



The Revised Treaty of Chaguaramas: Conflicts and Contradictions for the Island State

ABSTRACT

An effective single market would require uniformity across the region in the relevant regulatory environment but there are financial, manpower and other hurdles involved in removing all the restrictions on, for example, the supply of services... For a regional integration grouping to thrive; the largest and most influential states must show strong leadership and political commitment to the integration process.

Hon. Mr. Justice Saunders

Address to a Public Gathering in St Vincent and the Grenadines 16th May, 2017

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Salutations

Caricom and the Revised Treaty of Chaguaramas (RTC)

I must thank the Open Campus for affording me this opportunity to address this gathering. Effectively, I ceased residing and working here a little over 20 years ago. Being a part of a regional judiciary throughout all those years, first with the ECSC and now with the CCJ, there's a sense in which I don't feel as if I ever really left home. But the truth is that any such notion is completely dispelled whenever I actually am here and I experience a warmth and welcome that only in this country I could reasonably expect to receive. It is a precious feeling and I deeply appreciate it.

This evening I wish to talk about Caricom and the Revised Treaty of Chaguaramas (RTC) that makes provision for the establishment of the Caricom Single Market and Economy. As you know, my training is in law and ideally, a learned presentation on the essence of the CSME should be made by a political economist or someone whose training is in international trade. Actually, in order to get

such a perspective, the late and very distinguished Professor Norman Girvan delivered a lecture to Caribbean judges in September 2013. It was one of the last public lectures he gave before his untimely and very tragic death in early 2014. The region lost then an irreplaceable icon. In preparing for this presentation I looked again at Professor Girvan's lecture notes and throughout my presentation I shall generously draw on his opinions which, as usual, were so prescient.

To understand the origins of the RTC it would be helpful to retrace briefly a little Caribbean history. Let us go back to the dissolution of the West Indies Federation. That federation was an amalgam of 10 English speaking Caribbean colonies – Jamaica, Trinidad and Tobago, Barbados, Grenada, Saint Lucia, Dominica, Antigua, St Vincent and the Grenadines, St Kitts and Nevis and Montserrat. In addition to these territories, Caricom currently embraces within its ranks the countries of Belize, Guyana, The Bahamas and non English speaking Haiti and Suriname. But to return to the origins of Caricom, in 1962 after the federation was dissolved, each of the ten countries, except Montserrat, eventually proceeded to independence. But, even as they did so, the dream and the inexorable destiny of Caribbean unity has remained. After all, these countries have much in common, arising not just from our geography – islands and territories in or bordering the Caribbean Sea – but we also enjoy a shared history. We have all experienced

the rigours and challenges of slavery and the plantation; of monocrop sugar production; of an exploitative colonial domination. In the process we have been deeply influenced by and schooled in British institutions. All of this has left us in the Anglophone Caribbean with structures of governance that, at independence were similar and for the most part resembled those that are to be found in Britain. We also share habits of thought and a way of life that render us unique.

The smallness (or at least in the case of the relatively large states like Belize and Guyana, the small populations) of these Caribbean states also impels us, naturally, to take advantage of the benefits of functional cooperation and we have done so in important ways to our mutual benefit as can be seen in the UWI, the CDB and of course West Indies cricket.

As the Anglophone Caribbean moved away from colonial control in the 60s and 70s, the leaders of these new states first established CARIFTA and then in 1973 they signed the Treaty of Chaguaramas establishing the Caribbean Community and Common Market. A Caricom secretariat was sited in Guyana and measures were formulated to govern the Common Market. These measures included trade liberalisation among the member states, the fixing of a common external tariff; the right of establishment; and the free movement of capital.

There were serious problems with the 1973 treaty. Some of these problems persist. Firstly, the most significant weakness was that the 1973 treaty rested on purely voluntary acceptance. It had no teeth. There were no mechanisms to ensure that the states honoured the commitments they made. Nothing compelled them to play by the rules they had voluntarily undertaken. Who can forget the memorable lines of the Mighty Chalkdust in his 1986 calypso classic - *Seawater and Sand*: Chalky spoke of Caribbean leaders in these terms:

**And they meeting regularly,
drawing up all kind of treaty
And after they drink their whiskey,
the treaty dead already
At their Heads of Government conference
is mere shop talk and ignorance
Lots of talk
but no action ever commence**

That was how the people of the region, with some justification, regarded the 1973 treaty.

Secondly, and this is a problem that is still current, as noted by Girvan in his lecture, “many member states are highly indebted and the Secretariat and CARICOM institutions are not sufficiently

well resourced to attract and retain the kind of expertise that one would like to see and to do the work that is necessary for them to do. A Secretariat that is under-resourced and over-worked is lacking in effectiveness.”

A third problem which also persists, is that there was no machinery for implementation of decisions taken at the regional level. Some years ago, regional technocrats had proposed that Caricom establish a Panel of Commissioners; “for example, responsible for Trade and Integration; for Social and Human Development; and for International Relations. But Caricom Heads have consistently rejected this idea.” Most leaders are skittish about diluting national sovereignty for the greater good. The result of this is that “In effect each government decides how far, and how fast, a decision is implemented.”

As the 20th century drew to a close it was becoming painfully obvious that the Caribbean needed to deepen the integration process if the region was to cope with the worldwide trend towards globalisation and liberalisation and avoid what one commentator referred to as “the looming threat of marginalization”¹ There was enormous pressure on the region to do so especially as preferences that were historically accorded to our commodities like sugar and bananas were being removed.

¹ Kenneth Hall, Re-Inventing CARICOM - The road to a new Integration, Ian Randle Publishers, 2nd edn.

Caribbean leaders recognised that it was necessary to forge a path forward to deepen the integration movement in a more meaningful manner. They established a West Indian Commission to go through the region to talk with people and politicians, business leaders and trade unions, church leaders and NGOs. The Commission was led by the very distinguished Guyana diplomat, Sir Shridath Ramphal, who had recently excelled in serving two terms as Commonwealth Secretary General.

The Commission's impressive Report, titled TIME FOR ACTION, proposed a serious overhaul of Caricom to encompass not only economic but also political objectives. Some of the recommendations of the Ramphal Commission found their way into the 2001 Revised Treaty of Chaguaramas and the companion Agreement establishing the CCJ.

The pillars upon which Caricom rests

Caricom rests on four principal planks, namely economic integration; foreign policy coordination; functional cooperation and security. Professor Girvan's assessment was that functional cooperation seems to be doing reasonably well. So too, security. As to foreign policy coordination, one only has to look at how, a year or two ago, the region approached the issue of the appointment of a Commonwealth Secretary General from the Caribbean or even

more recently at the region's position on events in Venezuela to appreciate that, regrettably, foreign policy coordination leaves much to be desired. But where there is a really a very serious problem is the economic integration plank.

Objective difficulties that threaten the establishment of the CSME?

Economic integration calls for the creation of both a Single Market and also a Single Economy. The first goal embraces the free movement of capital, goods, labour and services. Manufacturers and service suppliers must be able to invest and provide services freely throughout the region. And workers should be able to move to take advantage of employment opportunities wherever they are available.

The creation of the single market is a work in progress. It is only partly complete at this time. It is probably fully achievable with goodwill and compromise and a robust CCJ. The establishment of a single economy (with uniformity or harmonisation on the full range of commercial and fiscal legislation) is simply a bridge too far and its attainment has been officially put on hold by Caricom.

The RTC provides for freedom of movement and by Article 45 the Member States commit themselves to the goal of free movement of

their nationals within the Community. Although each States has committed itself to the realization of this goal practical problems have arisen in relation to this commitment. Article 46 defines certain categories of skilled labour that are granted the right to move. These include University graduates, media workers, sportspersons, artistes and musicians. As regards these skilled nationals, Girvan pointed to a lack of uniformity in certification practices and procedures and I have seen this operate first hand. There is at least one country I know that refuses to recognise and accept fully the authenticity of Skills Certificates of countries other than from that particular country. So, that country requires persons who acquire certificates from other countries to re-apply for and obtain again certification in that country. I made inquiries of the reason for this and was told that the receiving State could not or would not trust the authenticity of the certification and procedures of the sending State because their experience has been that some persons were able to acquire certification by fraudulent means. Quite apart from this niggling issue, Girvan notes that “there is still no Protocol on the Contingent Rights of skilled nationals; People who accept employment in another member state are not certain if their spouses will be able to work, or if their children have the right to attend the government schools, or if family members have a right to public health services.”

An effective single market would require uniformity across the region in the relevant regulatory environment but there are financial, manpower and other hurdles involved in removing all the restrictions on, for example, the supply of services. Some States have weaker or greater regulations relating to, for example, health and safety standards.

For a regional integration grouping to thrive; the largest and most influential states must show strong leadership and political commitment to the integration process. Compare for example the commitment and role of France and Germany to the European Union. I leave it to you to assess whether there is a similar level of commitment to Caricom always demonstrated by the leading States in Caricom.

What is the role of the Court?

The Court, the CCJ, has been thrown into this fraught vortex. Articles 211 – 222 of the RTC deal with the CCJ, its jurisdiction, the law it applies and the way in which private entities may approach the Court. The Agreement to Establish the Court spells out in greater detail the institutional underpinnings of the Court.

The CCJ is two courts in one. In other words, it has two broad separate jurisdictions – firstly to replace the JCPC as a final court of appeal and secondly to serve the unique purposes of the RTC. Today we are not discussing the appellate jurisdiction. We are concerning ourselves only with the Court as an institutional organ of the Revised Treaty. This latter jurisdiction is properly referred to as the original jurisdiction of the court. Original because that is where you originate your action relating to the Revised Treaty. The court’s jurisdiction is original and final. There is no appeal from a judgment of the court.

In its original jurisdiction the CCJ has been described as the centre-piece of the Revised Treaty. The Court performs at least five critical functions. The first is to interpret and apply the treaty. The RTC is a long and complex document comprising 240 articles. Like all treaties, it is written in a broad and ample style that gives rise to gaps, grey areas, interstices which must be filled in order to render the treaty effective. Such gaps often loom large in importance when a critical dispute arises as one side argues for this interpretation and the other side argues for a different approach. Only the CCJ can give an authoritative interpretation of the treaty. This exclusive role accorded to the CCJ in the interpretation of the treaty ensures that no State may take it upon itself unilaterally to determine how any gaps in it should be filled. To have allowed that would have been a recipe for chaos because each state could then

interpret the treaty in its own fashion invariably resulting in conflicting and inconsistent interpretation.

A second function of the Court is to resolve disputes between States concerning matters that arise under the treaty. I believe we have had only one matter in which a Caricom State came up before the Court against another Caricom State. And even then it was not because one State had sued another but rather a State intervened to support its national who was bringing an action against a defendant state. This was the case of Shanique Myrie where Jamaica intervened in the proceedings to support the action brought by Ms Myrie, its national. It is not expected that States will frequently launch proceedings against each other. States in a Community of States are naturally reluctant to sue each other. Moreover, the RTC contains a raft of alternative measures that can be utilized to produce a non-litigious settlement of a dispute between States.² These measures include good offices³, mediation⁴, entering into consultations⁵, conciliation⁶, arbitration⁷ and third party intervention⁸. While there is no obligation on States first to exhaust these modes of settlement for resolution of their disputes⁹ the likelihood is that they will do and perhaps have been doing just

² See Articles 191 - 210

³ Article 191

⁴ Article 192

⁵ Article 193

⁶ Article 195 - 203

⁷ Articles 204 - 207

⁸ Article 208

⁹ Article 188(4) specifically states that the use of any of these voluntary modes of dispute settlement is “without prejudice to the exclusive and compulsory jurisdiction of the court in the interpretation and application of the treaty...”

that. Further, we must bear in mind that the Court’s original jurisdiction is compulsory in the sense that Member States have submitted in advance to the Court’s jurisdiction by signing and ratifying the Agreement. When, therefore, a State is not playing by the rules to the disadvantage of another State, the mere threat by the disadvantaged State, that it can or will bring proceedings before the CCJ, is usually enough to cause the recalcitrant State to fall in line. And I have seen this happen in relation to airline subsidies.

A third function of the Court is to accept and answer referrals by the national courts of Member States of any question or issue that may arise in proceedings before those courts which involves the interpretation or application of the Treaty. In other words, if someone starts an ordinary action in a domestic court, and in the course of the proceedings an issue arises concerning the interpretation or application of the RTC, the domestic court (which could be a Magistrates Court, the High court, the Appeal court or even the Privy Council), that domestic court is obliged to stay the proceedings and refer the question to the CCJ for an answer. After the CCJ has provided the answer the domestic court must act on the answer which the CCJ provides to the question referred. The Court has not yet received a referral from a domestic court but the “underlying purpose of this referral requirement is to ensure that there is a uniform interpretation of the Treaty

throughout CARICOM and to eliminate the risk of different national courts giving different interpretations of the same provision of the Treaty.”¹⁰ Uniform interpretation promotes legal certainty with regard to the rules governing the CSME. Legal certainty in turn is critical to investor confidence.

Fourthly, the most widely performed function of the Court is to guarantee the treaty rights of ordinary Caricom citizens and companies; that is, to receive complaints from Caricom nationals that their rights under the treaty are being violated by a Member State and to adjudicate those complaints. The treaty has a specific provision – Article 222 – that allows for a person to file an action against a Member State if that State is doing something that has prejudiced a right that should be enjoyed by the person under the treaty. Most of the cases that have come before the Court have fallen into this category. In our very first case a very contentious issue arose in relation to this Article. Can a person sue their own State if the latter is breaching the treaty to the prejudice of its own citizen? This question occasioned heated debate and the Court’s ultimate answer that Yes, you can sue your own State, is regarded in some quarters as being somewhat controversial.

Finally, the Court plays a significant role in ways that are not intrinsic to the RTC but which are important to building trust and

¹⁰ See De la Bastide

confidence and promoting reforms in justice administration throughout the region. The court seeks consciously to develop and adopt effective practices and procedures and assist the courts of the region to strengthen their ability to engage in meaningful judicial reform and enhance justice delivery. The Court has gone about this by, inter alia, radically improving its management information system and working with other judiciaries to enhance their information and communications technology. One of the vehicles being used to accomplish this goal is the establishment of a special-purpose, not-for-profit Barbados corporation - Advance Performance Exponents Inc. (APEX) - to ensure that courts and justice stakeholders across the region have access to special technology and training to strengthen and improve court operations and service delivery. APEX has played a critical role in enabling the e-filing of documents and the efficient management of filed cases. This system was introduced into the Caribbean Court of Justice Registry in December 2016 and it is now in use by practitioners in Belize, Barbados, Guyana and Dominica when they file proceedings with the CCJ. The benefits of the system allow for all filings and other court related documents to be uploaded and submitted online. Lawyers and judges in those States can now have 24/7 access to their files whether from their laptops, tablets or Smart Phones. I can, for example, access all of my files with my Smartphone.

As the highest court in the region, the CCJ and its judges have also been involved in the training of judges and lawyers throughout the Caribbean. Through its education arm, Caribbean Academy for Law and Court Administration (CALCA), the CCJ organizes training for Attorneys and judges throughout the region especially on matters of International and CARICOM law. The Court also provides logistical and technical support to the Caribbean Association of Judicial Officers (CAJO) – a body which has been chaired by myself from the time of its inauguration in 2009 and which promotes the interests of judicial officers in the region. It is therefore an error to think of the CCJ as simply a judicial decision-making body. It is an Institution that seeks to improve the administration of justice in the region in ways that no other court can.

The rights of Caricom Nationals

But let us get back to the RTC and Caricom nationals. Earlier we spoke of the rights of Caricom nationals under the RTC. What are these rights? Where in the treaty are they to be found? In a national Constitution, the Constitution of SVG for example, there is a whole Chapter that sets out the Fundamental Rights of each citizen. The rights are laid out there in the Constitution explicitly for all to see. That is not the case with the RTC. Identification of the rights and benefits of Caricom nationals under the Revised Treaty is by no means a straightforward exercise. For the most

part, the Treaty does not explicitly confer rights. Instead, as the court made clear in the first case that came before it¹¹, many of the rights are to be derived or inferred from correlative obligations imposed upon the Member states. In other words, the treaty imposes a raft of obligations on Member States. Where an obligation is thus imposed, it is capable of yielding a correlative right that enures directly to the benefit of private entities throughout the entire Community.¹² Article 9 of the treaty seeks to guarantee and buttress these correlative rights. Article 9 requires Member States to take all appropriate measures to ensure the carrying out of their treaty obligations.

Examples of the Court's exercise of its jurisdiction

Let us now look at certain rights and see how they have been prosecuted. Article 7 of the treaty imposes on States a general prohibition against discrimination on the ground of nationality alone. This translates to a right of every Caricom citizen not to be discriminated against on grounds of his or her nationality.

We have had a few cases where private entities, i.e. individuals or companies, have complained that they have been discriminated against on the ground of nationality alone. Typically, the complaint has been that a company has been forced to pay a tax that local companies are exempted from paying. Take for example the cases

¹¹ TCL v Guyana

¹² See: Para [32]

of *Rudisa* and *Jaleel* respectively. Rudisa Beverages is a company incorporated in Suriname. This Surinamese company exports bottled drinks to several Caricom States including to Guyana. Guyana enacted local legislation that imposed an environmental tax on all imported non-returnable beverage containers. The effect of this tax was that the cost of each *imported* beverage packaged in a non-returnable container was increased by GUY\$10. The problem here was that the local manufacturers and distributors of non-returnable beverage containers did not have to pay this tax. The tax applied only to imported containers. Since Guyanese companies didn't have to pay the tax, they had a clear competitive advantage over manufacturers from other CARICOM States. Guyana was favouring its own manufacturers and engaging in discriminatory treatment towards other manufacturers. So far as those other manufacturers were Caricom manufacturers Guyana's tax is prohibited by Article 7. Guyana was required to take measures to cease this discriminatory practice but it failed to do so. Rudisa therefore brought an action against Guyana claiming that it had been discriminated against on account of its nationality. Guyana's defence was that it was entitled to protect its environment and the purpose of the tax was to raise funds to do so. The CCJ rejected this defence and ordered Guyana to reimburse Rudisa all the taxes that had been wrongly collected by the Guyanese tax authorities. The total sum amounted to just over US\$6million.

The case of *Jaleel*, which we decided only last week, is to the same effect. The facts were very similar to those in *Rudisa*. *Jaleel* was a Trinidad company that exported bottled drinks to Guyana and they too had been made to pay the Environmental levy. They also instituted proceedings and here too the Court ordered Guyana to return the unlawfully collected taxes to *Jaleel*. In *Jaleel*, Guyana raised two interesting defences. Guyana claimed that they should not be made to repay *Jaleel* because *Jaleel* had passed on the tax to its Guyanese customers and that for the Court to order that *Jaleel* be reimbursed would mean that *Jaleel* would be unjustly enriched. The Court did not accept this passing on defence. The other defence raised by Guyana partially succeeded. *Jaleel* was claiming reimbursement of taxes paid since 2006 when the RTC came into operation. The court said, No. You should have brought your case within 5 years and so you can only get back taxes you paid over the last 5 years.

The Court has also tried cases where companies in the region have alleged that they have been prejudiced as a result of the failure of a Member State to honour the common external tariff. The CET is a vital mechanism of the single market. It is provided for in Article 82 of the treaty. By that Article the Member States agreed to establish a common external tariff in respect of all goods which do not qualify for Community treatment. The Caricom Community's

Council on Trade and Economic Development (or COTED) sets the tariff that must be paid on all goods produced outside the region and which are imported into the Community. So, for example, COTED may take the position that within Caricom, we have producers of cement that can supply the entire region with cement and so it is prudent to discourage the importation into the Community of cement produced outside the Community. COTED would do so by, for example, imposing a 15% tariff on externally manufactured cement. Each Member state would therefore either have to purchase Community produced cement or else pay a 15% tax on any cement they wished to import from, say Mexico or the Dominican Republic.

Trinidad Cement Limited (“TCL”) was a Trinidad company that produced cement. In *T C L v Guyana*, TCL complained that Guyana was not purchasing cement from the Trinidadian company and instead was importing cement from outside the region without levying the 15% tariff on the imported cement. The Court agreed with the company and gave judgment for it, ordering Guyana, in effect, either to purchase cement from TCL or to apply the CET on the cement imported from extra-regional sources.

The same result was achieved in a case brought by another Trinidadian company against Suriname. This company, Hummingbird Rice Mills Ltd, was producing flour and their

exports to Suriname were frustrated because Suriname was importing flour from the Netherlands without imposing the CET. The company instituted proceedings and Suriname was ordered by the Court to cease this practice.

A third line of cases the Court has heard relates to the vexed issue of freedom of movement. Almost all the other cases we had decided were concerned with corporations. This was one of the few that dealt with a private individual. Earlier I alluded to the rights of skilled nationals who can obtain a Caricom skills certificate and enjoy certain rights. But what of un-skilled Community nationals? What about persons who simply wish to travel as tourists within the Community? Are they at the mercy of the arbitrary actions of the receiving State and its local laws? What is the value of a Caricom passport? Most importantly, what is the significance of the Agreement made by Heads of Government in 2007 on free movement? Some of you would have heard about the *Myrie* case.

The background to the case is that in 2007 the Caricom Heads of Government solemnly agreed that all CARICOM nationals should be entitled to an automatic stay of six months upon arrival in each other's State. They declared that this measure was necessary in order to enhance the sense that Caricom nationals belong to, and can move in the Caribbean Community. The enjoyment of this right was subject to the rights of Member States to refuse entry to

undesirable persons and to prevent persons from becoming a charge on public funds.

Shanique Myrie was a young Jamaican lady who arrived in Barbados on a Caribbean Airlines flight on the afternoon of 14 March 2011. At the Grantley Adams Airport she was subjected to insults based on her nationality and a female border official carried out on her an unlawful body cavity search in demeaning conditions. Her luggage was also searched but none of these searches revealed any contraband substances. She was nevertheless detained overnight in a cell at the airport and deported to Jamaica the next day. She filed suit against the State of Barbados and succeeded in obtaining appropriate declarations that her rights had been violated. Barbados was also ordered to pay her a decent sum of money in damages.

The Myrie case is important because it enabled the Court to discuss and pronounce on the rights of ordinary Community nationals and to answer the questions referenced earlier. The Defence put up by Barbados was that the Court had to respect the right of Barbados to apply its domestic laws to persons visiting its shores and under those laws its border officials were within their rights to do as they did. The Court did not agree. If, when there is a binding regional decision, a State could simply invalidate its applicability by pointing to contrary local legislation then the efficacy of the entire

CARICOM regime would be jeopardized. The original jurisdiction of the Court has been established to ensure observance by the Member States of obligations voluntarily undertaken by them at the Community level. Having consented to the creation of a Community obligation, it is the obligation of each State to ensure that its domestic law, at least in its application, reflects and supports Community law.

Earlier this year the Court heard the case of Cabral Douglas from Dominica. Douglas complained that certain Jamaican Dance Hall Artistes were refused entry into Dominica and that the government's refusal to allow them to enter and perform at a concert he had organised had caused him financial loss. The court took the view that even if it were to assume that the dance hall artistes were wrongly refused entry, it was they and not Douglas who should have brought the action. The court therefore held that Douglas had no standing to complain about a supposed wrong done to these artistes.

After 12 years it is surprising that the Court's Original Jurisdiction case load is still as light as it is. In the Appellate Jurisdiction the Court has delivered 140 or so written judgments but we have heard less than a dozen cases and delivered only about 20 judgments in the Original Jurisdiction. The flow of cases that relates to the RTC is sluggish. Why? I can only hazard a few guesses. First of all, many

persons and companies who are prejudiced by the unlawful conduct of a member State still feel constrained to rely on the delinquent government for a host of things - from the expeditious and favourable processing of licenses to direct business opportunities. They prefer therefore to suffer in silence than risk displeasing a government and possibly lose business by bringing legal proceedings against it. We actually had a litigant who said this to us while giving evidence to the Court. He said that there were other actions he could bring but if he did so he believed that spiteful measures would be taken against him.

Secondly, in the Original Jurisdiction the Court applies rules of International Law and the vast majority of lawyers in private practice are not experienced in this area of law. Many of them have never even read the treaty. They are therefore unable or reluctant to advise their clients to institute cases in the Original Jurisdiction.

Thirdly, the vast majority of Caricom nationals are still ignorant about the treaty, about their rights that proceed from it and about the role of the Court in vindicating those rights. Having established the Court in 2005 Caricom, it seems, could not afford to concentrate any more of its slender resources in widespread public education about these matters. In the Court's early years the Court attempted itself to do some of this work. Judges of the Court would go to various member states and conduct public education sessions

about the treaty, the rights of Caricom citizens and the court's role. But when we embarked upon our first strategic plan our stakeholders told us in no uncertain terms that they did not consider it seemly that the judges of the court should be doing this kind of work and so we have cut back considerably on it.

Still, the case of Shanique Myrie and the public spiritedness of a few Jamaican attorneys who were willing to act for her *pro bono* have demonstrated that with courage and an abiding faith in the legal system, it is possible to take on a member state and secure justice.

If you were to ask me what it is I find most significant about the original jurisdiction of the CCJ and the court's role as guardian of the treaty I would say without hesitation that despite the fact that only 4 countries have acceded to the appellate jurisdiction; despite the challenges we experience in securing law and order in the region; despite everything you see and hear about the justice system in the region, what impresses me most is that the governments in the region have demonstrated the utmost respect for the Court and its judgments. After the *Myrie* decision Caricom governments re-examined their protocols relating to admission of entry of Caricom nationals and they made alterations to those protocols to conform with the prescriptions of the Court. The same thing happened when we decided a case brought against Caricom

itself. Every single judgment of the Court has been fully complied with. Guyana revoked the discriminatory feature of its environmental levy; Ms Myrie was paid her damages in full; Suriname imposed the CET on flour from The Netherlands; Guyana reimbursed the Rudisa company.

Now, I have absolutely no doubt that on the occasions that the Court found against these Governments, the latter were not happy about it especially as in each case they had employed lawyers of the highest calibre to stoutly defend the respective suits. Yet, though naturally disappointed, these governments accepted the decisions of the Court and obeyed its orders. All of this says to me that we in the region live in a part of the world where the rule of law is still very much alive and well respected. And that is something we should not take for granted but instead should deeply cherish.

The profound respect the Caricom Governments have shown for the decisions of the Court should really not be surprising. Everyone loves to bash the Government but, in establishing the CCJ the Member States did much to ensure that the Court would be a high quality court. They employed a variety of measures to secure and guarantee both the institutional independence of the CCJ as a corporate entity and the judicial independence of the judges. These measures are unparalleled.¹³ They include the following:

¹³ Notwithstanding these measures, in *Independent Jamaica Council for Human Rights (1998) Ltd and Others v. Marshall-Burnett and Another [2005] UKPC 3* the Judicial Committee of the Privy Council, indicating that it had “no interest of its own in the outcome” of the proceedings

- **Appointment of an independent, broad-based and impartial Regional Judicial and Legal Services Commission (“the RJLSC”) to select the Judges and senior staff of the court¹⁴. No politician sits on this body and in fact, it is representatives of Bar Associations in the region who dominate the membership of the RJLSC;**
- **Recruitment of the President, other judges and senior staff of the court by a competitive, transparent and merit-based system¹⁵;**
- **The financial independence of the court is secured through the unique mechanism of a trust endowed with monies obtained from the Caribbean Development Bank (CDB). These monies were repaid to the CDB by regional States in a manner corresponding to their projected annual percentage contributions to the budget of the CCJ. The obligation to make repayment is premised solely on a State’s ability to access the original jurisdiction of the court. The CCJ is therefore simultaneously guaranteed of its funding while not being required to interface with the Governments of the region on matters relating to the same. As a matter of interest, the current Chairman of the Trust Fund is a Vincentian;**
- **The requirement that the CCJ Agreement is incapable of amendment unless the proposed amendment is ratified by all CARICOM States¹⁶;**
- **The strengthening of the sustainability of the court by introducing stringent measures for any State that wishes to withdraw from the CCJ Agreement. Any such State must give three years’ notice and the withdrawal cannot take effect before the expiry of five years after the notice has been received¹⁷ (Article XXXVII)**

before it, struck down three Bills passed by the Jamaica legislature for the purpose of having civil and criminals appeals from Jamaica determined by the court in its appellate jurisdiction in lieu of those appeals being determined by the Judicial Committee on the ground that there was a risk that the governments of the Contracting States might amend the CCJ Agreement so as to weaken that court’s independence.

¹⁴ See Article V of the CCJ Agreement

¹⁵ The positions are widely advertised and applications are received from individuals from many different Commonwealth States. The Commission ultimately interviews those shortlisted before making the final selection

¹⁶ Article XXXII of the Agreement

¹⁷ Article XXXVII of the Agreement

It is not for me to comment on the quality of the Court's jurisprudence over the last 12 years, but what I can say is that the above measures go a long way to ensure that the court is staffed by competent judicial officers and that decision-making is of a consistent and high standard. Naturally, as with any other court, it is impossible to please all the litigants and other stakeholders of the Court all the time. The CCJ welcomes scholarly criticism of its judgments but, with a few notable exceptions, there is not enough of this from regional Law Institutions, or from Caribbean lawyers and other intellectuals. On the contrary, ever so often I see international journals in which academics from outside the region analyse and critique the jurisprudence of the Court.

Whither the RTC and the Court?

As previously indicated, the idea of establishing a Single Economy among Caricom States may not be realized in the foreseeable future although the Caricom single market remains a work in progress. As long as that is so the CCJ will have its own work cut out to do in interpreting and applying the treaty. But even beyond fulfilling that role, since it also serves as a final appellate court for four States in the region, the CCJ is clearly here to stay. And it is disappointing that the pace at which States accede to the appellate jurisdiction is so slow. There are obvious advantages in the CCJ being the final appellate court and simultaneously also the Court that interprets and applies the RTC. To have one tribunal perform

both functions eliminates the possibility of conflicting decisions between the tribunals performing these separate functions.

In 2003 Lord Hoffman, then one of the more influential judges of the Privy Council, told the Law Association of Trinidad and Tobago: “The CCJ is necessary if Trinidad and Tobago is going to have the full benefits of what a final court can do to maintain democratic values in partnership with the other two branches of Government — the Executive and the Legislative”. The States that have not acceded to the appellate jurisdiction of the Court deprive their citizens of those benefits. Only a tiny fraction of litigants can afford to take their appeals to the Privy council. The current situation is unsustainable and I look forward patiently to the day when SVG and the other Anglophone Caribbean states take their place alongside Barbados, Belize, Dominica and Guyana and broaden access to justice by having the CCJ determine their final appeals. Until that occurs, the Court is committed to fulfilling its mission both as an appellate and a Caricom treaty court without fear or favour.