STRATEGIC INTERGRATION - CARICOM AND THE CARIBBEAN COURT *

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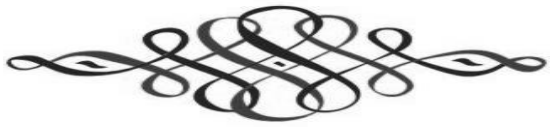

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STRATEGIC INTERGRATION - CARICOM AND THE CARIBBEAN COURT

Good afternoon, ladies and gentlemen,

I am grateful to the Local Organising Committee of the Caribbean Association of Banks Inc. ("CAB") for inviting me to present at this, the 39th Annual General Meeting and Conference. With the effects of the global economic recession rippling throughout our Caribbean region, this year's theme "Partnering for Regional Transformation, Development and Growth: Empowering the Financial Services Sector" is perhaps a most fitting one. This idea of "regional transformation" certainly hinges on the necessity for Caribbean unification and its significance in strengthening the economic aspirations of the Caribbean Community including the Caribbean Single Market and Economy.

The Genesis and Mandate of CARICOM

It can be said that CARICOM started in 1973 as a customs union. The vision of a CARICOM Single Market and Economy (CSME) was proclaimed in the Grande Anse Declaration of 1989 which laid the foundation for the establishment of the CSME and the Caribbean Court of Justice. On July 5th, 2001, the Heads of Government of the Caribbean Community at their Twenty-Second Meeting of the Conference in Nassau, the Bahamas signed the Revised Treaty of Chaguaramus ("Revised Treaty") which established the Caribbean Community including the Caribbean Single Market and Economy ("CSME").

However, it was not until January 1, 2006 that the CARICOM Single Market (CSM) came into being. Presently, the Members of the Community comprise 14 territories namely, Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago.

The goal of the Revised Treaty is to deepen the regional integration movement among Member States to "sustained economic development based on international competitiveness, coordinated economic and foreign policies, functional co-operation and enhanced trade and economic relations with third States".[1] In this regard, there are five key components encompassed by the CARICOM single market regime namely: free movement of goods, free movement of skilled persons, free movement of services, the right of establishment and the movement of capital.

Relationship of the Treaty to the Banking Sector

Chapter Three of the treaty reflects the vision for the dynamic growth of the economy through the free movement of capital (money), skilled labour, and the freedom to establish business enterprises anywhere in the Community. The free movement of capital is closely linked to the provision of financial services which is an important element for the enhancement of the region's economic framework.

Against this backdrop, in Article 38 of the Revised Treaty, Member States agreed to remove discriminatory restrictions on Banking, Insurance and other financial services. In article 39 they agreed not to introduce new restrictions on the movement of capital and payments connected with such movements[2]. The goal of economic union is further strengthened by the fact that Member States are obliged to adopt measures necessary to coordinate their foreign exchange policies in respect of the movement of capital between them and third States[3].

Such arrangements are geared towards the easy transfer of capital from one Member State to another whether through bank notes, electronic transfers or other means. Envisaged under this regime is also the easy convertibility of the Region's currencies and the coordination of exchange and interest rate policies. The unrestricted movement of capital further allows for the equal right to invest in corporations within the Member States.

[1] Preamble to the Revised Treaty
[2] Article 39 of the Revised Treaty
[3] Article 42(1) of the Revised Treaty

In its attempt to facilitate such economic union, Article 44 of the Revised Treaty mandates inter alia that The Council on Trade and Economic Development ("COTED') and The Council for Finance and Planning (COFAP) take appropriate measures for the abolition of exchange control in the Community, and free convertibility of the currencies of the Member States[4]; the establishment of an integrated capital market in the Community[5]and convergence of macro-economic performance and policies through the co-ordination and harmonization of monetary and fiscal policies, including, in particular, policies relating to interest rates, exchange rates, tax structures and national budgetary deficits[6]. Undoubtedly, as it relates to the financial sector, the spirit of the Revised Treaty aims at the harmonisation of economic policy through the integration of the financial and regulatory environments in which Member States are to operate.

While banking institutions control the majority of the region's financial sector, the increase in globalization has resulted in the emergence and rapid growth of other financial institutions. Today, the financial sectors within some Member States offer a diverse range of services including securities, insurance plans, pension schemes, trust and other investment funds. These are particularly notable in the territories of Jamaica, Barbados and Trinidad.

I have been advised that the dominant enterprises in the Banking and Financial services sectors are non-indigenous. This has been partly attributed to the fact that the footprint of the indigenous institutions have not tended to spread across national boundaries and embrace the vision of regional integration. As a result they have to a large extent remained under-developed without adequate resources to compete in times of financial stress. Such a reality suggests a critical need to re-evaluate the financial framework within which the Community operates.

It is within this context that the role of integration must be emphasized. By giving effect to the mandate of the Treaty, the removal of financial barriers will not only allow for greater investment across the region but will increase the Community's attractiveness as an area for investment by both regional and non-regional organisations. Financial integration will also result

[4] Article 44(c) of the Revised Treaty
[5] Article 44 (d) of the Revised Treaty
[6] Article 44 (e) of the Revised Treaty

in increasing the availability of capital to the entire region which would in turn, foster development at both the national and regional level by increasing investment and improving resource allocation.

To this end, Member States must play their part in ensuring the harmonization of rules and regulations which govern the various financial sectors within the Community. So far, at the CARICOM level a Financial Institutions Bill and the CARICOM Financial Services Agreement (CFSA) have been drafted. The CFSA is expected to play a crucial role by supporting the formation of a harmonized financial services market in which all economic entities will be governed by similar regulations, standards and conditions across the Community. The Agreement has as its core objectives to:

- Streamline and facilitate the cross border operations of financial institutions;
- Create an environment for enhancing competitiveness of the Single Market in financial services;
- Reduce payments system and portfolio risks, while ensuring stability and soundness of;
- the financial system and the integrity of financial markets in the CSME;
- Provide for the harmonisation of essential definitions of principles in order to avoid disparity in approaches, thereby, minimising regulatory arbitrage;
- Provide a mechanism for ongoing consultation and review to assess the implementation of the financial integration and to resolve problems affecting the delivery of cross border financial services;
- Strengthen the process of Capital Market Integration

In this way, it is anticipated that the CFSA will create the framework to fully operationalise the region's single economic space.

However, there is a gap between the vision and the implementation. Despite these efforts, the facilitating measures are not currently in place. The CFSA has not been enforced into law and there is still the need for further review by the relevant regulatory institutions within Member States. The reality is that, within CARICOM, intra-regional activities are currently regulated by

six Central Banks and five different stock markets. The diverse regulatory frameworks and supervisory systems which exist present a major challenge to the establishment and function of a harmonious economic market.

While regional regulators have been in active discussion, there appears to be little convergence on crucial elements of financial services and financial regulation in the region. This failure to push for uniformity in the regulatory environment therefore presents some challenging questions for CARICOM.

The economic benefits that the Treaty intend, and the realization of a common financial market will only be attained when policymakers adopt appropriate mechanisms for the development of CARICOM's financial landscape. Until such time, the onus will no doubt lie with the private sector to actively take measures towards the goal of a harmonized economic market. As a result, private entities may well function as the catalyst for change in ensuring that Member States comply with their obligations under the Treaty. With the aim of these obligations directed at improving the economic climate within the region, it is incumbent on private institutions to ensure that they seize the benefits to which they are entitled. This should be self-evident in sectors, such as banking where, in addition to the objective benefits on the community, the profit levels of the relevant institutions will be positively enhanced.

In this regard, your institution, the Caribbean Association of Bankers is well placed. It represents the platform for discussion and community among financial institutions throughout CARICOM and your constituent members exercise economic influence in each state. The powerful voice of this combination of financial institutions should call for greater cooperation along with implementation of effective measures by all Members States to realize the goal of economic union. Private sector entities could also be instrumental in identifying the areas where change is necessary and proposing the steps by which such change could be initiated. In the absence of such action, the sector becomes complicit in the failure of Member States. The operational difficulties across the financial sector remain unresolved and the Community is no closer to the attainment of the goal of full regional integration. The result is that the sector deprives both itself and Caribbean people of the benefits that CARICOM should provide.

Intervention by the Justice System

Now, in your quest for "regional transformation, development and growth", the financial sector should recognize and welcome the judiciary as a body capable of protecting and enforcing its rights under the Revised Treaty. In this vein, the Caribbean Court of Justice ("CCJ"), in its original jurisdiction, plays a fundamental part in facilitating the integration scheme envisioned by the CSME. As the sole arbiter of disputes arising from the Treaty regime, the CCJ acts as a mechanism for the enforcement of the rights and obligations created by the Treaty. The Court ensures the uniform interpretation and application of the Treaty of Chaguaramas, and is therefore crucial for developing a CARICOM Single Market and Economy.

Pursuant to Article XII of the Agreement Establishing the Court, the CCJ has the exclusive jurisdiction to hear and deliver judgment on disputes between Contracting Parties to the Agreement and disputes between any Contracting Party to the Agreement and the Community. Further, applications can be brought directly to the CCJ by private entities including corporations and nationals of member states.

However, if in any domestic case a question arises as to the interpretation of the Revised Treaty, the domestic Court or tribunal is required to refer the matter to the CCJ for adjudication. The obvious purpose of such a provision is to guarantee that no other courts within the jurisdictions of the Contracting Parties possess the authority to resolve issues concerning the interpretation and application of the Revised Treaty.

In this regard, The Caribbean Court of Justice ("CCJ") has already assisted in bringing the Treaty to life. In its original jurisdiction the CCJ has adjudicated on cases which have supported the treaty vision for economic development and social stability within the region. There have been the cases addressing the movement of goods and the application of common external tariffs in cases brought against the governments of Guyana and Suriname. This has provided evidence that the CSME system can work in supporting the competitiveness of business within the region. The CCJ has also recently addressed the system for ensuring that the benefits expected from the establishment of the CSME are not frustrated by anti-competitive business conduct. In addition,

it is well known that the regime for the freedom of movement of persons is now the subject of litigation before the court.

To date, all of the twelve signatories to the Agreement Establishing the Court are Members of the Caribbean Association of Banks ("CAB"). This undoubtedly has significant implications not only for CAB Members who are Parties to the Treaty but for individuals and companies belonging to these Member States. The result is that members of the private sector in these States can access the Court in order to vindicate their rights under the Treaty.

In light of the theme of your convention, "Empowering the financial services sector", the CCJ may provide an avenue for such empowerment. While it is true that the necessary measures to found a single economic market are yet to be fully implemented, a failure by Member States to take proactive steps in this regard or to remove discriminatory practices which inhibit more dynamic financial interventions may very well be issues which can attract the court's jurisdiction.

Now that you all are more familiar with the role of the CCJ in the CSME, it would be remiss of me if my message did not address the structure and mandate of the court.

Now, as I had alluded to earlier, the Revised Treaty and the Agreement Establishing the Court are the two integral documents which set out the framework, parameters and functions of the CCJ. As part of its mission the Court intends to provide for the Caribbean Community an equitable, fair, efficient, innovative and impartial justice system while upholding an independent institution dedicated to developing Caribbean jurisprudence.

When the then Prime Minister of Jamaica, the Most Honourable P.J. Patterson proposed to introduce the Act establishing the Caribbean Court of Justice, the Honourable Edward Seaga, then leader of the Opposition, speaking at the CCJ Debate in Parliament affirmed that a regional court of final appeal would not be viewed with disfavor provided that "a mechanism could be devised to ensure that judges would be so appointed as to be entirely free of political connections

to ensure that their independence would not be in question". Amidst key deterrents in welcoming a Caribbean Court were the issues of funding and its immunity to political influence.

The debates were quite fascinating because at that time those were undoubtedly valid concerns. And perhaps it is no small measure due to those debates and the thoughtful and responsive reaction of the framers of the court's constitution, who put rationality and the interests of the greater Caribbean good before party political considerations, that I am able to assert without fear of contradiction that these issues have been satisfactorily addressed in the constituent documents which established the Court and its supporting organs.

In addition, the CCJ has been operational for over eight years and has established a record of performance by adopting practices that have built on its solid institutional foundation.

Appropriate mechanisms elaborated in the Agreement Establishing the CCJ in relation to the selection of judges, their security of tenure as well as the financial provisions for the establishment of the court have guaranteed that the court is immune from political influence and ensures its operation in a sound and stable financial environment.

Judicial Independence - Appointment, Removal and Security of Tenure of Judges

The responsibility for the appointment of Judges of the CCJ does not rest with Heads of States or Ministers of Government. Rather, such responsibility is vested in a Regional Judicial and Legal Services Commission (the RJLSC). This Commission has a membership of 11 persons namely:

- The President of Court who is to be the Chairman
- 2 persons nominated jointly by OCCBA and the OECS Bar Association
- 1 Chairman of a Judicial Services Commission (rotating)
- 1 Chairman of a Public Service Commission of a contracting party (rotating)
- 2 persons from civil society nominated jointly by the Secretary–General of CAICOM and the Director- General of the OECS
- 2 distinguished jurists nominated jointly by the Deans of the Faculties of Law of contracting parties and the Chairman of the Council of Legal Education
- 2 persons nominated jointly by the Bar Associations of the Contracting parties

The Powers of the Commission include selecting the President of the Court and appointing all judges except the President of the court as well as all officials and employees of the court and determining their remuneration. In the exercise of those powers specific provisions exists which prohibits the Commission from seeking or receiving instructions from any source external to the Commission.

In making appointments to the office of Judge, the Commission is obliged to have regard to the high moral character and intellectual quality of nominees[7]. The Commission is also charged with exercising disciplinary control over the Court's judiciary as well as its officials and employees[8].

The removal of a Judge from his or her office also lies within the purview of the Commission. Such removal requires a majority vote of all members of the Commission[9] however, the circumstances in which a judge may be so removed are confined to his inability to perform the functions of his office, whether arising from illness or any other cause or for misbehavior in accordance with the provisions of Article IX of the Agreement.

Turning to the seat of the President, he or she may be removed from office by the Heads of Government. Such removal must however be based on the recommendation of the Commission only where the issue of removal has been referred to a tribunal and the tribunal has advised that the President ought to be removed from office for matters of impropriety or inability to perform the functions of his Office.

The court has also made a sound start in terms of the adequacy of its compliment. The compliment of the CCJ are the President and not more than 9 other judges, with power to increase the number on the recommendation of the commission. At present, the compliment is the president and 6 other judges. It is said that a picture is worth a thousand words and the point may be more easily made by comparison. In the United Kingdom for example, the compliment

[7] Article IV 11. of the Agreement
[8] Article V 3.(2). of the Agreement
[9] Article IV 7 of the Agreement

of the UK Supreme Court presently comprises the President, 9 Lords of Appeal and one Baroness. In the United States, the size of the Court is set by Congress and currently consists of a Chief Justice and 8 Associate Justices. Similarly the Canadian Supreme Court consists of a Chief Justice and 8 Judges.

Financing of the Caribbean Court of Justice

Throughout the region commentators complain that the administration of justice is not adequately funded. For example in the OECS islands of Antigua and Barbuda and Grenada, the 2012 budgetary allocation for the judiciary was set at $1,742,688.00 and $5,885,641 Eastern Caribbean Dollars respectively. With regard to Antigua and Barbuda, this was against a national budget of $754 million XCD and represented a mere 0.23 percent of the same. As for the island of Grenada, this figure represents a meagre 0.58% of the total budget for the stated period. The 2012/2013 Trinidad and Tobago Budget was set at its largest ever at approximately $57.4 Billion TTD. Out of this sum, approximately $430 Million TTD was allocated to the judiciary which represented only 0.75% of the total annual budget. Similar trends follow in Jamaica where the 2012/2013 budget statement revealed that, out of a total budget of approximately 6 Trillion JMD, an aggregate of 4,124,753 JMD was allocated to the judiciary. However, this is representative of a mere 0.67% of that territory's total national budget. These figures are certainly inadequate and suggest the need for directly confronting the poor financial arrangements provided by the executive arm. In this regard, pressure should be exerted on our governments to increase their investment in the national judiciaries.

These are the realities which informed the concerns about court funding. However, the Court's thoughtful institutional arrangements have nullified the debates on appropriate investment in the administration of justice, and the certainty of funding allocation.

Prior to the establishment of the court, actuaries calculated that a fund of US$100,000,000.00 would generate an income that would fund the CCJ in perpetuity. The member states accepted the advice and established a trust fund with a capital base of the said $100 million. The fund has been established and is functioning and maintaining the court.

The fund is vested in a Board of Trustees of the Fund drawn mainly from the private sector and civil society, and is completely immune from political influence. The trustees comprise a nominee of CARICOM, a nominee of Vice-Chancellor of UWI, a nominee of the Insurance Association of the Caribbean, a nominee of the Indigenous Banks of the Caribbean, a nominee of the Caribbean Institute of Chartered Accountants, a nominee of the Organisation of Commonwealth Caribbean Bar Association, a nominee of the Heads of Judiciary of CARICOM, a nominee of the Caribbean Association of Industry and Commerce and a nominee of the Caribbean Congress of Labour. This is a completely independent funding arrangement.

There is also specific provision for addressing increases in the resource requirements of the court when that may occur. In this regard, the Board of Trustees is obligated to review the adequacy of the resources of the fund not later than two years after the entry into force of the Agreement and thereafter at least once within every succeeding biennium. If upon such a review an inadequacy in resources is found to exist, the Member States are obliged to make additional contributions to the Fund.

The intention of these provisions speaks directly to the financial viability of the Court and its centrality to the organisation's efficiency, effectiveness and independence in the performance of its functions. Such innovations have produced significant benefits to this region's justice system and will undoubtedly continue to do so. It is against this background that I call on the citizens of all the Contracting Parties to acknowledge these advantages and to ensure that they benefit fully from their investment in the Court. It is also my hope that the contribution of the Court in fostering a system of regional economic and social unification will be recognized by all, and that all Member States and, most importantly, the private sector of these Member States will seize the opportunity to benefit from the Court in this respect.

I thank you.

The Right Honourable Sir Dennis Byron

Date: Thursday, 15th November, 2012