advancing other goals while remaining cautious in pushing the most controversial issues surrounding the court. In 2012, the court faced a petition from migrant workers formerly employed at a Belizean fruit orchard company who claimed that the company fired them because of their attempts to unionize.²⁴⁹ Despite the fact that there was no “smoking gun,” the court ruled against the company, reinstating the amount of damages set by the Belizean trial court that the appeals court had reduced.²⁵⁰ This decision is particularly important for the future of Belize with respect to the relation between business and human rights, since the country is home to many companies that employ significant numbers of migrant workers and indigenous people.²⁵¹ A regional court that respects and protects unions could vastly improve the state of labor laws in such an area.

While the CCJ strategizes its substantive decisions, it has not forgotten about procedure. In 2012, the court made plans to sign a Memorandum of Understanding with the U.S.-based National Center for State Courts in an attempt to increase the “delivery of justice” to Caribbean citizens.²⁵² This may serve as an extra check on CARICOM governments by showing that the CCJ has international connections with groups committed to improving access to justice, and not just ones committed to giving funds, as was the case with SADCT’s foreign contributors.

Thus, it seems here that the CCJ has achieved a relatively high level of political sustainability. It has limited the influence of contracting state governments, maximized judicial independence, increased judicial visibility to Caribbean citizens, and mollified voices of concern, while advancing the Caribbean region as a responsible player in the modern world.

3. *Economic Sustainability*

Two major problems plagued the economic sustainability of the SADCT: (1) it was too dependent on a parent that eventually considered it an imprudent investment, and (2) the parent itself was unable to generate the requisite funds.²⁵³ Although the ECJ may not have problems of the second sort, it could run into issues with the first, since the court is entirely dependent on the six year budget planned by its parent.²⁵⁴ The CCJ, however, is tied to an economic power much weaker than the EU, and

248. See discussion *supra* Part III.A.2.

249. *Mayan King Ltd. v. Reyes*, CCJ Appeal No CV 3 of 2011 ¶ 1 (Caribbean Ct. Just. 2012).

250. *Id.* ¶¶ 22, 89.

251. See Nadia Bernaz, *Important Decision of the Caribbean Court of Justice on Labor Rights*, RIGHTS AS USUAL (July 11, 2012), <http://rightsasusual.com/?p=177>.

252. See *CCJ to Sign MOU to Improve Delivery of Justice in the Caribbean*, THE NEW YORK CARIB NEWS (Nov. 2, 2012), <http://www.nycaribnews.com/news.php?viewStory=2878>.

253. See discussion *supra* Part III.B.3.

254. See discussion *supra* Part III.A.3.

has sought to circumvent both problems by creating the CCJ Trust Fund.²⁵⁵

As explained in Section II, one reason for establishing the fund was to ensure the independence of the body by preventing direct financial ties between contracting states and the salaries of judges or the operations of the court.²⁵⁶ A direct consequence of this system is the creation of a significant level of economic sustainability. The Trust Fund was established with an initial amount of \$100,000,000 USD.²⁵⁷ Although this may seem small in light of the SADC's \$83,000,000 USD annual budget²⁵⁸ and the ECJ's \$355,000,000 annual budget,²⁵⁹ one must remember that the SADC has a population more than thirteen times the size of CARICOM's and that the EU has a population more than thirty times CARICOM's.²⁶⁰

The real strength of the fund, however, is not its initial size, but its process of disbursement. The \$100,000,000 USD fund is managed by a group of individuals selected for their independence, range of backgrounds and financial skills.²⁶¹ CARICOM planned to have the court operate predominantly from the income generated by the fund through prudent investing.²⁶² This system is far from perfect since it is highly dependent on the state of the global market; some years the fund has generated profits while other years it has suffered losses.²⁶³ At the very least, however, it adds an extra layer of economic sustainability. And, even if the fund should fail, the court can still request additional financial injections from contracting parties or external sources if all states agree to it.²⁶⁴ Thus, the CCJ is protected by multiple levels of economic safety nets: an initial large fund reserved solely for the court, the prospect of the fund generating income to cover the court's operational costs, and the ability to request additional funding from contracting states should both other safety nets fail.

255. See Agreement Establishing CCJ Trust Fund, *supra* note 51, art. XVIII.

256. See discussion *supra* Part II.A. .

257. See *CCJ Trust Fund*, *supra* note 89.

258. See *SADC Must Wean Itself from Donors, Control Own Budget*, *supra* note 202.

259. See *The Court in Figures*, *supra* note 163.

260. Compare *SADC Countries at a Glance*, SADC TRADE, <http://www.sadctrade.org/sadcsmarytext> (last visited May 7, 2014) (stating that the SADC has an overall population of about 213 million people), and *European Demography*, EUROSTAT (July 28, 2011), http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-28072011-AP/EN/3-28072011-AP-EN.pdf (stating that the EU has an overall population of about 502 million people) with HECORA, *Strategic Plan on Health and Related Social Services in the CARICOM*, 4 (2008), available at http://www.caricom.org/jsp/single_market/services_re_gime/concept_paper_health.pdf (stating that CARICOM has an overall population of about 15 million people).

261. See Agreement Establishing CCJ Trust Fund, *supra* note 51, art. VI-VII.

262. See *CCJ Trust Fund*, *supra* note 89.

263. See, e.g., *CARIBBEAN COURT OF JUSTICE TRUST FUND*, *supra* note 96; Bravo, *supra* note 100.

264. Agreement Establishing CCJ Trust Fund, *supra* note 51, art. IV, §§ 2, 7.

4. *Rate of Growth and Efficacy*

The CCJ differs from the ECJ and the SADCT in one very important way. Though the ECJ was formed concurrently with the EU and the SADCT was technically formed concurrently with the SADC, the CCJ was created separately from, and, indeed, twenty-eight years after its parent entity, CARICOM.²⁶⁵ As a result, states can still be members of CARICOM without ceding appellate jurisdiction to its court.²⁶⁶ Here, from an absolutist perspective, growth has been seemingly slow. The court was created in 2001,²⁶⁷ and four years passed before the first states, Guyana and Barbados, signed on to the court's appellate jurisdiction in 2005.²⁶⁸ Belize followed suit in 2010, but it was the last to do so thus far.²⁶⁹ Caribbean countries have advanced different reasons for not ceding jurisdiction; Trinidad and Tobago, for example, fears losing the Privy Council because it believes that the British body "inspires confidence in foreign investors."²⁷⁰ However, this hesitance to cede jurisdiction should not be viewed entirely as a damning sign. Rather than promote an SADCT-type situation, where states immediately sign on to a court whose operation they have little understanding of, states here are permitted to wait until they are comfortable enough with the court to cede jurisdiction to it. This is similar to the system in the ECJ where only a few states signed on to the EU and ECJ, with the rest joining slowly as time progressed.

Moreover, the potential growth of the CCJ cannot be judged only from the speed at which states sign on to its appellate jurisdiction. Original jurisdiction of the court to decide CARICOM region law has been compulsory since the court was first formed.²⁷¹ And, as happened with both the ECJ²⁷² and the SADCT,²⁷³ original jurisdiction alone can become a powerful tool for establishing the primacy of regional law. As such, it is clearly too soon to declare the CCJ stunted just barely a decade after it formed. Regional courts require a certain amount of time to grow properly, and the CCJ has already shown signs of proper growth.

265. See Treaty of Chaguaramas, *supra* note 13 (stating that the formation date of CARICOM is July 4, 1973); see also *About the CCJ: FAQs*, *supra* note 16 (stating that the agreement establishing the CCJ was signed on February 14, 2001).

266. See, e.g. Singh, *supra* note 85 (discussing this idea within the context of member states making debt payments).

267. See *About the CCJ: FAQs*, *supra* note 16 (agreement establishing the CCJ was signed on February 14, 2001).

268. See Ruth Moisa Alleyne, *Political Blockage*, THE BARBADOS ADVOCATE (Apr. 11, 2012), <http://www.barbadosadvocate.com/newsitem.asp?more=local&NewsID=23966>.

269. *Id.*

270. See Tony Fraser, *Jamaica, Trinidad and the CCJ*, CARIBBEAN INTELLIGENCE, <http://www.caribbeanintelligence.com/content/jamaica-trinidad-and-ccj> (last visited May 7, 2014) (quoting the Prime Minister of Trinidad and Tobago).

271. See *id.*; Agreement Establishing the Caribbean Court of Justice, *supra* note 17, art. XVI.

272. See discussion *supra* Part III.A.2.

273. See discussion *supra* Part III.B.2.

5. Summary

The CCJ has created a remarkable array of devices meant to ensure the political and economic sustainability of its operations. It has found ways to avoid the complications surrounding the SADCT while emulating successes of the ECJ. And beyond borrowing systems of other courts, it has created bold new systems of its own, such as the Trust Fund, the Commission and the mixed system of judicial tenure. This amalgam of old and new has created a framework poised to build the CCJ into a successful regional court.

Conclusion

CARICOM has created a novel hybridized court of appellate and original jurisdiction in the CCJ and, as a result, it faces novel issues. The CCJ must simultaneously prove itself as an effective replacement for the Privy Council and as a regional court capable of satisfying the region's citizens while still respecting international concerns. Although checks are in place to promote the court's sustainability, its continued success still depends heavily on the actions of CARICOM contracting states. Perhaps one of the biggest issues facing the court is that the very state that holds its seat, Trinidad and Tobago, has not yet ceded appellate jurisdiction to the court. Trinidad and Tobago stands in a unique position to contribute a huge sense of legitimacy to the court, and its choice to do so would go a long way towards ensuring the CCJ's success. And, if the court is able to continue safeguarding judicial independence while carefully promoting regional integration, it may even be able to change the average Caribbean citizen's perception of the average Caribbean judiciary. The CCJ has a big job ahead of it, but it stands well-equipped to fulfill its role.