Law and Business Review of the Americas

Volume 14 | Number 3 Article 5

2008

Constructing a Financial Integration Model for CARICOM: Essential Provisions and Agenda for Reform

C. P. Malcolm

CONSTRUCTING A FINANCIAL INTEGRATION MODEL FOR CARICOM: ESSENTIAL PROVISIONS AND AGENDA FOR REFORM

*C.P. Malcolm**

"The role of the financial system in a developing country is critical to supporting the overall development process."

-Rumu Sarkar[1]

I. INTRODUCTION

THIS article will first examine the regulatory context against which any financial integration model for the Caribbean Community (CARICOM) has to be devised. Second, it will examine the Draft CARICOM Financial Services Agreement (CFSA)[2] to determine whether it provides a sufficient foundation upon which an integrated financial market could be established. This will involve evaluating the CFSA by reference to general principles as well as more detailed provisions in other financial regulatory models. Third, the article will identify the core elements that would have to be considered in preparing drafting instructions (Outline Drafting Instructions) for a proposed and more comprehensive alternative agreement, as well as supporting legislation to establish an Integrated CARICOM Financial Sector (ICFS).[3] The Outline Drafting Instructions should become useful to relevant policymakers and ultimately serve an important role in the overall development process. They will emphasize policy considerations, require outline details that would have to be included in an appropriate financial integration model for CARICOM, and could be easily adapted for implementation under the CARICOM Single Market and Economy (CSME).

---

* Christopher P. Malcolm, LL.B. (University of the West Indies), LL.M. – Banking & Finance, Ph.D. (London), MCIArb. Attorney-at-Law (Jamaica, Dominica, British Virgin Islands, St. Lucia) E-mail: chris@malcolmgordonlaw.com.

1. Rumu Sarkar, DEVELOPMENT LAW AND INTERNATIONAL FINANCE 229 (J.J. Norton ed., Kluwer Law Int'l 1999).
2. *See generally* Second Draft CARICOM Financial Services Agreement (CFSA) dated November 2004; prepared by Economic Intelligence and Policy Unit, CARICOM Secretariat.
3. The Outline Drafting Instructions are located in section VIII of this article - Elements to be Considered in Preparing Drafting Instructions for an Agreement and Supporting Legislation to Establish an Integrated CARICOM Financial Sector [hereinafter Annex].

II. CONTEXT

There are essentially five distinct financial regulatory regimes in the Commonwealth Caribbean: 1) Barbados, 2) Guyana, 3) Jamaica, 4) Trinidad and Tobago, and 5) the Organization of Eastern Caribbean States (OECS). In a jurisdictional sense, however, the OECS arrangement comprises seven independent States under a monetary union: 1) Antigua and Barbuda, 2) the Commonwealth of Dominica, 3) Grenada, 4) Montserrat, 5) St. Christopher (St. Kitts) and Nevis, 6) St. Lucia, and 7) St. Vincent and the Grenadines (the Member States).[4] While each OECS Member State could be considered as a distinct regulatory regime, they have all implemented uniform financial laws, and the Eastern Caribbean Central Bank (ECCB) is their common financial regulator and supervisor.[5]

This paper will consider the financial systems in Jamaica and the OECS. The Jamaican system has undergone recent and fundamental reforms, and the regulatory principles incorporated there could be instructive. The OECS system already involves several Member States of CARICOM and has incorporated principles that could become important in devising a relevant financial integration model. Nevertheless, it is anticipated that before the implementation of any new and comprehensive CARICOM financial model, the policymakers will examine the remaining jurisdictions to ensure that relevant inputs from them are also included.

III. FINANCIAL SYSTEM IN JAMAICA

The regulation of the Jamaican financial sector is carried out by the Bank of Jamaica (BOJ) and the Financial Services Commission (FSC). The BOJ was established under the Bank of Jamaica Act: "To influence the volume and condition of supply of credit so as to promote the fullest expansion in production, trade and employment, consistent with the maintenance of monetary stability in Jamaica . . . [and] to foster the development of money and capital markets in Jamaica and to act as banker to the Government."[6] The BOJ has been authorized to examine "commercial banks and specified [financial] institutions."[7] The FSC was established under section 3 of the Financial Services Commission Act (FSCA). It is responsible for the regulation and supervision of other prescribed financial institutions.[8]

---

4. *See generally* Eastern Caribbean Central Bank Agreement Act, July 5, 1983, *available at* http://www.eccb-centralbank.org/PDF/bank_agreement1983.pdf.
5. *See* Eastern Caribbean Central Bank (ECCB), http://www.eccb-centralbank.org/About/who-we-are.asp
6. *See* Bank of Jamaica Act, 1960, § 5, *available at* http://www.caricomlaw.org/docs/the.%20Bank%20of&20Jamaica%20Act.pdf.
7. *Id.* § 2.
8. *See* Financial Services Commission Act (FSCA), 2001, § 6 (1) (Jam.), *available at* http://www.caricomlaw.org/docs/Financial%20Services%20Commission%20Act.pdf. FSCA, section 2, provides, "[a] 'prescribed financial institution' means an institution or person offering or providing financial services to the public." The definition of "prescribed financial institution" is not very helpful. But section 2

A. Financial Laws

As statutory creatures, the BOJ and FSC derive their authority under relevant legislation. Such legislation includes: the Banking Act, the Financial Institutions Act, the Building Societies Act, the Insurance Act, the Securities Act, and the Unit Trusts Act.

1. Banking Act

Section 2 (1) of the Banking Act provides that "[a] 'bank' means any company licensed under this Act to carry on banking business."[9] Banks are supervised by the BOJ through the Department of Supervision of Banks and Financial Institutions (DSBFI).[10] This authority is under section 29 (1), which provides that "[t]he Bank of Jamaica is responsible for the supervision of banks."[11]

The BOJ has extensive supervisory authority under Part IX of the Banking Act. The BOJ shall, at least once in each year, examine the affairs of each bank to ensure that the provisions of the Banking Act are being complied with and that the bank is in a sound financial position.[12] It also has wide powers of inspection under the provisions of the Banking Act. These provisions require the BOJ to ensure that banking procedures are adequate for protection of depositors and shareholders.[13]

2. Financial Institutions Act

Section 1 (2) of the Financial Institutions Act (FIA) establishes a category of institutions over which the FIA shall not apply. To carry out the business of deposit taking in Jamaica, a financial institution that is not registered under one of the legislation prescribed in section 1 (2) must be licensed under the FIA.[14] Licensed financial institutions are then subject to supervision under section 29 (1), which provides that "The Bank of

---

also provides that "financial services means services provided or offered in connection with – (a) insurance; (b) the acquisition or disposal of – (i) securities within the meaning of the Securities Act; (ii) units under a registered unit trust scheme within the meaning of the Unit Trust Act; (c) such other services as the Minister may by order declare to be financial services for the purposes of this Act." Although the Act contemplates non-deposit taking institutions, the Minister may by order declare that deposit taking institutions are subject to its operation.

9. *See* Banking Act, 1992, § 2 (1) (Jam.), available at http://www.caricomlaw.org/docs/The%20Banking%20Act.pdf. Section 2(1) defines "banking business" as, "the business of receiving from the public, on current account or deposit account, money which is repayable on demand by cheque or order and which may be invested by way of advances to customers or otherwise; and such business of a like nature as the Minister may, by order, prescribe."
10. *See* Bank of Jamaica Act, § 34A (1).
11. Banking Act, § 29 (1).
12. *See id.* § 29 (2)(c).
13. *Id.* § 30; *see also* § 29A (2)(i).
14. *See* Financial Institutions Act (FIA), Part IX (Jam.), *available at* http://www.caricomlaw.org/docs/Financial%20Institutions%20Act.pdf. The statute includes section 29(1) and is essentially a verbatim reproduction of Part IX of the Banking Act. Under that part of the FIA, the powers conferred on the BOJ are identical to those conferred under Part IX of the Banking Act.

Jamaica is responsible for the supervision of licensees."[15] This is conducted through the DSBFI.[16]

3. *Building Societies Act*

Section 3 of the Building Societies Act states the formal requirements for the establishment of a building society in Jamaica. Although it does not define a building society, section 4 of the Building Societies Act determines the basis on which a Jamaican building society must operate.[17]

The BOJ has not been conferred with supervisory authority under the Building Societies Act. Nevertheless, it has implicit authority to supervise building societies under the Bank of Jamaica (Building Societies) Regulations, 1995. This authority is found in regulations 7 and 10. Further, regulation 12 provides that: "Until a society has complied with regulations 7 and 10 it shall be subject to such conditions to ensure prudent management as the Bank may determine, with the approval of the Minister."[18]

4. *Insurance Act*

Unless a contrary intention is expressed in the Act itself, the Insurance Act applies to all insurance intermediaries and all insurers, whether established in or outside of Jamaica that carry on insurance business in Jamaica.[19] Whereas a specialist insurance supervisor was responsible for supervising insurance entities under the Insurance Act, 1971, the 2001 Act confers regulatory and supervisory authority on the FSC.[20] Since the FSC is responsible for regulation of all non-deposit taking institutions in Jamaica, it cannot therefore be considered as a specialist insurance regulator.

The FSC has been authorized to make regulations for the insurance sector. This is confirmed under section 144 (1) of the Insurance Act, which provides that: "The Commission may, with the approval of the Minister, make regulations providing for such matters as may be necessary or expedient for the purposes of this Act . . . ."[21] In exercise of this power, the FSC has adopted the Insurance Regulations 2001, which describe the procedural requirements for the conduct of business in the

15. *See id.* Section 2(1) defines a "licence" as "a licence granted under this Act".
16. *See* Bank of Jamaica Act, § 34A (1).
17. *See* Building Societies Act, 1997 (Jam.), *available at* http://www.caricomlaw.org/docs/The%20Building%20Societies%20Act.pdf. Section 4 (2)(b) provides, "The rules of every building society shall set forth . . . the purpose to which the funds of the society are to be applied, and the manner in which they are to be invested."
18. *Id.*
19. *See* Insurance Act, 2001 (Jam.), (repealing the Insurance Act, 1971), *available at* http://www.caricomlaw.org/docs/The%20Insurance%20Act.pdf. Section 3 (1) includes a non-exhaustive list of the classes of insurance business covered by the Act.
20. *Id.* Section 4 provides, "The Commission [FSC] shall be responsible for the administration of this Act." Parts II–VIII of the Insurance Act delimit the substantive requirements for the insurance sector and the powers of the FSC.
21. *Id.* § 144 (1).

Jamaican insurance sector.[22]

5. Securities Act

Section 5 (1)(a) of the Securities Act provides: "The functions of the Commission shall be – to regulate the securities industry in accordance with this Act and to ensure that appropriate standards of conduct and performance are maintained in the industry in accordance with this Act on (sic) any rules or regulations made hereunder."[23] For these purposes, "[a] 'Commission' means the Financial Services Commission established under section 3 of the Financial Services Commission Act."[24]

Parts II–VII of the Securities Act establish the powers of the FSC. In particular, section 76 (1)(a) provides: "The Commission may, with the approval of the Minister, make regulations—(a) regulating the issue of and dealings in securities and the records relating thereto."[25] No regulations have been made in exercise of the powers conferred under section 76 of the Securities Act.

The FSC has been conferred with extensive powers of investigation under section 68 of the Securities Act. Further, section 13 of the Act requires the issuer of securities to register with the FSC in a prescribed form. In this role, the FSC has published non-exhaustive guidelines requiring the "issuer [of securities] to provide detailed information about itself to the Commission and to the investing public. These requirements are geared to protect investors by promoting full and fair disclosure of information."[26]

6. Unit Trusts Act

Section 3 of the Unit Trusts (Amendment) Act 2001 provides: "[the] 'Commission' means the Financial Services Commission established under section 3 of the Financial Services Commission Act."[27] The FSC is responsible for general administration of this Act. Under section 28: "[t]he Commission may, with the approval of the Minister, make regulations for the better carrying out of the provisions of this Act . . . ." Section 5 requires the registration of all unit trusts with the FSC and it may impose such disclosure or other requirements as it deems fit for the protection of investors.[28]

---

22. The Insurance Regulations, 2001, are contained in Vol. CXXIV, No. 119 of Dec. 31, 2001.
23. *See* Securities Act, 1993 (Jam.), *amended by* Securities Act, Act 8 of 2001.
24. *Id.* § 2 (1).
25. *Id.* § 76(1)(a).
26. *See generally* FIN. SERV. COMM'N, GUIDELINES FOR ISSUERS OF SECURITIES, *available at* http://www.fscjamaica.org/download_file.php?filename=documents/sections/Guidelines%20to%20Issuers%20of%20Securities.pdf.
27. *See* Unit Trusts Act, 1971 (Jam.), *available at* http://www.caricomlaw.org/docs/Unit%20Trusts%20Act.pdf.
28. *See id.* § 5 (1)(d),(e).

B. INSTITUTIONAL FRAMEWORK

The framework for the regulation and supervision of the Jamaican financial sector includes two recognized regulatory agencies and an oversight body. The recognized regulatory agencies are the BOJ and the FSC and the oversight body is the Financial Regulatory Council (FRC).[29] The FRC has been conferred with the authority to coordinate the regulatory and supervisory activities of the BOJ and the FSC.[30]

The Jamaica Deposit Insurance Corporation (JDIC) was established in 1998.[31] It also serves an integral role in the Jamaican financial sector and has been authorized to maintain deposit insurance for prescribed financial institutions.[32] The JDIC complements the BOJ, which is authorized to regulate deposit taking institutions[33] and the FSC, which is authorized to regulate and supervise non-deposit taking institutions.[34]

1. Financial Services Commission

The FSC was introduced as part of an overall strategy to foster investor confidence and to strengthen the framework for financial regulation in Jamaica.[35] It is based on a novel consolidated approach to financial sector regulation and supervision.[36] Nevertheless, the FSC has not been conferred with the authority to regulate the entire Jamaican financial sector. This is anomalous because the FSC was a response to regulatory failures and subsequent financial sector collapse in Jamaica during the 1990s and reasons given for its establishment favor a single regulator.[37]

The General Duties and Powers of the FSC are set out in sections 6-9 of the Financial Services Commission Act. Section 6 (1)(a) states that it has been established for "the purpose of protecting customers of financial

29. The FRC was established in 2000 and is chaired by the Governor of the BOJ or his nominee.
30. *Id.*
31. *See* Deposit Insurance Act, 1998, § 3 (1) (Jam.), *available at* http://www.caricomlaw.org/docs/The%20Deposit%20Insurance%20Act.pdf.
32. *Id.* § 2 (1).
33. *See* Bank of Jamaica Act, 34A (1).
34. *See* Financial Services Commission Act, § 2 (1).
35. *See generally* Kenneth Rattray, Chairman, Fin. Sector Adjustment Co., Remarks on FINSAC's 2001 Annual Report, *available at* http://www.finsac.com/publications/report2001/index.html.
36. *See generally* Celia Blake, *Under One Roof: Integrated Regulator for Non-Deposit Taking Financial Institutions in Jamaica*, 6 Caribbean. L. Bull. 1 (2002). The approach is considered novel, not in a general sense, but because it is new to the Commonwealth Caribbean.
37. *Id.*; *see generally* Brian Wynter, Submission To The Committee Debates On The Financial Bills (Nov. 9, 2000), *available at* Gordon House, Kingston, Jam.; *see also* Gayon Hosin, Div. Chief, Bank of Jam., Speech Delivered at the Banking on Safety Seminars at Kingston, Jam.:Regulatory Convergence – A Must for Financial Sector Safety, (July 22, 1999) *available at* http://www.jdic.org/egulatory covenrgence.htm. . The reasons stated by Hosin are also reflected in the submission of Wynter to the Committee Debates. According to Wynter, "[the FSC] would present an opportunity to create common standards and importantly, it would facilitate the reduction of duplication caused by many different regulators imposing separate standards on - in some cases – a single entity."

services[38] the Commission shall supervise and regulate prescribed financial institutions."[39]

2. *Bank of Jamaica*

Section 34F (1) of the Bank of Jamaica Act provides: "[t]he Minister may, in accordance with the recommendations of the Bank, make regulations prescribing prudential criteria and minimum solvency standards to be complied with by commercial banks and specified financial institutions."[40] The relevant institutions would have been established under specific legislation governing the legal and policy parameters for their licensing, supervision, and operation. The principal legislative acts are the Bank of Jamaica Act, the Banking Act, the Financial Institutions Act, and the Building Societies Act.[41] The BOJ also relies on the Bank of Jamaica (Building Societies) Regulations, 1995 and the Banking (Capital Base) Regulations, 1997.[42]

3. *Jamaica Deposit Insurance Corporation*

The Jamaica Deposit Insurance Corporation (JDIC) was established under section 3 (1) of the Deposit Insurance Act 1998. Part II of the Act establishes the objects and functions of the JDIC. The JDIC is there authorized to establish and manage a deposit insurance scheme for protection of deposits[43] with prescribed financial institutions.[44] It is also required to monitor the affairs of these prescribed financial institutions.[45]

The JDIC has been authorized to share financial and other information with the BOJ and the FSC.[46] By this mechanism, the JDIC could be con-

38. *See* Financial Services Commission Act, § 2. Under the act, "financial services" are "services provided or offered in connection with – (a) insurance; (b) the acquisition or disposal of – (i) securities within the meaning of the Securities Act; (ii) units under a registered unit trust scheme within the meaning of the Unit Trusts Act; (c) such other services as the Minister may by order declare to be financial services for the purposes of this Act."
39. *Id.* A "prescribed financial institution" is "an institution or person offering or providing financial services to the public."
40. *See* Bank of Jamaica Act. Section 34F (2) includes a non-exhaustive list of regulations that may be made under section 34F (1).
41. *Id.; see also* Banking Act; Financial Institutions Act; and Building Societies Act.
42. *See generally* Bank of Jamaica, Legislation, *available at* http://www.boj.org.jm/supervised_legislation.php.
43. *See* Deposit Insurance Act. Section 2 (1) provides a definition for "deposit" that is similar to the definition in the Banking Act, the Financial Institutions Act and the Bank Of Jamaica (Building Societies) Regulations, 1995. An "insured deposit" under section 18 of the Deposit Insurance Act is a maximum of J$300,000 per depositor per institution.
44. *Id.* Section 2 (1) defines a "financial institution" as "(a) a bank licensed under the Banking Act or a financial institution licensed under the Financial Institutions Act; (b) a building society licensed under the Building Societies Act; or (c) subject to subsection (3), any other person or undertaking whose business includes the accepting of deposits and who has been declared by the Minister under section 2 of the Bank of Jamaica Act to be a specified financial institution."
45. *Id.* § 5.
46. *Id.* § 7.

sidered to have a critical and complementary role in the regulation and supervision of the Jamaican financial sector.

4. Financial Regulatory Council

The Financial Regulatory Council (FRC) was established under a Memorandum of Understanding (MOU).[47] The FRC is:

> A high level inter-regulatory agency which was established in 2000 with the mandate to develop policies and strategies to facilitate greater co-ordination and information sharing between (sic) the various supervisory agencies operating in the Jamaican financial sector. . . . The MOU addresses issues including information sharing, lead regulator and the conduct of co-ordinated examinations for dually licensed entities.[48]

The FRC provides a mechanism through which the distinct regulatory agencies are able to coordinate their activities.[49] It also enables the ongoing participation of central government in the regulation and supervision of the entire Jamaican financial sector.[50] While this would not have been intended, the FRC could conceivably be considered to be a single or umbrella financial regulator for Jamaica with the BOJ and FSC as its agents.

C. Overview of a Financial Crisis

Prior to the 1970s, the Jamaican financial sector was dominated by foreign banks and insurance companies. Local investment in the sector was limited and there was significant reliance on self regulation. Relevant standards were determined by individual institutions and applied on the bases agreed in their home country.[51]

During the 1960s and 1970s, in particular, many of the foreign banks and other financial institutions then operating in Jamaica were nationalized.[52] There was also a global oil crisis in the 1970s that resulted in dramatic increases in the cost to Jamaica of imported goods and services. This led to an economic crisis and the commencement of a borrowing

47. *See generally* Bank of Jamaica Act; Banking Act; Financial Institutions Act; and Building Societies Act.
48. *Id.*
49. *See* Bank of Jamaica Act, § 34D; *see also* Financial Services Commission Act, § 16; Deposit Insurance Act, § 7. Those sections authorize regulatory coordination and information sharing. *See also* Banking Act, *supra* note 9, at § 45; Financial Institutions Act, *supra* note 14, at § 44; Bank of Jamaica (Building Societies) Regulations, 1995 reg. 44.
50. The Financial Secretary, the chief civil servant in the Ministry of Finance and Planning, is represented at the FRC.
51. *See* Fin. Sector Adjustment Co. (FINSAC), Annual Report: Historical Background (1998) *available at* http://www.finsac.com/publications/annualreport98/historicalbackground.htm [hereinafter FINSAC Annual Report].
52. By the end of the 1970s Jamaica's largest commercial bank was the National Commercial Bank (NCB) (formerly Barclays Bank D.C.O.). NCB was wholly owned by the Jamaican Government. The Jamaica Citizens Bank (JCB), which was a casualty of the financial sector crisis of the 1990s, was, by then, wholly owned by Jamaican private investors.

relationship with the International Monetary Fund (IMF) and the World Bank.[53]

By the mid-1980s, Jamaica's external debt burden became even more unmanageable and external support from the IMF and the World Bank increased.[54] By then, there had been a paradigm shift in the approach adopted by the IMF and World Bank under what became known as "the Washington Consensus". This required commitment to privatization and liberalization.[55] The IMF and World Bank reinforced this policy by "encouraging" borrower members to privatize state owned entities and liberalize their economies.[56]

The Jamaican financial sector responded favorably to this policy, and new institutions mushroomed during the 1980s and 1990s.[57] But, their growth in the 1980s and 1990s was unsustainable, and during the latter part of the 1990s, underlying weaknesses were exposed and the sector suffered a financial crisis. While there is no single factor which explains the crisis, the sequence of liberalization in the Jamaican financial sector has been identified as one of its fundamental causes.[58]

Under the macro-economic policies adopted at the time, a program of structural reform aimed at fostering private sector activity and increasing the role of market forces in resource allocation was actively pursued.[59] In 1991, for example, the government led a more-structured and well-defined macro-economic liberalization program. This program was aimed specifically at the financial sector. It required removing exchange controls, floating the exchange rate, and removing restrictions on foreign investment.[60]

Within one year of its introduction, the 1991 program resulted in a 156 percent depreciation of the Jamaican dollar against its U.S. counterpart and inflation spiraled to 80 percent. A tight monetary policy was introduced, and it resulted in a dramatic and unprecedented rise in interest

53. *See generally* Linton Kwesi Johnson, *Jamaica Uncovered*, GUARDIAN, Feb. 28, *2003, available at* http://arts.guardian.co.uk/fridayreview/story/0,,904020,00.html [hereinafter Jamaica Uncovered].

54. *See generally* ECONOMIC OVERVIEW: THE JAMAICAN ECONOMY, Fiscal Year 1 April 2001 - 31 March 2002 http://www.emjamusa.org/economy.htm (visited December 2005) [hereinafter Jamaican Economy].

55. *See generally* Sarkar, *supra* note 1, at p. 28 note 9. The author quotes David Trubeck, who wrote: "The Washington consensus is a term often used to refer to the dominant paradigm in development thinking among Bretton Woods institutions [i.e., the World Bank and the IMF]. This approach is radically different from development thinking in the 1960s when the law and development idea was first articulated. Then emphasis was placed on central planning, state enterprise and inwardly oriented import substitution industrialization. The Washington consensus, on the other hand, promotes markets as allocative institutions, favours privatization and promotes closer linkages to the global economy."

56. *See generally* Jamaican Economy, *supra* note 54.

57. *See generally* NLR Johnson, *Big Growth in Financial Sector's Operations, Daily Gleaner*, Oct. 18, 2002, *available at* http://www.jamaica-gleaner.com/gleaner/20021018/business/business7.html.

58. *See generally* Jamaican Economy, *supra* note 54.

59. *Id.*

60. *Id.*

rates. Under the monetary policy employed, the cash reserve ratio was increased by the BOJ, bank loan rates mushroomed to over 50 percent, and penalty rates were as high as 100 percent. Many borrowers were subsequently unable to service their debt obligations.[61]

The 1991 program also resulted in deregulation of the price of most consumer goods and services. Deregulation led to a dramatic increase in the price of goods and services, and inflationary pressures resulted in large wage increases. Increases in prices and wages were followed by unmanageable increases in administrative expenses in the financial sector, and this increase in administrative expenses was exacerbated by limited variety of investment vehicles.[62]

Among the limited investment vehicles, real estate was most attractive and it became the preferred hedge for financial institutions. With increased investment in real estate, prices escalated during the early 1990s. Investment in that sector, including direct investment by financial institutions, showed remarkable growth. But, by the mid-1990s the asset/liability mismatch of financial institutions worsened as they used short-term customer deposits for long-term real estate investments.[63] The situation was untenable, and detailed evaluations have shown that this problem also contributed significantly to the Jamaican financial sector crisis of the 1990s.[64]

Although the Jamaican financial sector relied on self-regulation by mature and established financial institutions up to and even after independence in 1962,[65] it did not suffer a real financial crisis before the 1990s.[66] But, the framework for its regulation and supervision was weak and this manifested in limited levels of entry and monitoring control.[67] Formal regulation of the whole securities industry, for example, only began in 1993 with enactment of the Jamaican Securities Act.[68]

By 1993, a complex structure had developed involving unregulated party related transactions among financial and non-financial institutions.[69] Against this background, the financial sector appeared buoyant between 1993 and 1996 and grew from $92.4 billion to $197.8 billion, an

61. *Id.*
62. *Id.*
63. *See generally* FINSAC Annual Report, *supra* note 51. The report identified an "over-exposure to real estate lending or acquisition" as a fundamental weakness in the Jamaican financial sector. The basic assumption is that the over-exposure to real estate resulted in an asset/liability mismatch that led to systemic failure and consequential crisis.
64. *Id.*
65. *Id.*
66. *Id.*
67. *See generally* Omar Davies, The Jamaican Economy After Consolidation of the Financial Sector Portfolios, Lecture Presented at the Management Institute for National Development (MIND) (1999), *available at* http://www.mof.gov.jm/news/1999/lecture.shtml.
68. *See generally* Blake, *supra* note 36.
69. *See generally* FINSAC,Annual Report *supra* note 51.

increase of 114 percent.[70] Much of this growth had resulted from unsafe and connected lending. After the phenomenal growth of 1993 to 1996, there was a downslide followed by a severe crisis—the repercussions of which are still being felt in the Jamaican economy.[71]

Subsequent analysis has determined that prior to the financial sector crisis of the 1990s the regulation and supervision of the Jamaican financial sector was compartmentalized and inadequate.[72] Where it existed, regulation and supervision was on an institutional basis. The BOJ had been conferred with legal authority to regulate and supervise the banking system.[73] This was done through the DSBFI, which had been established in the 1960s. Unfortunately, its terms of reference remained unchanged until after the financial sector crisis of the 1990s, and gaps which had developed were exploited by banks and other financial institutions.[74]

The analysis also reveals that during the 1990s, Jamaican banks were involved in high risk lending and investment activities.[75] These risks included:

> Inadequate credit and investment assessment and monitoring; [e]xcessive credit concentration; [i]nadequate portfolio diversification; [o]ver-exposure to real estate lending or acquisition; [h]igh levels of non-performing assets; [m]ismatch of assets and liabilities maturity dates; [e]xcessive related party exposure including inappropriate connected lending; [n]on-compliance with internal control procedures; and [n]on-compliance with effective risk management principles.[76]

Another risk was excessive diversification away from core business lending.

In several cases, insurance companies owned or controlled banks, or vice versa. This close relationship led to imprudent practices of loan provision to insurance companies. Banks also moved beyond core business

---

70. *See generally* Johnson, *supra* note 57.
71. *See generally* PLANNING INST. OF JAM. KINGSTON, ECONOMIC AND SOCIAL SURVEY JAMAICA 2001, Chap. 7 (2002).
72. There was, for example, no clear structure for regulation and supervision of building societies.
73. As supervisor of banks and other financial institutions, the BOJ only had access to those institutions that were licensed to take deposits. But, the BOJ could not supervise holding companies that controlled deposit-taking institutions, and this loophole was exploited.
74. *See generally* FINSAC Annual Report, *supra* note 51. The gaps that developed included an anomalous situation: where prior to 1995, building societies were largely autonomous, and neither the Ministry of Finance nor the BOJ had legal authority to regulate and supervise them. This anomaly was exploited. Those entities were often used to hive off non-performing loans, and questionable deals were undertaken through them. *See generally* Davies., *supra* note 67. The Minister underscored that gaps included the non-regulation of financial holding companies.
75. *See generally* WORLD BANK, JAMAICA – SECOND BANK RESTRUCTURING AND DEBT MANAGEMENT PROGRAM, *available at* http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20072415~menuPK:51062078~pagePK:34370~piPK:4607,00.html [hereinafter World Bank Report].
76. *See generally* FINSAC Annual Report, *supra* note 51.

and placed excessive confidence in the real estate market.[77] This market collapsed in the mid-1990s, and its collapse then contributed to a crisis in the banking sector.[78]

During the 1990s, the Jamaican insurance sector was subject to limited regulation and supervision. Prior to 2001,[79] it was regulated by the Office of the Superintendent of Insurance, which was established under the Jamaica Insurance Act, 1971. The Office of the Superintendent of Insurance's regulation and supervision were weak and the only meaningful enforcement measures available to the superintendent were the winding-up and judicial management options under section 36 of the Insurance Act, 1971.[80] In the aftermath of the crisis, the Office of the Superintendent of Insurance was criticized for its unimpressive supervisory record.[81]

Liberalization, however, had created a high returns investment environment in the Jamaican financial sector. As a result, insurance companies were plagued by extremely low overall returns on investments, high surrender rates due to the deposit-like nature of the new insurance products, high levels of commission for new business, little or no incentives for renewal business, high levels of expenses significantly above international industry norms, highly-leveraged operations, and difficulty in meeting solvency standards.[82] They also became heavily involved in the real estate market,[83] and the real estate market's collapse resulted in a solvency and liquidity crisis for them.[84]

Although the Jamaican securities sector had been relatively small, it also sought to benefit from liberalization. After liberalization and prior to the establishment of the Securities Commission,[85] securities brokers, investment advisors, and other persons involved in the securities sector, effectively operated in an unregulated environment.[86] Securities dealers were then able to offer non-traditional products and services to their customers.[87]

While they offered essential banking services,[88] securities dealers were not subject to banking or any other form of regulation or supervision.[89] During the 1990s, the securities sector benefited from its expanded business conduct and experienced an unprecedented level of growth.[90] But,

77. *Id.*
78. *Id.* The crisis in the banking sector was contagious, and it contributed to an overall crisis in the Jamaican financial sector.
79. The insurance sector is now regulated under the provisions of the Insurance Act, 2001.
80. *See generally* Blake, *supra* note 36.
81. *Id.*
82. *See generally* FINSAC Annual Report, *supra* note 51.
83. *See generally* Davies, *supra* note 67.
84. *See generally* FINSAC Annual Report, *supra* note 51.
85. The Securities Commission was established under the Securities Act, 1993.
86. *See generally* Davies, *supra* note 67
87. *See generally* Hosin, *supra* note 37.
88. *Id.*
89. *See generally* Blake, *supra* note 36.
90. *See generally* PLANNING INST. OF JAM. KINGSTON, *supra* note 71.

the securities sector was interconnected with banking and insurance, and problems in those sectors had a negative impact on the securities sector.[91]

The problems that led to the Jamaican financial crisis of the 1990s have been well documented, and there are important lessons to be learned. The most important lesson is that prudent conduct by service providers, as well as by consumers, is required for financial stability. The next most important lesson is that an appropriate regulatory and supervisory regime is essential. Since the crisis, Jamaica has introduced significant reforms in the financial sector. Jamaica has now established a better financial system than existed before the crisis of the 1990s, and the lessons derived would be invaluable in any attempt to create an appropriate financial model for CARICOM.

IV. FINANCIAL SYSTEM IN THE OECS

The financial system in the OECS is supported by necessary provisions in the Treaty of Basseterre. The Treaty requires the OECS "to promote economic integration among the Member States through the provisions of the Agreement Establishing the East Caribbean Common Market."[92] The OECS must then "pursue the said purposes through its respective institutions by discussion of questions of common concern and by agreement and common action."[93]

The Treaty also requires that Member States shall "co-ordinate, harmonise and pursue joint policies particularly in the fields of . . . Currency and Central Banking."[94]

On July 5, 1983, the Governments of Antigua and Barbuda, the Commonwealth of Dominica, Grenada, Montserrat, St. Christopher (St. Kitts) and Nevis, St. Lucia, and St. Vincent and the Grenadines (the Participating Governments) agreed to establish a "Common Central Bank" (ECCB). Their agreement was based on a desire "to maintain a common currency and to establish a Common Central Bank with powers to issue and manage that currency, to safeguard its international value, to promote monetary stability and a sound financial structure and to further the economic development of the territories of the Participating Governments."[95]

The ECCB, since established, has been conferred with authority to "regulate banking business on behalf of and in collaboration with Participating Governments."[96]

In addition to the regulation of banking business, the purposes of the

91. *See generally* Hosin, *supra* note 37.
92. *See* Treaty Establishing the Organisation of Eastern Caribbean States (Treaty of Basseterre), art. 3 (1)(e), June 18, 1981, 1338 U.N.T.S. 97, *available at* http://untreaty.org/unts/60001_120000/11/27/00021345.pdf.
93. *Id.* art. 3 (1)(f).
94. *Id.* art. 3 (2)(i).
95. *See generally* Eastern Caribbean Central Bank Agreement Act, 1983, pmbl.
96. *Id.* art. 3 (2)(e).

ECCB include: "regulat[ing] the availability of money and credit;"[97] "promot[ion] and maint[enance of]monetary stability;"[98] "promot[ion of] credit and exchange conditions and a sound financial structure conducive to the balanced growth and development of the economies of the territories of the Participating Governments;"[99] and active promotion "through means consistent with its other objectives the economic development of the territories of the Participating Governments."[100]

A. ECCB AGREEMENT ACT

The ECCB Agreement Act was agreed at Port of Spain on July 5, 1983. The Participating Governments have since enacted the ECCB Agreement Act as their domestic legislation and generic references to the Act should therefore be understood as applicable law in Member States, where it has full force and legal effect.[101]

The central feature of the ECCB Agreement Act is the establishment of the ECCB.[102] The Act specifically replaced the pre-existing Eastern Caribbean Currency Authority (ECCA), which had been established under the Eastern Caribbean Currency Agreement, 1965. The ECCA was abolished on entry into force of the ECCB Agreement Act and upon establishment of the ECCB.[103] The Eastern Caribbean Currency Agreement and all amendments thereto also ceased to exist and terminated on establishment of the ECCB.[104]

In addition to the purposes set out under article 4, a 1993 amendment conferred special emergency powers to the ECCB.[105] These concern: prescribed financial institutions, their agents, their affiliates, their holding companies and subsidiaries, and their directors and officers.[106]

The special emergency powers authorize the ECCB: "to investigate the affairs of . . . financial institution[s and their affiliates] . . . and to appoint a person . . . for that purpose;"[107] "assume control of and carry on the affairs of . . . financial institution[s] and . . . to take over property and undertakings of the institution[s];"[108] take appropriate steps "to protect the interests, and to preserve the rights of depositors and creditors of . . .

97. *Id.* art. 4 (1).
98. *Id.* art. 4 (2).
99. *Id.* art. 4 (3).
100. *Id.* art. 4 (4).
101. *Id.* art 5 (4). While current membership is limited to territories listed in the preamble, article 56 of the ECCB Agreement Act enables membership of other territories. But admittance to such membership is subject to the discretion of the council and a two-thirds majority vote of the total number of its members.
102. *See id.* art. 3. The ECCB must do business it accordance with the ECCB Agreement Act's terms.
103. *Id.* art. 54 (3).
104. *Id.* art. 54 (4).
105. *Id.* pt. IIA.
106. *Id.* art. 5A (1).
107. *Id.* art. 5B (1)(c)(i).
108. *Id.* art. 5B (1)(c)(ii).

financial institution[s];"[109] "restructure the business or undertaking of . . . financial institution[s] or reconstruct [their] capital base;"[110] provide financial assistance to financial institutions, so as to prevent a collapse;[111] acquire property and assets of financial institutions for sale or other dealing;[112] appoint persons to assist in its emergency functions;[113] and stipulate prudential criteria for financial institutions and ensure compliance.[114]

Article 5B (1)(c) provides that the ECCB shall exercise its powers if it is of the opinion that: the interests of depositors or creditors are threatened,[115] a financial institution is unlikely to meet its payment or other obligations,[116] or a financial institution is not compliant with sound prudential standards.[117] As a safeguard, it must be satisfied "that the financial system of any of the territories of Participating Governments is in danger of disruption, substantial damage, injury or impairment as a result of the circumstances giving rise to the exercise of such powers."[118]

The special powers shall be implemented in accordance with provisions of the ECCB Agreement Act.[119] This requires that the ECCB shall:

> publish in the Gazette and in such newspapers as it thinks appropriate, in the territory where it proposes to exercise such powers a notification to that effect.[120] The [specified] notification must state - (a) the property and undertaking that the Bank proposes to take over; (b) the powers of control that the Bank proposes to exercise, and shall give such particulars as the Bank considers necessary for the information of persons having business dealings with the financial institution.[121]

These special powers can be considered as evidencing an unequivocal commitment by Member States to the proper management and control of the OECS financial system without undue political interference.

Other parts of the ECCB Agreement Act deal with: "General Reserve Fund and Profits;"[122] "Administration and Management;"[123] "Currency;"[124] "External Reserve;"[125] "Foreign Exchange Operations;"[126] "Relations with Financial Institutions;"[127] "Relations with the Participat-

109. *Id.* art. 5B (1)(c)(iii).
110. *Id.* art. 5B (1)(c)(iv).
111. *Id.* art. 5B (1)(c)(v).
112. *Id.* art. 5B (1)(c)(vi).
113. *Id.* art. 5B (1)(c)(vii).
114. *Id.* art. 5B (1)(c)(viii).
115. *Id.* art. 5B (1)(a).
116. *Id.* art. 5B (1)(b).
117. *Id.* art. 5B (1)(c).
118. *Id.* art. 5B (2).
119. *Id.* arts. 5B (3)–5E (4).
120. *Id.* rt. 5C (1).
121. *Id.* art. 5C (2).
122. *Id.* pt. III.
123. *Id.* pt. IV.
124. *Id.* pt. V.
125. *Id.* pt. VI.
126. *Id.* pt. VII.
127. *Id.* pt. VIII.

ing Governments;"[128] "Accounts and Statements;"[129] "Immunities, Privileges and Arbitration of Disputes;"[130] and "Withdrawal and Termination."[131] These provisions are also critical to the proper management and control of the OECS financial system.

The Administration and Management provisions, for example, require the establishment of a "Monetary Council."[132] It "shall meet not less than twice each year to receive from the Governor the Bank's report on monetary and credit conditions and to provide directives and guidelines on matters of monetary and credit policy . . . ."[133] Decisions of the council on monetary and credit policy are binding on the ECCB.[134] But, the ECCB has direct input in policy construction through a board in which its powers are vested.[135] The board is comprised of the governor, the deputy governor and one director appointed by each Participating Government.[136] The board is empowered to make, alter, or revoke regulations, notices, and orders.[137]

The currency provisions entrench the Eastern Caribbean Dollar as the monetary unit of the Participating Governments.[138] The ECCB has the sole right to issue currency notes and coins in the territories of the Participating Governments[139] and it "shall on the recommendation of the Board approved by a decision of the Council, both such recommendation and decision having been adopted unanimously by all their members declare the external value for the Eastern Caribbean Dollar . . . ."[140] This provision is critical to the central role of the ECCB in monetary policy.

The ECCB is lender of last resort[141] and may prescribe and maintain reserve and security holdings.[142] This role is complemented by an inspection and compliance function.[143]

The ECCB is also the depository of the external assets of the Participating Governments.[144] In this role, the ECCB determines gold and foreign currency rates[145] and may take steps, in the interest of Participating Governments, "to prevent disorderly conditions in the foreign exchange markets . . . ."[146] The ECCB may also open accounts for and accept de-

128. *Id.* pt. IX.
129. *Id.* pt. XI.
130. *Id.* pt. XII.
131. *Id.* pt. XIII.
132. *Id.* art. 7 (1).
133. *Id.* art. 7 (2).
134. *Id.* art. 7 (6).
135. *Id.* art. 8 (1).
136. *Id.* art. 8 (3).
137. *Id.* art. 8 (2).
138. *Id.* art. 17 (1).
139. *Id.* art. 18 (1).
140. *Id.* art. 17 (2).
141. *Id.* art. 31.
142. *Id.* art. 33.
143. *Id.* art. 35.
144. *Id.* art. 25 (1).
145. *Id.* art. 28 (1).
146. *Id.* art. 28 (3).

posits from financial institutions doing business in the territories of Participating Governments.[147]

Consistent economic policy requires close collaboration between fiscal and monetary affairs. With this in mind, the Participating Governments have made the ECCB their banker, fiscal agent, and advisor on monetary and financial matters.[148] In these roles, the ECCB shall inform and advise the Council and Participating Governments concerning any matter that will likely affect its purposes[149] and may also represent any Participating Government at external conferences.[150]

As banker, the ECCB may "make temporary advances to . . . Participating Government[s]";[151] "purchase, sell, discount and rediscount treasury bills . . . of the Participating Government[s], payable in Eastern Caribbean Dollars . . . maturing within ninety-one days of . . . acquisition";[152] "purchase and sell publicly issued securities (other than treasury bills) of or guaranteed by . . . Participating Governments payable in Eastern Caribbean Dollars" that mature within fifteen years of acquisition;[153] invest in securities of Participating Governments;[154] and "purchase and sell bonds of any Corporation established under the authority of . . . Participating . . . Governments for the express purpose of financing development within the territory," provided express conditions are satisfied.[155]

As an agent, the ECCB shall administer law and regulation relating to exchange control,[156] as well as "monitor the operations of offshore financial institutions."[157] This authority complements the ECCB's role as banker in that it enables direct contact with the offshore sector. While it has to date been treated as special, prudence would suggest that the offshore sector should be within general oversight by the ECCB as it constitutes an important economic component within the financial sector.

The ECCB has been conferred with special status, immunities, and privileges in the territories of the Participating Governments.[158] Where there are disputes, these shall be resolved under an established procedure requiring arbitration by a tribunal appointed in a prescribed manner.[159] Participating Governments may withdraw in a prescribed manner,[160] and the council may terminate its operations "by resolution adopted by a two-thirds majority of all its members . . . ."[161]

147. *Id.* art. 30.
148. *Id.* art. 37 (1).
149. *Id.* art. 37 (3).
150. *Id.* art. 37 (4).
151. *Id.* art. 40 (1)(a).
152. *Id.* art. 40 (1)(b).
153. *Id.* art. 40 (1)(c).
154. *Id.* art. 40 (1)(d).
155. *Id.* art. 40 (1)(e).
156. *Id.* art. 41 (1).
157. *Id.* art. 41 (2).
158. *Id.* art. 50.
159. *Id.* art. 51.
160. *Id.* art. 52.
161. *Id.* art. 53.

B. Uniform Banking Act

The banking acts across the OECS Monetary Union derive from "An Act to Provide for Regulating Banking Business in the ECCB Territories."[162] Collectively these banking acts are referred to as the Uniform Banking Act (the Banking Act). Domestic legislation to adopt the Uniform Banking Act was enacted between 1988 and 1992. Since then, a platform has been set for full harmonization of banking business in the OECS.[163]

The Uniform Banking Act provides that a bank is "any financial institution whose operations include acceptance of deposits subject to the transfer by the depositor by cheque."[164] A "'financial institution' includes any person doing banking business and all offices and branches of a financial institution in [a given territory] shall be deemed to be one financial institution."[165] Banking has been defined as:

> The business of receiving funds through -
> (i) the acceptance of monetary deposits which are repayable on demand or after notice or any similar operation;
> (ii) the sale or placement of bonds, certificates, notes or other securities and the use of such funds, either in whole or in part, for loans or investment for the risk of the customer; and includes – any other activity recognised by the Central Bank as banking practice and which a financial institution may additionally be authorised to do.[166]

As central banker,[167] the ECCB has responsibility for the granting and renewing of licenses;[168] establishing and maintaining financial requirements and limitations;[169] examining information required to be provided by financial institutions;[170] advising the minister of finance in matters relating to business liquidation, business reorganization, or the appointment of a receiver;[171] and upon request, investigating and reporting on proposed transfers of a banking business.[172] While ultimate authority in the application of the Act is vested in the relevant Minister of Finance,[173] the ECCB has unfettered authority to examine banking activities.[174]

The audit, information and inspection provisions of the Uniform Bank-

---

162. *See* Banking Act: An Act to Provide for Regulating Banking Business in the ECCB Territories, E. Caribbean Cent. Bank Territories, 1988-1992.
163. *See generally* Eastern Caribbean Central Bank (ECCB), http://www.eccb-centralbank.org.
164. Banking Act, § 2 .
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* pt. I.
169. *Id.* pt. II.
170. *Id.* pt. III.
171. *Id.* pt. V.
172. *Id.* pt. VII.
173. *Id.* pt. I. Section 3(1) provides: "A person shall not carry on banking business . . . [in a given territory] without a licence granted by the Minister."
174. *Id.* pt. III.

ing Act[175] have significant implications for financial harmonization in the OECS. These provisions require an annual audit to be conducted and, if requested, the auditor to "report and publish financial statements and results";[176] periodic and snap examinations of financial institutions;[177] "[d]isclosure and access to books and records;"[178] corrective or other measures to prevent unlawful or unsound business conduct;[179] the production of certain information required by the ECCB;[180] and forbearance from misleading advertising practices.[181] By reference to these and other provisions in the Act,[182] the ECCB obtains essential information to assess the performance of the financial system and to make informed policy decisions.[183]

Complemented by the ECCB Agreement Act, the Uniform Banking Act has entrenched, as a matter of policy and legislative record, an unfettered regulatory and supervisory role for the ECCB.[184] As a result, the OECS financial system has been enhanced—with the ultimate objective being the establishment of harmonized laws consistent with the best international practices. The OECS policy is also geared to the adoption of a single regulatory and supervisory unit for financial services in Member States.[185] While this latter objective has not yet been attained, from this discussion it can be concluded that there are already significant levels of harmonization in the OECS banking sector.

C. SECURITIES ACT

Money and capital markets have a central role in the financial sector. They enable better risk pooling and risk sharing opportunities that enhance the resilience of economies and make them less vulnerable to financial crises.[186] While there are distinctions between how capital and money markets operate, they can both be considered as being within the securities sub-sector of the financial market.[187]

---

175. *Id.*
176. *Id.* § 19.
177. *Id.* § 20.
178. *Id.* § 21.
179. *Id.* § 22.
180. *Id.* § 23.
181. *Id.* § 24.
182. *Id.* § 33. Under section 33, the ECCB is conferred with authority to recommend financial regulations. These affect: (1) content of reports and other information required of financial institutions; (2) content of records, returns, and reports; and (3) character and timeframe for provision of reports and returns.
183. *See generally* ECCB, *supra* note 163.
184. *See generally* Banking Act, pt. III.
185. *See generally* ECCB, *supra* note 163.
186. *See generally* COMM. OF WISE MEN, FINAL REPORT OF THE COMMITTEE OF WISE MEN ON THE REGULATION OF THE EUROPEAN SECURITIES MARKET (Feb. 15, 2001), *available at* http://www.cesr-eu.org (follow "Documents" hyperlink; then search for "Lamfalussy Report".
187. *Id.*; *see generally* George A. Walker, Capital Reform, Financial Services and Single Markets: A Regulatory Overview (May 2, 2006), (unpublished paper presented at the second Biennial International Conference on Business, Banking & Finance at the University of The West Indies, St. Augustine, Trinidad).

Securities include: share and stocks in the share capital of a company; indebtedness evidenced by debentures, debenture stock, loan stock bonds, and notes; government bonds and other instruments; options to subscribe for shares or debt securities; options to acquire or dispose of any security; and units in collective investment schemes.[188] But the following are not considered securities under the OECS Securities Act: bills of exchange, treasury bills with original short term maturity dates, promissory notes with short term maturity dates, and certificates of deposits issued by licensed financial institutions.[189]

Securities are usually traded on a formal exchange. Under the Securities Act, a securities exchange has been determined to be "a market, exchange, place or facility which provides for bringing together on a regular basis purchasers and sellers of securities, and sets of rules for the execution of securities transactions or for the negotiation or conclusion of sales and purchases of securities . . . ."[190] An over-the-counter exchange (OTC) or alternative trading platform (ATP), relying on the internet or an intranet mechanism, is not prohibited and would therefore qualify as an exchange.

Nevertheless, any exchange within the OECS would have to include adequate facilities for the conduct of business,[191] enable competition among at least three members,[192] ensure that business is conducted in an orderly manner and have the capacity to protect investors,[193] satisfy established regulatory and compliance requirements,[194] and enable a closing out of the position of a member who is unable to satisfy market contracts.[195]

Capital market development in the OECS can be traced to the early 1990s. During that period:

> [T]he Monetary Council of the Eastern Caribbean Central Bank (ECCB) mandated the Bank to proceed with the activation of Article 4(3) of the Agreement, which . . . [required it] . . . 'to promote credit and exchange conditions and a sound financial structure conducive to the balanced growth and development of the economies of the territories of the participating Governments.'"[196]

Significant steps have since been taken to develop and integrate the monetary and capital markets of the OECS. These steps have included the enactment of the Securities Act and the opening of the Eastern Car-

188. *See* Securities Act, 2001, § 2.
189. *Id.* Short-term treasury bills are those with original maturity of less than 90 days. Short-term promissory notes are notes for less than 275 days.
190. *Id.* § 2.
191. *Id.* § 10(2)(b).
192. *Id.* § 10(2)(c).
193. *Id.* § 10(2)(d).
194. *Id.* § 10(2)(e).
195. *Id.* § 10(2)(f).
196. ECCB, Money and Capital Markets, http://www.eccb-centralbank.org/Money/index.asp.

ibbean Securities Exchange Limited (ESCE) in October 2001.[197]

While it is usually referred to as the Securities Act, without qualification, the long title for the 2001 Act is: "An Act to provide for the protection of investors in securities through regional Eastern Caribbean Securities Regulatory Commission, by regulating the securities market, exchanges and persons engaged in securities business, and by regulating the public issue of securities and to provide for related matters."[198] Although this title emphasizes the regulatory scope of the Securities Act, its detailed provisions indicate much more comprehensive scope and coverage.[199]

The Eastern Caribbean Securities Regulatory Commission (ECSRC) could be considered to be the most critical feature of the Securities Act.[200] The ECSRC was established under the Agreement Establishing the Eastern Caribbean Securities Regulatory Commission of November 24, 2000 (the Agreement).[201] The primary objective of the ECSRC is to ensure that the market operates safely and soundly.[202]

The ECSRC has been established as a legal body vested with all the powers and characteristics of a body corporate having perpetual succession and a common seal.[203] It is required to: "Promote the development of and to provide for the regulation of a regional securities market in the territories of the Participating Governments and to establish the Eastern Caribbean Securities Regulatory Commission (ECSRC) as an independent and autonomous regional regulatory body."[204] The ECSRC is also required to grant licenses to persons engaged in the securities business, monitor and supervise the conduct of such business by licensees, and promote the growth and development of the capital markets.[205]

In addition, the ECSRC shall do all things incidental to the attainment of its prescribed purposes.[206] It must therefore support the operation of an orderly, fair, and properly informed securities market as well as regulate the manner of trading and the range of securities traded.[207]

The Securities Act established a commission (the ECSRC) and the ECSRC Agreement provides for the commission's composition;[208] how the commission's chairperson, deputy chairperson and secretary shall be appointed;[209] the terms of office of the chairperson, deputy chairperson,

197. *Id.*
198. *See* Securities Act, 2001.
199. *Id.*
200. *Id.* sched. art. 3.
201. *Id.* § 2.
202. *See generally* Eastern Caribbean Securities Regulatory Commission (ECSRC), http://www.ecsrc.com/about.php (last visited June. 2, 2008.
203. *Securities Act,* , § 3; *see also* Securities Act, sched., art 3.
204. *See* Securities Act, sched., pmbl.
205. *Id.,* sched., art 4.
206. *Id.* art. 5.
207. *Id.* art. 6.
208. *Id.* art. 12.
209. *Id.* art. 13.

and other commissioners;[210] the manner of vacation of and removal from office of commissioners;[211] and notice, quorum, and other particulars for meetings.[212] The ECSRC Agreement has also conferred administrative capacity on the commission;[213] dealt with financial arrangements, such as funding audits and accounts;[214] enabled the commission to make rules concerning "any . . . matter relating to the organisation, procedure, administration or practice of the Commission;"[215] established a procedure for settlement of disputes;[216] and accorded certain immunities and privileges to it.[217]

The Securities Act has been enacted in all the territories of the OECS.[218] This was done as part of an initiative of the Financial and Enterprise Development Department (FEDD) of the ECCB—a special unit with the mandate to develop and integrate the money and capital markets of the OECS into a single financial space. The FEDD has also been responsible for other integration and harmonization initiatives. These have included establishment of the Eastern Caribbean Home Mortgage Bank, the Regional Government Securities Market, the Eastern Caribbean Enterprise Fund, the Eastern Caribbean Unit Trust, the Interbank Market, and the Eastern Caribbean Institute of Banking and Financial Services.[219]

V. DRAFT AGREEMENT

The draft CARICOM Financial Services Agreement (CFSA) has a Preamble, forty articles and three appendices. The CFSA's articles include provisions concerning: Scope and Coverage;[220] Market Access for Financial Institutions;[221] Intraregional Trade in Financial Services;[222] Cross-Border Supervision of Transnational Financial Corporations and Conglomerates;[223] New Financial Services;[224] Prudential Carve Out/Requirements;[225] Mergers and Acquisitions in the Financial Services Sector;[226] Corporate Governance;[227] Transparency;[228] and Settlement of Dis-

210. *Id.* art. 15.
211. *Id.* art. 16.
212. *Id.* art. 17.
213. *Id.* art. 18.
214. *Id.* pt. IV.
215. *Id.* art. 31.
216. *Id.* art. 33.
217. *Id.* art. 34.
218. *See* ECSRC, *supra* note 202.
219. ECCB, Money and Capital Markets, *supra* note 196.
220. *See* CFSA, *supra* note 2, art. 2.
221. *Id.* art. 3.
222. *Id.* art. 4.
223. *Id.* art. 5.
224. *Id.* art. 7.
225. *Id.* art. 11.
226. *Id.* art. 17.
227. *Id.* art. 19.
228. *Id.* art. 22.

putes.[229] The Appendices determine the nature of: Banking Services;[230] Services of a Financial Nature;[231] and Investments.[232]

The CFSA has not clearly established its objectives under any of its articles. Nevertheless, the preamble provides some guidance as to what would have been intended. Under the CFSA, the parties recognize that "[l]iberalisation, globalisation and the CARICOM Single Market and Economy (CSME) have intensified both international and regional competition the production and delivery of financial services."[233] They are conscious that "Member States of the Caribbean Community are increasingly open to penetration by financial services providers from both intentional and regional sources."[234] And acknowledge that: "The development and application of harmonised regional standards in the financial services sector are essential for the efficient operation of the CARICOM Single Market and Economy and, in particular, the provision of financial services in the Caribbean Community."[235] They are also conscious that: "The formulation and application of internationally accepted standards and best practices on a regional basis would enhance the international competitiveness of the financial services sector within the CARICOM Single Market and Economy and assist the regional institutions in the provision of financial services worldwide."[236] And have been convinced that: "The execution of a Financial Services Agreement would facilitate intra regional operations and improve the delivery of financial services within the Caribbean Community."[237]

These "objectives" articulate the importance of the financial sector to the CSME as well as the need for the implementation of internationally accepted financial standards and best practices. They do not, however, explicitly or otherwise support the establishment of an integrated regional financial market. Indeed, the parties have apparently not been convinced that the CFSA would assist such an undertaking.

While the CFSA could, without more, be considered an unreliable foundation for financial market integration, the analysis here will nevertheless emphasize some of the CFSA's essential provisions and, by extension, seek to determine the CFSA's substantive value "as a means of safeguarding and promoting development of the financial services sector in the Caribbean Community."[238] This process will also help to clarify whether there is need for an alternative CARICOM Financial Integration Model.

---

229. *Id.* art. 23.
230. *Id.* app. I.
231. *Id.* app. II.
232. *Id.* app. III.
233. *Id.* pmbl. ¶ 1.
234. *Id.* ¶ 2.
235. *Id.* ¶. 4.
236. *Id.* ¶ 5.
237. *Id.* ¶ 6.
238. *Id.* ¶ 3.

A. Scope and Coverage

The CFSA is intended to affect:

Measures adopted or maintained by a State relating to:

(a) a financial institution of another State;
(b) a financial activity from another State;
(c) a financial transaction of a participant, in a financial institution in the territory of another State;
(d) cross-border trade in financial services;
(e) the supervision of a financial institution; and
(f) a contingent right.[239]

It is not, however, intended to affect:

Measures adopted or maintained by a State relating to:

(a) activities or a financial service forming part of a public retirement plan or statutory system social security;
(b) government procurement;
(c) activities conducted a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies; and
(d) any other activity conducted by public entity for the account or with the guarantee or using the financial resources of Government.[240]

Article 1 defines a "financial institution" as including "[a]ny financial intermediary or other enterprise that is authorised to do banking or financial business and regulated or supervised as a financial institution under the law of the State in whose territory it is located."[241] And a "financial service" is "any service of a financial nature listed in Appendix II."[242] These have been determined to be certain established activities when performed by a finance house or finance company, credit union, merchant bank, mortgage institution, trust company, unit trust, credit card business, financial services, and insurance and insurance related services.[243]

While "trade in financial services" could have been understood to mean participation in an established activity through the class of institutions determined in Appendix II, the term has nevertheless been defined to mean:

The supply of a financial service through the following modes:

(a) from the territory of a State into the territory of other State;
(b) in the territory of a State to the financial service consumer of another State;
(c) by a financial service supplier of a State, through the commercial presence in the territory of another State;

---

239. *Id.* art. 2 (1).
240. *Id.* art. 2 (2).
241. *Id.* art. 1.
242. *Id.*
243. *Id.* app. II.

(d) by a financial service supplier of a State, through the presence of a natural person of a State in the territory of another State.[244]

The CFSA has not determined what constitutes "cross-border" or a "contingent right" over which it is intended to apply.

Curiously, the CFSA will not affect the cross-border supply of banking services. This conclusion is derived because the relevant provision applies to financial services as defined in Appendix II and banking services are covered under Appendix I.[245] This lacuna is unfortunate for two main reasons. First, coverage for banking appears to have been intended.[246] Second, there has already been significant cross-border merger and acquisition activity as well as consequential trade in banking products and services within CARICOM.[247]

In the preamble, the CFSA states that the parties acknowledge the need to develop and apply regional standards in the financial sector. But, the intended scope of the CFSA does not require harmonized regulations for trade in financial services by nationals within their own territory.[248] It would nevertheless apply to the supervision of domestic service providers.[249] But, on point of fact, supervision is an administrative function that is ordinarily supported by regulations.[250] The CFSA cannot therefore be relied upon as a foundation for the attainment of common regional standards.

B. MARKET ACCESS

The securing of the cross-border market access of intra-regional financial service suppliers is one of the most important components of any regional arrangement. Under the CFSA:

A State shall accord a financial service and a financial service supplier of another State treatment no less favourable than that provided for under the terms, limitations and conditions specified in Chapter Three of the Treaty in areas where market-access commitments are undertaken, as set out in Articles 32-40 of the Treaty.[251]

This provision, like every other under the CFSA, would have been designed with the idea of collective sovereignty in mind. Therefore, the right of the individual state to protect its own domain is paramount.

244.
245. *Id.* art. 2(1)(d).
246. *See generally id.* art. 1. A "financial institution" is defined to include banks and appendix I sets out what are "banking services.")
247. *See generally* Eleanor Brown, *The CSME and the Integration of Financial Services*, *in* PRODUCTION INTEGRATION IN CARICOM: From Theory to Action 176-77 (Denis Benn & Kenneth Hall eds., 2006).
248. *See* CFSA, *supra* note 2, annex art. 1 (defining "trade in financial services").
249. *Id.* art. 2 (1)(e); *see also* id. art. 1, (defining "State" as a "Member State of the Community").
250. For a discussion as to the nature and function of supervision and how it relates to regulation, see generally GEORGE A. WALKER, INTERNATIONAL BANKING REGULATION: LAW, POLICY AND PRACTICE, note 1 (Kluwer Law Int'l 2001).
251. CFSA, *supra* note 2.

Subject to treaty exceptions, articles 32-40 require: that no new restrictions on the right of establishment are introduced;[252] the removal of existing restrictions on the rights of establishment;[253] that the removal of restrictions are managed in accordance with an established schedule of priorities;[254] the establishment of common standards and measures for accreditation or the mutual recognition of diplomas, certificates and other evidence of qualification;[255] that no new restrictions are introduced on the provision of services;[256] that discriminatory restrictions on the provision of services are abolished;[257] that discriminatory restrictions on banking, insurance and other financial services are removed;[258] that no new restrictions on movement of capital and current transactions are introduced;[259] and that existing restrictions movement of capital and current transactions are removed on an established schedule.[260]

In addition, the CFSA also prohibits a state from adopting or maintaining any measure that imposes numerical or other established limitations on financial service suppliers,[261] restricts or requires the use of specific investment vehicles,[262] or restricts the participation of foreign capital.[263]

While these requirements would benefit the intra-regional or cross-border supply of financial services, they have nevertheless been devised under an agreement that does not require the establishment of an integrated financial market. The requirements could therefore be considered to have created an inappropriate foundation for the attainment of such an objective. This gap is emphasized further because the CFSA lacks sufficient or required details for implementation.

C. INTRA-REGIONAL TRADE

An appropriate regime for the cross-border trade in financial services would be an important component of any regional arrangement. This regime should be designed to secure market access and control based upon transparent, non-discriminatory, and rules-based criteria. Nevertheless, without a full financial integration model, necessary measures or conditions will have to be introduced to protect national interests on prudential or other basis.[264]

252. *See generally* Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the Caricom Single Market and Economy, art. 32, July 4, 1973, available at http://www.caricom.org/jsp/Community/revised_treaty-text.pdf [hereinafter Revised Treaty].
253. *Id.* art. 33.
254. *Id.* art. 34.
255. *Id.* art. 35.
256. *Id.* art. 36.
257. *Id.* art. 37.
258. *Id.* art. 38.
259. *Id.* art. 39.
260. *Id.* art. 40.
261. *See* CFSA, *supra* note 2, art. 3 (3)(a).
262. *Id.* art. 3 (3) (b).
263. *Id.* art. 3 (3) (c).
264. *Id.* arts. 4 (3)-(6).

Although significant financial activities involving the state are not affected by the CFSA,[265] their capacity to supply cross-border financial services has nevertheless been protected.[266] This protection appears to be outside the scope and intended coverage of the CFSA.[267] Other suppliers are also protected and:

> A State may not adopt measures restricting any type of intra regional trade in financial services by a regional financial service provider of another State that the State permits on the date of entry into force of this Agreement, except as set out in Article 43 of the Treaty in relation to the imposition of restrictions to safeguard the balance of payments or to address external financial difficulties or any threat thereof.[268]

While these provisions are critical, they have been included under an agreement that requires the establishment of an integrated, regional financial market. It could therefore be considered inappropriate for the attainment of such an objective. This inadequacy is further compounded as the CFSA does not provide sufficient or required details for implementation.

D. Cross-Border Supervision

The cross-border supervision of intra regional financial service suppliers is critical. The CFSA requires that a state shall establish the necessary legal framework to ensure that: a home supervisor or home regulator is able to fully assess the operations of a financial institution for soundness;[269] a home supervisor or regulator is able to verify the accuracy of information received and that there is no regulatory or supervisory gap;[270] information may be shared with relevant authorities in another State;[271] and information is provided in accordance with established law or under prior agreement.[272]

These requirements establish general guidelines without including sufficient details to secure the implementation of common standards. Without an intervention to achieve this, the CFSA would have to be considered an inadequate basis for an integrated, regional financial market where participants are able to function across borders on common standards.

---

265. *Id.* art. 2 (2).
266. *Id.* art. 4 (1).
267. *Id.* art. 2. Article 1 provides that a public entity would not qualify as a "financial service supplier." While the term "public entity" does not include the state, it is clear that the state would not qualify as a "financial service supplier."
268. *Id.* art. 4 (5).
269. *Id.* art. 5 (a).
270. *Id.* art. 5 (b).
271. *Id.* art. 5 (c).
272. *Id.* art. 5 (d).

E. New Financial Services

A new financial service would be "a service of a financial nature, including services related to existing and new products or the manner in which a product is delivered."[273] Regarding these services, a state shall permit a financial service supplier from another State, which is established in its territory, to offer them—unless this would require the enactment of new law or the modification of existing law.[274] Nevertheless, the host State may determine the legal form through which such service is to be provided and may require authorization.[275] Authorization shall, however, be provided within a reasonable time, and refusal must be for prudential reasons or in the public interest.[276]

Under article seven, cross-border financial service suppliers would be able to exploit existing law as a basis for the introduction of unavailable products and services with a legitimate expectation that the required permits will be granted. But, the proviso—refused for prudential purposes or in the public interest—could be considered a state-held a trump card for the protection of domestic service suppliers and could be used to justify unintended grounds for refusal. Nevertheless, a similar proviso would likely appear in any financial services model for CARICOM that does not require financial integration.[277]

F. Prudential Requirements

The prudential requirements of the CFSA have been devised so that Member States may adopt or maintain reasonable measures for:

> (a) the protection of an investor, depositor, financial market participant, policyholder, or person to whom a fiduciary duty is owed by a financial services supplier;
> (b) the maintenance of the safety, soundness, integrity or financial responsibility of a financial service supplier; and
> (c) ensuring the integrity and stability of the financial system of a State.[278]

Member States would have significant discretion in determining what measures to apply. Nevertheless, they shall not use non-conforming measures to avoid their commitments or obligations under the CFSA.[279]

---

273. *Id.* art. 1.
274. *Id.* art. 7 (1).
275. *Id.* art. 7 (2).
276. *Id.* art. 7 (3).
277. Financial integration represents one aspect of the larger economic integration process. More specifically, financial integration, as used in this article, refers to the integration of the main financial sectors on a region-wide basis , the further approximation or harmonization of financial laws, the free movement of capital and cross-border establishment of financial businesses, and the creation in other areas of monetary and economic policy. *See generally* Willem Molle, The Economics of European Integration: Theory, Practice, and Policy (5th ed. 2006).
278. *See* CFSA, *supra* note 2, art. 11 (1).
279. *Id.* art. 11 (2).

While these requirements are important, they have been devised under an agreement that does not require the establishment of an integrated financial market. The CFSA also lacks sufficient or required implementing rules and is therefore an inadequate framework to achieve its desired objectives.

G. MERGERS AND ACQUISITION

Mergers and acquisitions have been considered to be important efficiency promoting and regional competitiveness strategies.[280] Therefore, a state shall permit intra-regional mergers and acquisitions in its territory from intra-regional entities in accordance with the Treaty and provisions of its domestic laws.[281] The state shall also "ensure that appropriate rules exist [to] address any intraregional hostile takeovers."[282]

While these provisions are critical, the CFSA should have gone further to determine the required content for adoption or, in the alternative, provided clear guidelines as to what would have to be included in functional rules when devised by Member States. Without this approach, uneven rules can be developed that would undermine any attempt to establish harmonized regional standards for mergers and acquisitions in the financial sector.

H. CORPORATE GOVERNANCE

The inclusion of an appropriate regime to secure the proper governance of financial institutions is an important component of any financial regulatory model. Under the CFSA, a state shall ensure that:

> (a) a supervisory authority takes steps to enable [gatekeepers] (for example accountants, auditors, lawyers) to maintain the highest level of professional conduct and that their functions are executed with honesty, integrity and impartiality;
> (b) a financial supervisory authority sets the guidelines and codes of conduct including measures to avoid conflict of interests, for the financial institution and related parties; and
> (c) a financial institution conducts its affairs with the highest level of prudence and integrity to maintain stability in the financial system.[283]

While these requirements are significant, they have not established sufficient details of a regional standard that would have to be included in relevant regulations or the basis on which supervisors should act. Uneven standards could therefore develop and inhibit the establishment of an integrated regional financial market.

---

280. *Id.* art. 17 (1).
281. *Id.*
282. *Id.* art. 17 (2).
283. *Id.* art. 19.

I. TRANSPARENCY

The transparent application of relevant regulatory standards and practices are an important function under the CFSA.[284] To achieve this, a state must ensure that sufficient and timely information is provided to intra-regional service suppliers. A state, for example, shall: "To the extent practicable, publish in advance any regulations general application relating to the financial services sector that it proposes to adopt to facilitate access of a financial institution and financial service supplier, and their operations in a State."[285] A state shall also: "Ensure that the regulatory authority in its State exercise its function in an expeditious manner and make available to any interested person the requirements for compliance with its domestic laws, including any documentation required for completing applications relating supply of financial services."[286]

These requirements establish general guidelines but do not include sufficient or required implementing details. Therefore, even if it could be said that the CFSA is committed to transparency in principle, it could still be argued that it is an unreliable basis on which to establish an integrated regional financial market supported by common and transparent standards.

J. DISPUTE SETTLEMENT

Disputes under the CFSA shall be settled in accordance with Chapter Nine of the Revised Treaty.[287] It can therefore be concluded that relevant proceedings have to be brought by a state and must concern the interpretation and application of the CFSA where there are:

> (a) allegations that an actual or proposed measure of another Member State is, or would be, inconsistent with the objectives of the Community;
> (b) allegations of injury, serious prejudice suffered or likely to be suffered, nullification or impairment of benefits expected from the establishment and operation of the CMSE [CARICOM Single Market and Economy];
> (c) allegations that [a relevant person or authority] has acted *ultra vires*; or
> (d) allegations that the purpose or the object of the [CFSA] is being frustrated or prejudiced.[288]

As provided under the Revised Treaty, disputes shall be settled by recourse to "good offices, mediation, consultations, conciliation, arbitration and adjudication."[289] Nevertheless, the applicability of any of these modes is subject to the provisions of the CFSA.[290] The CFSA requires,

284. *Id.* art. 22.
285. *Id.* art. 22 (1) (a).
286. *Id.* art. 22 (1) (b).
287. *Id.* art. 23 (1).
288. *See* Revised Treaty, *supra* note 252, art. 187.
289. *Id.* art. 188.
290. *See* Annex, *supra* note 3, art. 23 (1).

for example, that: "Upon initiation of a consultation, a State shall provide information to enable the examination of how a measure of that State or any other matter may affect the operation and application of the Agreement, and give confidential treatment of the information exchanged during any consultation."[291] If a dispute is not resolved within a prescribed number of days after the holding of a consultation, the aggrieved state may request in writing the establishment of an arbitration panel.[292] This latter procedure would proceed on the basis established under the CFSA.[293]

The dispute settlement regime reflects that the CFSA may be more concerned with maintaining good state relations at the governmental level than securing the effective market participation of individuals. This is a curious position since the CFSA is intended to regulate the cross-border supply of financial services by non-state entities.[294] It can therefore be argued that these persons are likely to be most affected by the application of the CFSA and should be able to access its dispute settlement regime by individual action.[295]

VI. OUTLINE DRAFTING INSTRUCTIONS

The CFSA has been considered to have included inadequate details and therefore offers limited guidance to policymakers and other interested persons. With this mind, since the CFSA was not intended to provide support for financial market integration, it is necessary to suggest that an alternative financial model should be devised for CARICOM.

This section will examine required details that would have to be included in an appropriate model to achieve the integration of the CARICOM financial sector. The required details include: Objectives, Authorization, Regulation, Supervision, Central Bank, Enforcement, Implementation, and Ongoing Review and Corrective Adjustment provisions. Proposed Outline Drafting Instructions for an Integrated CARICOM Financial Sector (ICFS) have been appended to this article.[296]

---

291. *Id.* art. 23 (2).
292. *Id.* art. 23 (4).
293. *Id.* art. 23 (5) – (10).
294. *Supra* s A (1).
295. According rights to individual persons under an interstate agreement is a normal Bilateral Investment Treaties' (BITs) practice. This is also a feature of the International Center for Settlement of Investment Disputes (ICSID) Agreement.
296. Annex, *supra* note 3. The Outline Drafting Instructions have been constructed with assistance from Caryle-Anne (Carla) Herbert, who is a legislative drafter and law reform specialist. Herbert has over thirty years of law reform and drafting experience and has been based in Trinidad and Tobago for over twenty years. She has been involved in specialist projects for government agencies in Antigua and Barbuda, Australia, Barbados, Belize, British Virgin Islands, Commonwealth of Dominica, Grenada, Jamaica, Saint Lucia, and Trinidad and Tobago. She has also performed assignments on behalf of the Commonwealth Secretariat, the Caribbean Centre for Development Administration (CARICAD), the Caribbean Development Bank (CDB), the Commonwealth Fund for Technical Co-operation

A. OBJECTIVES

The objectives of a financial integration model for CARICOM must include: establishing a reliable regional framework for the financial system and the integration process more generally; securing the elimination of unnecessary bureaucratic and other barriers to the cross-border provision of financial services; promoting market confidence, public awareness, and consumer protection; and reducing financial crime. The objectives must also include assuring effective implementation and enforcement of agreed and consequential measures and requiring ongoing sector review and corrective adjustments when necessary.

1. Regional Framework

Macro-economic stability is a prerequisite for financial sector stability.[297] Consequently, any regional framework for the financial sector must have the capacity to generate economic growth and reduce the possibility of unnecessary risks that could result from operational limitations in the financial system.[298] This is a key objective and should be assured through detailed provisions in the regulatory and supervisory aspects of any proposed new CARICOM model.[299]

2. Bureaucratic and Other Barriers

Unnecessary bureaucratic or other barriers to the cross-border provision of financial services, as well as free movement, could complicate, if not undermine, the establishment of an integrated financial market. With this in mind, the proposed new model will have to include the elimination of such barriers as an important objective.[300]

3. Market Confidence

An objective of any financial model is the maintenance of market confidence in the financial system.[301] The need for confidence is of utmost importance in relation to the securities sector. Relevant rules and operat-

---

(CFTC), the United Kingdom Department for International Development, (DFID), the United Nations Development Programme (UNDP), the United States Agency for International Development (USAID) and the OECS. Herbert has also been an Associate Tutor in legislative drafting at the Hugh Wooding Law School.

297. *See generally* World Bank Report, *supra* note 75; Ruth de Krivoy, *The Venezuelan Banking Crisis*, *in* FINANCIAL CRISES IN THE 1990s 151 (Douglas Arner et al. eds., 2002).

298. For a general discussion of the importance of the financial sector in this regard, see generally GEORGE A. WALKER, EUROPEAN BANKING LAW: POLICY AND PROGRAMME CONSTRUCTION 6-13 (2007).

299. *See generally* Annex, *supra* note 3.

300. *Id.*

301. *See* Financial Services and Markets Act, 2000, ch. 8, § 3(1), (Eng.), *available at* http://www.opsi.gov.uk/acts/acts2000/ukpga_20000008_en_1 [hereinafter FMSA]. For a discussion of this objective in the context of the U.K. model, see generally MICHAEL BLAIR ET AL., BLACKSTONE'S GUIDE TO THE FINANCIAL SERVICES & MARKETS ACT 2000 25-28 (2001).

ing procedures must then be "fair, efficient and transparent."[302]

Market confidence is an important objective and must be included in the proposed CARICOM model.[303] This approach should incorporate an extended definition to include financial stability as an integral component of market confidence. This approach will also require preserving actual system stability, as well as taking measures that can instill a reasonable expectation of system stability in market participants.[304]

4. *Public Awareness and Consumer Protection*

Public awareness has to be secured by measures that promote "public understanding of the financial system."[305] This includes both "awareness of the benefits and risks associated with different kinds of investment or other financial dealing; and the provision of appropriate information and advice."[306] Consumer protection, on the other hand, generally refers to "securing the appropriate degree of protection for consumers."[307]

These objectives have been considered important for correcting the imbalance of information between producers and consumers of financial services.[308] They are important objectives under the U.K. model[309] and should be adopted for inclusion in the proposed CARICOM model.[310]

5. *Reduction of Financial Crime*

The reduction of financial crime is an increasingly important concern for financial systems.[311] This reduction is a key objective in the United Kingdom, where it means "reducing the extent to which it is possible for a business carried on by a regulated person . . . to be used for a purpose connected with financial crime."[312] A financial crime has then been defined to include "misconduct in, or misuse of information relating to, a financial market . . . ."[313]

The reduction of financial crime is considered to have important links to prudential issues, in particular with the adequacy of systems and controls, as well as money laundering.[314] Reducing financial crime is an im-

302. *Id.*
303. *See generally* Annex, *supra* note 3.
304. For a discussion on the merits of this approach, see generally Walker, Capital Reform, Financial Services and Single Markets, *supra* note 187.
305. *See* FSMA, *supra* note 301, § 4(1).
306. *Id.* § 4(2).
307. *Id.* § 5(1).
308. *See generally* BLAIR, *supra* note 301, at 28-29; Walker, Capital Reform, Financial Services and Single Markets, *supra* note 187.
309. BLAIR, *supra* note 301, at 28-34.
310. *See generally* Annex, *supra* note 3.
311. *See generally* COMMONWEALTH SECRETARIAT, COMBATING MONEY LAUNDERING AND TERRORIST FINANCING: A MODEL OF BEST PRACTICE FOR THE FINANCIAL SECTOR, THE PROFESSIONS AND OTHER DESIGNATED BUSINESSES, chs. 1 & 2 (2nd ed. 2006).
312. *See* FSMA, *supra* note 301, § 6(1).
313. For a definition of "financial crime" in the U.K., see *id.* § 6(3).
314. *See generally* BLAIR, *supra* note 301, at 34.

portant component in attempts to secure public confidence in institutions and the financial system in general.[315] While these conclusions were derived elsewhere, similar considerations would apply in CARICOM and a U.K.-type objective should be adopted for inclusion in the proposed new CARICOM model.

6. *Implementation and Enforcement*

While the harmonization of financial laws is critical, "there is more to creating an integrated financial market than regulatory harmonisation."[316] Policymakers must ensure that once an appropriate financial regime has been established, there is a subsequent shift away from devising legislation to implementation and enforcement.[317] This would need to be supported by a common region-wide culture of supervision.[318]

Although the European Union (EU), for example, has devised various financial laws for region-wide application, in practice there has been an unfortunate lag in implementation.[319] There are significant variances in regulatory culture across the EU, which has been a deterrent to the creation of an integrated financial market.[320] Against this background, Sir Howard Davies, in considering EU particularities, has nevertheless concluded that financial market integration has the capacity to generate significant economic gains.[321]

7. *Ongoing Review and Corrective Adjustments*

While initial model selection is critical, adequate provisions for ongoing review and corrective adjustment, where required, should be considered to be even more important in devising the proposed new CARICOM

315. *Id.*

316. *See generally* Howard Davies, Dir. of the London Sch. of Econ. & Political Sci., Speech Delivered at the Reykjavik, Iceland Conference: The European Single Financial Market - Mirage or Miracle? (Jan. 13, 2005) (transcript available at http://www.lse.ac.uk/collections/meetthedirector/pdf/Iceland%20conference%20revised%2005Jan13.pdf).

317. *Id.*

318. *Id.*

319. In the words of Sir Howard, "there is plenty of legislation in place which has not so far been implemented in practice." *Id. at 9.*

320. *Id.*

321. *Id.*; *see generally* COMM. OF WISE MEN, *supra* note 185; Willem F. Duisenberg, President of the European Cent. Bank, Speech Delivered at "The Single Financial Market: Two Years into EMU" Economics Conference: The Role of Financial Markets for Economic Growth (May 31, 2001) (transcript available at http://www.bis.org/review/r010601b.pdf). For a Caribbean view on the possible benefits of financial integration, see THE CARIBBEAN TRADE AND ADJUSTMENT GROUP, IMPROVING COMPETITIVENESS FOR CARIBBEAN DEVELOPMENT 28 (2001). The report concluded that, with effective financial market integration, "[m]ore cost effective cross-border supply of services should be positively encouraged." *See also* Christopher P. Malcolm, *Financial Harmonisation in the OECS: Implications for Integrated Development in CARICOM*, *in* PRODUCTION INTEGRATION IN CARICOM: From Theory to Action 183 (Denis Benn & Kenneth Hall eds., 2006); Brown, *supra* note 246, at 176.

model.[322]

B. AUTHORIZATION

The authorization (including exemption) provisions of any financial model are intended to establish the basis upon which a person may become involved as a provider of financial services as well as a person's associated rights and obligations.[323] The proposed CARICOM model will have to include relevant provisions to determine how a person may qualify for authorization and how it may end,[324] passport rights for cross-border service providers,[325] and the granting of exemptions.[326] In addition, the new model must also include corollary permission provisions with a distinct application procedure.[327]

These provisions have been adopted from the U.K. model. While this model is not regional, it nevertheless provides some guidance for market integration because the model incorporates EU directives dealing with cross-border service providers,[328] as well as relevant establishment and general service provision treaty rights.[329] The U.K. model has also established threshold conditions related to legal status,[330] the location of offices,[331] close links,[332] adequate resources,[333] suitability,[334] and the protection of consumers.[335] These have been considered appropriate threshold standards and, therefore, should be adopted for inclusion in the proposed CARICOM model.[336]

---

322. *See generally* Annex, *supra* note 3.

323. *See generally* BLAIR, *supra* note 301, at 72.

324. *See generally* Annex, *supra* note 3. For a comparison to the U.K. approach, see FSMA, *supra* note 301, § 31 (setting out the four possible routes to authorization).

325. *See generally* Annex, *supra* note 3; FSMA, *supra* note 301, sched. 3 (giving effect in U.K. law to European single markets in banking, investment services, and insurance). The provisions under the U.K. model are based on a mutual recognition regime, as compared to the ICFS, where full harmonization supported by uniform legislation is the integrating principle relied upon.

326. *See generally* Annex, *supra* note 3; FSMA, *supra* note 301, §§ 38, 39 (providing the power to make exemption orders and exemptions for appointed representatives).

327. *See generally* Annex, *supra* note 3; FSMA, *supra* note 301, pt. IV. The U.K. approach has been considered to be an important component of its single integrated regime. *See generally* BLAIR, *supra* note 301, at 83].

328. BLAIR, *supra* note 301, at 5-79; *see also* Revised Treaty *supra* note 252.

329. *See generally* FSMA, *supra* note 301, sched. 4. The rights of establishment and cross-border provision of services have been established under articles 43 to 55 of the Treaty Establishing the European Community and go beyond the passport rights covered by schedule 3 of the FSMA.

330. *Id.* sched. 6, ¶ 1.

331. *Id.* ¶ 2.

332. *Id.* ¶ 3.

333. *Id.* ¶ 4.

334. *Id.* ¶ 5; *see also* FSMA, *supra* note 301, § 49(1).

335. *Id.* § 41(3).

336. For a discussion of these requirements in the context of the UK, see generally BLAIR, *supra* note 301, at 86-88.

C. REGULATION

The establishment of an appropriate regulatory regime is a required component of any financial model.[337] While this is generally accepted, the framework within which it operates has been subject to various theoretical and practical approaches.[338]

The proposed CARICOM model will require the establishment of a single financial regulator for CARICOM having a proper balance between independence on the one hand and accountability on the other. Ensuring this balance is complicated and has proved to be one of the most complicated aspects of the U.K. Financial Services and Markets Act (FMSA).[339] Nevertheless, the guiding principles to be adopted under the proposed model will be derived mainly from the U.K. model.[340]

The CARICOM regulator will have overall responsibility for 1) the ef-

337. For a discussion of the rationale for financial regulation, see generally CHARLES GOODHART ET AL, FINANCIAL REGULATION: WHY, HOW AND WHERE NOW? (Routledge 1998); see also generally ROBERT BALDWIN AND MARTIN CAVE UNDERSTANDING REGULATION: THEORY, STRATEGY AND PRACTICE 9-17 (OUP 1999).

338. *Id.*

339. *See generally* BLAIR, *supra* note 301, at 20. The accountability provisions in the United Kingdom reflect the traditional constitutional doctrine that incorporated bodies should not be directly answerable to Parliament. The primary line of accountability has therefore been through Her Majesty's Treasury. The FMSA holds the Financial Services Authority (FSA) accountable by: (1) power of appointment and dismissal of the board and chairman [sched. 1, ¶ 2(3)]; (2) requiring that a report be submitted to the Treasury at least once per year covering prescribed matters accompanied by a report from the non-executive directors [sched. 1, ¶ 10(2)] and will be laid before Parliament [sched. 1, ¶ 10(2)]; (3) its capacity to commission reviews and enquiries into aspects the FSA's operations [§§ 12-18]; and (4) the Treasury' approval is required for the appointment or dismissal of chairmen of the Consumer and Practitioner Panels. FMSA, *supra* note 301, §§ 9(3), 10(3). In addition, a majority of the members of the governing body of the FSA shall be non-executive. *Id.* sched. 1, ¶ 3(1)(a). The FSA shall hold an annual public meeting open to any interested parties within three months of the report required under schedule 1, paragraph 10. This is intended to facilitate a general discussion of the report's contents as well as to provide an opportunity for questions about the acts or omissions of the FSA in the discharge of its functions. *Id.* sched. 1, ¶ 11(2). Judicial review and scrutiny is another accountability mechanism. The independence provisions include immunity from suit for all acts, except those taken in bad faith or in breach of the Human Rights Act 1998. *Id.* sched. 1, ¶ 19. But, the FSA has been required to establish a scheme for dealing with complaints arising from the discharge of or failure to discharge its functions]. Id. sched. 1, ¶ 7. The Act also provides for an investigator who can act independently of the FSA [sched. 1, ¶ 7(b)] and confers authority on him to recommend compensation to a justified complainant. *Id.* sched. 1, ¶ 8(5). Alan Greenspan, then Chairman of the Federal Reserve Board of the United States, has argued that "[a monopoly regulator for the entire financial sector in the United States] is highly undesirable on both political and economic grounds." *See generally* Alan Greenspan, *Financial Innovations and Supervision of Financial Institutions*, *in* PROCEEDINGS OF THE 31ST ANNUAL CONFERENCE ON BANK STRUCTURE AND COMPETITION 1-6 (1995). While Greenspan's observations may be well-founded in the constitutional context of the United States, a multiple-regulators approach has not been considered most appropriate for implementation in CARICOM. Instead, a variant of the single-regulator approach adopted in the United Kingdom has been preferred.

340. *See generally Annex, supra note 3.*

ficient and economic allocation of resources;[341] 2) securing a supervisory regime in which sound corporate governance is considered to be the first and most important protection for investors and consumers alike;[342] 3) ensuring that measures adopted are proportionate to the benefits that are expected to be derived;[343] 4) "facilitating innovation in connection with regulated activities";[344] 5) seeking to establish and maintain an internationally competitive financial sector in CARICOM;[345] 6) ensuring appropriate arrangements for and observance of relevant standards in the supply of cross-border financial services;[346] and 7) minimizing the possible adverse impact of regulation on financial institutions and the services they provide.[347]

While these principles could receive unanimous policy support, it will still be difficult to secure the implementation of a single financial regulator for CARICOM. Initial resistance could be based on a lack of political will or the unwillingness of existing regulators to surrender their control and bureaucratic prestige.[348] The establishment of a single regulator will also require fundamental and far-reaching regime change, and this could militate against establishing a single regulator in the short term.

Against this background, it is necessary to suggest an alternative approach to be devised for implementation. This will involve establishing a well-considered mutual recognition regime based upon agreed minimum standards and the incorporation of existing regulators.[349] While this ap-

341. For an example of how this has been dealt with in the United Kingdom, see FSMA, *supra* note 301, § 2(3)(a). The FSA has sought to develop a risk-based approach to regulation, in which resources are allocated according to institutions and sectors that pose the greatest risk to consumers and the financial system more generally *See generally* BLAIR, *supra* note 301, at 35.

342. For an example of how this has been dealt with in the United Kingdom, see FSMA, *supra* note 301, § 2(3)(b). For a discussion on the importance of this principle, see generally BLAIR, *supra* note 301, at 35. The authors conclude that "[n]o supervision, however effective, could – or should – ever replace sound management in a firm."

343. For an example of how this has been dealt in the United Kingdom, see FSMA, *supra* note 301, § 2(3)(c). In the United Kingdom, a cost/benefit analysis approach has been adopted. There are still, however, serious conceptual difficulties to be resolved before this can become a reliable principle for regulation. Nevertheless, the general concern that regulatory measures should match their anticipated outcome appears to be well-founded. *See generally* BLAIR, *supra* note 301, at 35.

344. For an example of how this has been dealt with in the United Kingdom, see FSMA, *supra* note 301, § 2(3)(d).

345. For an example of how this has been dealt with in the United Kingdom, see FSMA, *supra* note 301, § 2(3)(e), (g).

346. *See generally* Annex, *supra* note 3.

347. For an example of how this has been dealt with in the United Kingdom, see FSMA, *supra* note 301, § 2(3)(f).

348. *See generally* Steve H. Hanke & Kurt Schuler, ALTERNATIVE MONETARY REGIMES FOR JAMAICA (Aug. 1995), *available at* http://www.psoj.org/hanke.pdf.

349. Mutual recognition allows regulators in one jurisdiction to rely on the regulatory standards and conduct of their counterparts in another. Under this system, regulators need not operate from precisely the same rules in precisely the same way. But there has to be a compatible and broadly similar regulatory framework in which broadly similar tasks are carried out. The system is therefore complimented by minimum harmonization with this requirement in mind.

proach may be acceptable to regional policymakers and easier to implement in the short-term, a single regulator is a better integrating option for CARICOM. Therefore, the establishment of a single regulator should be included in the proposed model as a standard to be reached.

D. SUPERVISION

An effective supervisory regime must be able to detect and take necessary corrective measures to improve weaknesses in the financial sector that could threaten stability within and outside the regime's territory.[350] The fundamental precepts are maintaining stability and confidence in the financial system; pursuing market discipline by encouraging good corporate governance and enhancing market transparency and surveillance; having operational independence—the means and power to gather information and the authority to enforce decisions; understanding the nature of the financial sector in order to ensure that risks are being adequately managed; being able to risk profile individual institutions and allocate resources accordingly; ensuring that financial institutions have adequate resources, sound management, and effective control systems; and maintaining close cooperation with other supervisors.[351]

The need for effective supervision has become even more relevant in recent years, and the Basel Committee called for action in this domain in 1996.[352] Since then, several bodies have been examining ways to strengthen financial stability around the world, including the Basel Committee, the Bank for International Settlements, the International Monetary Fund and the World Bank.[353]

The Basel Committee prepared a comprehensive set of core principles for effective banking supervision and a supporting compendium (to be updated periodically) of existing Committee recommendations, guidelines, and standards. These were endorsed by the G-10 central bank governors and then submitted to the G-7 and G-10 Ministers of Finance in preparation for the 1997 Denver Summit. The intention of these and subsequent measures, such as the Basel II Capital Accord, is to provide a useful mechanism for strengthening global financial stability.[354]

The core principles comprise essential elements that need to be in place for an effective supervisory regime. These principles relate to preconditions for effective banking supervision – Principle 1; licensing and structure – Principles 2 to 5; prudential regulations and requirements – Principles 6 to 15; information requirements – Principle 21; formal pow-

350. *See generally* WALKER, INTERNATIONAL BANKING REGULATION: LAW, POLICY AND PRACTICE, *supra* note 250, at 447.
351. *Id.* at 452-453.
352. *See generally* ECONOMIC COMMUNIQUÉ: MAKING SUCCESS OF GLOBALIZATION FOR THE BENEFIT OF ALL, (June 28, 1996), *available at* http://www.g8.utoronto.ca/summit/1996lyon/communique.html.
353. *See generally* WALKER, INTERNATIONAL BANKING REGULATION: LAW, POLICY AND PRACTICE, *supra* note 250, at 447-452.
354. *Id.*

ers of supervision – Principle 22; and cross-border banking – Principles 23 to 25.[355] While the principles have been devised from a banking perspective, they establish standards that can be generally adopted for implementation in the financial sector.

The proposed model must be devised to secure the establishment of a supervisory mechanism with operational independence and clear responsibilities and objectives.[356] It must be conferred with authority to set licensing criteria and reject applications for establishment that do not meet the required standards; determine prudent and appropriate minimum capital adequacy requirements and internal policies, practices, and procedures; independently validate information received through on-site or off-site examination; require that information provided comply with consistent accounting policies and practices; determine and implement appropriate corrective action where required; and establish contact and information exchange with other supervisors.[357]

E. CENTRAL BANK

The proposed model requires the establishment of a single central bank (CCB) modeled on the ECCB.[358] The CCB will operate as lender of last resort,[359] have responsibility for monetary policy,[360] and have critical input in fiscal policy.[361] The ECCB has been successful in the OECS and is considered appropriate for implementation in CARICOM.[362] Insofar as the EU is concerned, a community central bank has already been established and the EU intends to integrate monetary and fiscal policy.[363]

The ECCB has its genesis in the Board of Commissioners of Currency of the British Caribbean Territories (Eastern Group). The Board of Commissioners of Currency was established in 1951 and became the Eastern Caribbean Currency Authority (ECCA) in 1965.[364] In 1983, the ECCA was collapsed into the ECCB and given responsibility for the

355. *Id.*
356. *See generally* Annex, *supra* note 3.
357. *Id.*
358. *Id.*
359. *Id.; see generally* Stanley Fischer, ON THE NEED FOR AN INTERNATIONAL LENDER OF LAST RESORT (Jan. 3, 1999), available at "[T]here is no accepted definition of the term lender of last resort, and there are important disagreements over what the lender of last resort should do. [However], [t]he lender of last resort. . . is associated with the prevention and mitigation of financial crises. . . . [I]n the domestic case . . . it is not essential that the lender of last resort be the central bank . . . ."http://www.imf.org/external/np/speeches/1999/010399.htm. Fisher contends:
360. For an example of how this has been dealt with in the OECS, see ECCB Agreement Act, art. 4.
361. *Id.* art. 37.
362. *See generally* Hanke & Schuler, *supra* note 348.
363. *See Consolidated Version of the Treaty on European Union, in* BLACKSTONE'S EC LEGISLATION 2004-2005 pmbl. 90-108 (Nigel Foster ed. 15th ed. 2004); *see also Consolidated Version of the Treaty Establishing the European Community, supra* art. 99, at 1-90; see generally Duisenberg, *supra* note 321.
364. For an historical overview, *see generally* Eastern Caribbean Central Bank (ECCB), http://www.eccb-centralbank.org.

maintenance of a common currency and monetary stability.[365] The ECCB has also been required to promote the economic development of OECS Member States.[366]

The capacity of the ECCB to impact the formulation of monetary policy has been constrained by constitutional impediments. Devaluation of the currency, for example, requires a unanimous vote and since 1976, the Eastern Caribbean Dollar (EC$) has been fixed at a parity of EC $2.70 to U.S. $1.[367] The unanimity rule translates to an effective principle of subordination requiring Member States to subscribe to the policy objectives of the community. The unanimity rule has been beneficial, and the ECCB has been able to keep inflation low, maintain the exchange rate, and ensure that the currency has current account convertibility.[368]

The ECCB is both a regulator and a supervisor.[369] But the proposed CCB will not have a similar role in the financial sector. Instead, it will operate along lines established for the Bank of England since the enactment of the U.K. FSMA. According to the U.K. FMSA, the Bank of England is independent from regulation and has primary responsibility for the conduct of monetary policy.[370]

Nevertheless, it will be difficult to secure implementation of the proposed CCB. Initial resistance will likely be influenced by jurisdictional insularity as much as by other more pragmatic militating factors. These factors include a possible lack of political will and the inability of individual countries to have exclusive control over monetary and other aspects of their fiscal policies. While the ECCB could be adopted for this role, in addition to jurisdictional and other related militating issues, the ECCB may also suffer operational difficulties related to the size of the economy that the ECCB will be required to manage.[371]

These operational difficulties can be considered by reference to the following example. Jamaica has a population about five times that of the OECS, and Jamaica's economy is twice as large. Whereas the ECCB has fewer than 200 employees, the BOJ has a staff of approximately 500 and thus, a functional merger would be problematic. Notwithstanding these difficulties, the ECCB has had a better history of performance on a cross-jurisdictional basis. Therefore, the ECCB is better suited than the BOJ or any other central bank in the Caribbean region to serve the overall interest of CARICOM.[372]

---

365. *See generally* Hanke & Schuler, *supra* note 348.
366. *See* ECCB Agreement Act, pmbl. .
367. *See generally* Hanke & Schuler, *supra* note 348.
368. *Id.*
369. For an overview of the OECS financial system, including the function of the ECCB, s*ee generally* Eastern Caribbean Central Bank (ECCB), http://www.eccb-centralbank.org. .
370. *See* Walker, Capital Reform, Financial Services and Single Markets, *supra* note 187.
371. *See generally* Hanke & Schuler, *supra* note 348.
372. *Id.*

Against this background, it is necessary to suggest an alternative central bank arrangement for possible implementation. This would necessarily involve a mechanism to secure mutual recognition of regulatory and supervisory practices across the several jurisdictions of CARICOM. While the existing central banks could be maintained, a coordinating mechanism needs to be included to provide necessary support and required information sharing capacity. This could be adopted from the FRC framework that has already been established in Jamaica.[373]

This alternative central bank arrangement would be better able to navigate jurisdictional sensitivities and could then be more attractive to regional policymakers. Nevertheless, a single and independent CCB is a better integration and economic development option.[374] It must therefore be introduced under the proposed model as a standard to be reached, even though it may not be the most viable short-term option for implementation.

F. ENFORCEMENT

Appropriate enforcement provisions must be introduced with to secure national policy and commitment to the ICFS in practice, an effective regime for free movement, and a graduated scheme for the settlement of disputes in which Member States, as well as individuals, can repose confidence.[375]

While a doctrine of direct effect has not, to date, been practiced under the Revised Treaty, this will have to become a critical component of the CARICOM regime going forward if its general integration objectives are to be realized.[376] This will assist any attempt by CARICOM to evolve from being merely another international organization to becoming a supranational system of governance and ultimately, a more efficient framework for regional integration and economic development.[377] In the interim, however, provisions for enforcement under the proposed model must be devised to require (and will not be able to function effectively

373. For a discussion of the Jamaican financial regulatory framework, including how the FRC works, see generally Christopher P. Malcolm 'Re-thinking the Frameork for Regulation of the Jamaican Financial Sector' (2004) 5 JIBR 4, 297. Article 26 of the Revised Treaty also requires a consultation process that could be adapted for this purpose. *See* Revised Treaty, *supra* note 252, art. 26.

374. For a more comprehensive central bank discussion dealing with the principle of independence, see generally ROSA M. LASTRA CENTRAL BANKING AND BANKING REGULATION, 10-12 (LSE Financial Markets Group 1996) .

375. *See generally* Annex, *supra* note 3.

376. As practiced in the EU, the doctrine of direct effect enables an individual to seek remedy for a breach of his rights under Community law in a domestic Court. *See generally* TAKIS TRIDAMIS, *The General Principles of EU Law* ch. 9 (2nd ed. 2006). With CARICOM, however, this is problematic for two main reasons. First, unlike the EU, CARICOM does not incorporate a supranational system of governance. Second, there is no corpus of law as such that can now be properly referred to as CARICOM law. *See generally* DUKE E. POLLARD, THE CARIBBEAN COURT OF JUSTICE: CLOSING THE CIRCLE OF INDEPENDENCE 6-7 (2004).

377. POLLARD, *supra* note 376, at 7.

without) commitment to an underlying doctrine of direct effect.[378]

The graduated scheme for the settlement of disputes is very important and includes both administrative mechanisms and judicial proceedings. While the administrative mechanisms must deal in particular with concerns between the regulator and regulated institutions, the judicial proceedings, including proceedings at the Caribbean Court of Justice in particular, will be available to ensure that rights conferred and obligations are observed under the proposed model, as well as the Revised Treaty.[379]

G. Implementation

The effective implementation of the proposed model will require unequivocal support at the community level and even more importantly, at national levels. With this in mind, the Agreement and supporting legislation must be enacted as domestic law with an effective sanctions mechanism in place for noncompliance, rules-based prudential or national interest reasons, lack of domestic policy, or support.[380]

The implementation provisions must therefore be able to secure optimal domestic support under a seamless arrangement.[381] These provisions will not, without more, ensure a viable regional financial sector. To achieve this, policymakers, as well as industry participants and individuals in general, will have to be vigilant and make use of available enforcement procedures.

H. Ongoing Review And Corrective Adjustment

Appropriate provisions dealing with ongoing review and corrective adjustment must be included under the proposed model to accommodate necessary change without bureaucratic hindrance.[382] These measures are consistent with an overall desire to ensure that potential systemic or other risks to the financial sector are detected and dealt with apace. In the United States, for example, the model includes carefully calibrated risk parameters that inform of potential liquidity problems and then provide support as necessary.[383]

While such or similar measures would have almost universal support, there is nevertheless an ongoing debate as to whether they should be based on discretion or rules.[384] But, as concluded by Guira: "The answer

378. *See generally* Annex, *supra* note 3.
379. *Id.*
380. This approach has been adopted with success in the OECS where the Agreement Establishing the ECCB and uniform financial laws have been enacted as domestic legislation in participating Member States.
381. *See generally* Annex, *supra* note 3.
382. *Id.*
383. *See generally* Ricki T. Helfer, *Rules and Discretionary Power in Relation to Troubled Banks: Case Studies – United States*, *in* Reform of Latin American Banking Systems (Ernesto Aguire & Joseph Norton eds., 2000).
384. *See generally* Jorge Guira, *Mercusor: Trade and Investments Amid Financial Crisis* 254 (2003).

is probably less important than providing some form of external bank [financial sector] oversight for bank [financial] institutions so that supervisory agencies can identify the specific problem early and respond quickly."[385] In practice, this is difficult to achieve because the financial sector is fast-moving and such measures would require, for example, sophisticated computer systems and highly skilled personnel that may not be available.[386] Nevertheless, a well considered mechanism for ongoing review and corrective adjustment must be included in any new and comprehensive CARICOM financial model.

VII. CLOSING COMMENTS AND CONCLUSIONS

With the implementation of the proposed model (ICFS), CARICOM will be in a better position to secure a viable regional financial sector that will become a critical supporting component for the more general integration objectives of the CSME. Implementation could be a slow-moving process. Nevertheless, it is anticipated that the ICFS will ultimately result in far-reaching policy and institutional transformation for individual Member States and for CARICOM as a whole.

The ICFS will require the harmonization of financial laws and is intended to become the foundation upon which a viable CSME can be established.[387] It has been set against a background that includes five distinct financial regulatory regimes and a CARICOM process that has already produced a draft financial services agreement (CFSA).

The CFSA is inadequate and unable to support the establishment of an integrated CARICOM financial market. The actual, as distinct from intended, scope and coverage of the CFSA will not affect the cross-border supply of banking business. Furthermore, the CFSA's market access, intraregional trade, cross-border supervision, prudential requirements, mergers and acquisitions, corporate governance, transparency and dispute settlement provisions lack sufficient details and do not provide sufficient guidance for national authorities, service providers, or sector participants more generally.

With this in mind, the construction of the ICFS within the guidelines proposed in the Annex is a necessary alternative. The Annex is intended to fill gaps that exist in the CFSA and to establish a forward thinking model with appropriate provisions for ongoing evaluation and corrective adjustment where required. The Annex has been influenced by and many of its provisions have been adopted from the United Kingdom., Jamaica, and OECS financial models. The ICFS has also sought to incorporate relevant principles devised under the Basel and other internationally accepted initiatives.

---

385. *Id.*
386. *Id. at* 257.
387. For a discussion of the intricate link between financial harmonization and the establishment of an integrated financial market, see generally COMM. OF WISE MEN, *supra* note 185; Davies, *supra* note 316.

The ICFS is still a work in progress and other Caribbean experiences will have to be analyzed and, where appropriate, provided for under a final model for implementation. For example, details included in the Barbados and Trinidad and Tobago models will have to be evaluated to determine their implications for the proposed ICFS. The relevant policymakers must also understand that such an arrangement could require domestic concessions in support of regional objectives. Therefore, policymakers will be expected to act accordingly.

Fortunately, the ICFS will be implemented under a CSME process that is not set in stone. As circumstances require, appropriate changes, including revised implementation strategies, will have to be made to the basic CSME framework.[388] With this in mind, it is anticipated that the proposed model will become part of an overall new and more comprehensive CARICOM strategy based upon well-considered detailed arrangements for the financial sector and other sectors.

VIII. ANNEX

ELEMENTS THAT ARE TO BE CONSIDERED IN DRAFTING INSTRUCTIONS FOR THE PREPARATION OF AN AGREEMENT AND SUPPORTING LEGISLATION TO ESTABLISH AN INTEGRATED CARICOM FINANCIAL SECTOR (ICFS).

1. Under the Revised Treaty, the establishment of a single, integrated regional financial sector is the responsibility of the Council for Finance and Planning (COFAP), which is an organ of CARICOM subject to ultimate control by the Conference of Heads of Government (CHG) and has primary responsibility for economic policy coordination, as well as financial and monetary integration within the CSME. It is to be assisted in this exercise by the Committee of Central Bank Governors (CCBG), which is a body of CARICOM accountable to COFAP. (Art 14).
2. The design will require the establishment of a homogenous and integrated financial services and markets for banking, insurance and securities in CARICOM. This is to be achieved through a single, independent and autonomous CARICOM Central Bank (CCB) with responsibility for the management of monetary policy and a common currency and having as well a critical role in fiscal policy development and management. It will be complemented by a single, independent and autonomous CARICOM Financial Services Commission (CFSC) with responsibility for the regulation and supervision of the entire financial sector (banking, insurance and securities services and markets).
3. This approach to the regional financial sector, supported by uniform legislation under a full integration model (covers the entire financial sector, includes full regulatory and supervisory details,

388. *See generally* Edward Green, *Striving Toward a Regional Reconfiguration of a Rational Community Through Shared Sovereignty*, *in* CARIBBEAN IMPERATIVES: REGIONAL GOVERNANCE AND INTEGRATED DEVELOPMENT 1, 8 (Kenneth Hall & Denis Benn eds., 2005).

establishes single institution/agency arrangement, requires consistent cross-jurisdictional adoption and application of essential measures), is to be preferred to a mutual recognition model (requires minimum harmonization based on the adoption of core principles, national agencies work together through common understanding and respect for the validity and effectiveness of each others laws, manage relationships under Memoranda of Understanding) since it will more likely secure the implementation of a common regime in every Participating Member State as well as reduce the uneven application of agreed regulatory standards and market conduct oversight.

4. The new institutions being proposed will create an overarching structure operating at the regional level as well as in the financial systems of individual Member States. The current central banks as well as other regulatory and supervisory arrangements will be required to cede ultimate authority to these new institutions. They will then have functional powers to manage monetary and aspects of fiscal policy as well as to regulate and supervise the financial sector delegated back to them within a prescribed policy framework under the auspices of COFAP.

5. The establishment of this new infrastructure will build on the institutional/administrative model that has been operating under the Agreement establishing the Eastern Caribbean Central Bank (ECCB) and implementing legislation since 1983. The ECCB model has been effectively implemented in the OECS and successfully relied upon by its Participating Member States (Antigua and Barbuda, the Commonwealth of Dominica, Grenada, Montserrat, Saint Christopher and Nevis (St. Kitts and Nevis), Saint Lucia and Saint Vincent and the Grenadines) as manifest through stable macro-economic management of small and vulnerable economies in a volatile economic environment.

6. The ECCB was established in 1983 to: (a) issue and manage a common currency; (b) safeguard the international value of the currency; (c) promote monetary stability and a sound financial structure; and (d) to further the economic development of Participating States (*ECCB Agreement Act* Preamble & art 4). It is banker, fiscal agent of, and advisor to, the Participating Governments and is the depository of their funds (Art 37).

7. Under the current arrangement, the ECCB is also the regulator and supervisor of financial institutions in the OECS. There is a lacuna in that the insurance sector has not been operating under uniform legislation, as is the case for banking and securities, and is not now subject to regulation and supervision by the ECCB. While this may have worked in the context of the OECS, the proposed new model must include an appropriate regulatory and supervisory framework for the insurance sector and it is intended that central banking will be separated from regulation and supervision as happened when the Financial Services Authority (FSA) was established in the UK in 2000.

8. The UK financial system now includes the Bank of England (BOE) which has responsibility for monetary policy and a role in fiscal policy and the FSA which is a single regulator for the entire

financial sector (services and markets) operating under omnibus legislation including single regulations.

9. The current UK approach contrasts with the U.S. approach which is based on multiplicity of relevant regulatory legislation and multiple regulators. The U.S. approach emphasizes a functional theory of regulation under which financial institutions are licensed to carry out specific functions and are then regulated and supervised by specialists based on the functions they perform.

10. The proposed new approach for CARICOM will incorporate, by treaty, a single regulator model in the vein of the UK FSA. It will as well incorporate a single central bank based on the underlying central bank functions – less regulatory and supervisory roles – of the ECCB.

11. The proposed CARICOM Central Bank (CCB) will be established as the central bank of all the Participating States of CARICOM, including those now served by the ECCB. Accordingly, it is anticipated that the new Agreement will replace or amend the ECCB Agreement Act as well as the relevant central bank Acts in every other Participating Member State. Like the ECCB, the CCB shall be banker, fiscal agent of, and advisor to the Governments as well as a depository of their funds.

12. It will have overarching authority for the control of monetary policy and serve as lender of last resort. But, it will have no day to day involvement in the regulation or supervision of any part of the financial sector (services or markets) in Participating Member States. This will be the preserve of the proposed new single CARICOM regulator (CFSC) and its agents.

13. The existing Central Banks will continue to function as the agents of the new CCB under special arrangement such as perhaps by an MOU endorsed under the Treaty. This should establish the relationship of the central banks to the CCB very clearly and provide that in the event of a conflict, the policies and directives of the CCB will prevail to the extent of any inconsistency.

14. The proposed structure to be reflected in the treaty for the establishment of a single financial space or integrated financial services and markets will also include a CARICOM Financial Services Commission (CFSC) as a single regulator for the entire financial sector (services and markets). It will accord with the approach of the UK FSA and is also consistent with the underlying single regulator philosophy that justified the establishment of the Jamaican FSC.

15. In developing a framework for regulating and supervising financial services and markets in the CSME, the models developed under the Financial Services Commission Act (FSCA) of Jamaica as well as under the UK Financial Services and Markets Act should provide guidance as to detail. In addition, the international standards developed, for example, under the Basel Initiative are also to be considered.

16. In considering these models, it is noted that the Jamaican FSC is a single regulator for non-deposit taking financial institutions while the Bank of Jamaica (BOJ) has responsibility for the regulation and supervision of deposit taking financial institutions. The underlying

philosophy that justified the establishment of the FSC was based on similar arguments to those that justified the establishment of the UK FSA. Relying on the same arguments the BOJ should have then been stripped of its financial regulatory and supervisory responsibilities by consequential amendment to the relevant legislation such as the Bank of Jamaica Act, the Banking Act, the Financial Institutions Act and now the Financial Services Commission Act.

17. In designing the ICFS, the following are some of the questions that will require careful consideration. The answers should determine the policy, design and detail. The content in brackets suggests outline answers as well as sources for guidance.

(a) How will financial activities, products, services and markets as well as central bank and regulatory concepts and applicable relationships be determined under the proposed ICFS? [These will be specified in the treaty and supporting legislation. Guidance may be sought from the Revised Treaty, the Draft CARICOM Financial Services Agreement, the ECCB Agreement Act, the Jamaican Financial Services Commission Act and the UK Financial Services and Markets Act.]

(b) What is intended to be achieved under the ICFS? [The intended outcome is the implementation of a single CARICOM financial sector under the CSME so as to promote the attainment of the regional integration and economic development objectives, which have been agreed since the Grand Anse Declaration of 1989.]

(c) Why should this intended outcome be achieved? [Regional integration is viewed as an imperative for the survival of Caribbean economies. The ICFS should become a critical driver for Caribbean integration and economic development and should be regarded as analogous and complementary to the CCJ without which the desired objectives of the CSME cannot be attained.]

(d) When is the intended outcome to be achieved? [Financial integration requires urgent attention since it is a major operational component of the CSME.]

(e) What is the authority for the intended outcome? [Through COFAP under Article 14 of the Revised Treaty, the proposed new framework should accord with Chapter Three of the Revised Treaty. It will therefore treat with: prohibition of new restrictions on the provision of services (Art 36); removal of restrictions on provision of services (Art 37); removal of restrictions on banking insurance and other financial services (Art 38); prohibition of new restrictions on movement of capital and current transactions (Art 39); removal restrictions on movement of capital and current transactions (Art 40); authorization to facilitate movement of capital (Art 41); coordination of foreign exchange policies and exchange of information (Art 42); restrictions to safeguard balance-of-payments (Art 43); measures to facilitate establishment, provision of services and movement of capital (Art 44); and movement of Community Nationals (Arts 45 & 46).]

(f) Who are the critical persons to be involved if the intended outcome of financial integration is to be achieved? [The Heads of

Government, COFAP, Central Bank Governors, Financial Regulators, Financial Institutions as well as relevant Associations, such as Bankers' Associations and Securities Dealers' Associations, and other bodies, such as Basel Committee and IOSCO.]

(g) How will the ICFSM be implemented? [This will be under a single treaty identifying the roles and functions of key partners. COFAP will need to secure corrective adjustment through a directives mechanism as obtains in the EU with critical interpretation and application support from the CCJ.]

(h) What are the likely constitutional or other impediments? [Anticipated resistance will come from existing central banks and regulatory authorities. The challenges may well be inadequate or lack of political support for implementation.]

(i) How will these be resolved? [The Agreement to be signed by the Heads will include clear directions that will deal with the anticipated resistance from the functionaries (central banks and regulatory authorities). In addition, an extensive education program and consensus-building exercise will have to be pursued at both the national and regional levels in accordance with the consultation requirement of Article 26 of the Revised Treaty.]

(j) How will the arrangement be funded? [Initial set-up costs could be funded from budgetary or other allocations by the Participating States. This will involve the establishment of a trust fund as has been the case with the CCJ (Revised Agreement Establishing the Caribbean Court of Justice Trust Fund). Thereafter, the recurrent expenditure will be met from this Fund as well as through user fees and fines, fixed according to policy by COFAP and from local regulators, collected from licensees.]

(k) How will accountability be secured? [The ICFSM should include an autonomous audit function comprising independent auditors having necessary job security and with reporting obligations to the Heads of Government. Their reports will be made public. Guidance on the establishment of this mechanism may be sought from the EU (EC Treaty arts 246-248; Charter of the Internal Audit Services of the European Commission <http://ec.europa.ed/dgs/internal_audit/docs/charter_en.pdf>]

(l) How will the directors/managers/other personnel be chosen? [The Treaty will specify the relevant appointing authority and principles governing the process.]

(m) By reference to what criteria and for what functions? [The treaty should specify that the persons appointed to serve either institution as directors or in other senior management positions will be persons of recognized standing and having relevant experience. Guidance for the CCB may be sought from the ECCB Agreement Act Part IV. For the CFSC, guidance should be sought from the Jamaican *FSCA* First Schedule.]

(n) How will disputes be resolved? [Disputes involving the Member States will be resolved in accordance with the procedure established under Chapter Nine of the Revised Treaty in compliance with the Revised Treaty. Other disputes, involving regulated entities or the CFSC and such entities, will be resolved also in accor-

dance with this procedure and such other procedures adopted by the CFSC from time to time within policy guidelines prescribed by COFAP. Guidance on establishing an appeals process from decisions of the CFSC may be sought from the Jamaican *FSCA* Second Schedule.]

(o) How will enforcement be secured? [Enforcement will be secured, where necessary, through the CCJ. In addition, the CFSC will be able to apply administrative or other remedies, such as naming and shaming, fines, suspension of and termination of licenses against regulated entities that are in breach of their obligations. Guidance on this aspect – administrative or other remedies – may be sought from the UK *FSMA* Part XIV and the Jamaican FSCA Third Schedule.]

(p) How will the ICFSMA be implemented? [The treaty should be incorporated into the domestic law of each Member State. Guidance on this aspect may be sought from the ECCB Agreement Act Part XIV.]

(q) Insofar as the CCB is concerned, how will it be established? [It will be established as a body corporate having perpetual succession under the authority of COFAP with specific powers and purposes that accord with the Agreement of the Heads. Guidance on this aspect may be sought from the ECCB Agreement Act Part XIV.]

(r) How will it manage general reserves and profits? [The CCB will establish and manage general reserves from its operating revenues and determine profits that will then be shared in accordance with an established formula. Guidance on this aspect may be sought from the ECCB Agreement Act Part III & Annex I.]

(s) How will it manage the currency and external reserves? [The CCB will issue and monitor use of the uniform currency once it has been agreed. It will also maintain an External Reserve on terms and conditions determined by COFAP. Guidance on this aspect may be sought from the ECCB Agreement Act Parts V & VI.]

(t) How will it manage foreign exchange operations? [The CCB will be the depository of the external assets of the Participating Governments and will by itself as well through its designated agents be able to trade in foreign currency on their behalf. Guidance may be sought from the ECCB Agreement Act Part VII.]

(u) How will it be able to promote monetary stability and sound financial management as well as further economic development in the territories of the Participating Governments? [The CCB will have an integral role in economic policy development through COFAP. It will be required to apply best economic management practice within the agreed policy framework.]

(v) How will it relate to financial institutions? [The CCB will be able to open accounts for and accept deposits from financial institutions operating in Participating Member States. It will also serve as lender of last resort to banks. Guidance on this aspect may be sought from the ECCB Agreement Act Part VIII.]

(w) How will it relate to the CFSC? [The CCB will have regular meetings with the CFSC and share relevant information with it in accordance with a Memorandum of Understanding (MOU).]

(x) How will it relate with Participating Governments? [The CCB will be the banker, fiscal agent of, and advisor to the Participating Governments. Guidance on this aspect may be sought from the ECCB Agreement Act Part IX.]

(y) How will it relate with existing central banks in CARICOM? [These will become functional agents operating under its direction and within a policy framework prescribed by COFAP under the authority of the Treaty.]

(z) What privileges and immunities will it enjoy? [The CCB will be accorded such privileges and immunities in the territories of Participating States as are necessary for it to fulfill its functions. Guidance on this aspect may be sought from the ECCB Agreement Act Part XII.]

(aa) With whom and on what basis will information be shared? [Relevant information, including economic policy objectives, fiscal and monetary targets, currency and reserves, performance of financial institutions, regulation, supervision, cross-border access and control and other operational concerns will be shared with the Participating Governments, the CFSC, Central Bank Agents and other interested parties. Information sharing will be coordinated through COFAP. Guidance on this aspect may be sought from the Jamaican *FSCA* ss 15 & 16.]

(bb) What are the conditions for withdrawal and termination? [A Participating Government will be able to withdraw from the CCB by an established notice procedure and its operations can be terminated in accordance with established procedure. Guidance on this aspect may be sought for the ECCB Agreement Act Part XIII.]

(cc) Insofar as the CFSC is concerned, how will it be established? [It will be established as a body corporate having perpetual succession by virtue of the authority of the Treaty. The CFSC will accountable to COFAP Guidance on this aspect may be sought from the Jamaica FSCA ss 3-9 and the UK FSMA Part I.]

(dd) What authorization criteria will it apply? [The CFSC will be guided as to what are regulated and prohibited financial activities. It will be able to authorize the provision of financial services within CARICOM as well as grant exemptions where appropriate according to objective criteria. It will also have general power to make rules that apply to authorized persons and in respect of regulated activities. Guidance on this aspect may be sought from the UK FSMA Parts II, III & X.]

(ee) How and on what basis will it be able to secure cross-border access as well as free movement? [This will be achieved by a uniform passport rights regime. Guidance on this aspect, by reference to how the EU regime has been introduced in the UK, may be sought from UK FSMA Schedule 3. See also generally *Lamfalussy Committee Report* ch 2.]

(ff) How will it be able to secure appropriate prudential and conduct of business standards and safeguard the domestic and regional economies against financial crises, contagion and systemic collapse? [The CSFC will be able to issue statements of principle concerning the performance and market conduct of financial services providers as well as establish fit and proper criteria for their functionaries and prudential requirements that must be met. Guidance on this aspect may be sought from: UK FSMA Parts V-VIII; Basel II: International Convergence of Capital Measurement and Capital Standards: A Revised Framework; Basel High-Level Principles for the cross-border implementation of the New Accord; Basel Home-host information sharing for effective Basel II implementation; Basel Core Principles for Effective Banking Supervision; Basel Core Principles Methodology; ISOCO Core Principles of Securities Regulation; IAIS Core Insurance Supervisory Principles.]

(gg) How will it be able to encourage innovation and respond to the needs of the financial sector in a fast-paced and pro-active manner as well as contribute to the maintenance of an enabling environment that will encourage economic expansion and development in the territories of the Participating Governments? [The CFSC will be required to follow principles of good corporate governance and will be able to function as an autonomous entity without having to resort to COFAP, except on questions of policy, in its decision making processes.]

(hh) How will it relate to the CCB? [The CFSC will have regular meetings with the CCB and share relevant information with it in accordance with an MOU.]

(ii) How will it relate to Participating Governments? [The CFSC will have no reporting or other direct obligations to the Participating Governments.]

(jj) How will it relate with existing regulators in CARICOM? [These will become functional agents operating under its direction and within a policy framework prescribed by the Treaty and policy direction of COFAP].

(kk) How will it relate with relevant international bodies as well as external regulatory authorities and institutions? [The CFSC will be able to establish functional relationships with Basel Committee, IOSCO, IAIS, World Bank, IMF, US Federal Reserve Board, UK FSA and similar bodies under MoUs where required.]

(ll) What privileges and immunities will it enjoy? [The CFSC will be accorded such privileges and immunities in the territories of Participating States as are necessary for it to fulfill its functions. Guidance on this aspect may be sought from the ECCB Agreement Act Part XII and Jamaican FSCA art 22.]

(mm) With whom and on what basis will information be shared? [Relevant information, including as to economic policy objectives, fiscal and monetary targets, currency and reserves, performance of financial institutions, regulation, supervision, cross-border access and control and other operational concerns will be shared with the Participating Governments, the CCB, Central Bank Agents and

other interested parties. Information sharing will be coordinated through COFAP. Guidance on this aspect may be sought from the Jamaican Financial Services Commission Act ss 15 & 16.]

(nn) How will it secure compliance? [The CFSC will have the power to require relevant information from financial institutions as well as conduct investigations that will enable it to assess their compliance with or breach of operating requirements. It will also be able to intervene in and take disciplinary action where necessary. Guidance on this aspect may be sought from the UF FSMA Parts XI, XII, XIII, XIV & XV and Jamaican FSCA Third Schedule.]

(oo) How will it secure ongoing review and corrective adjustment? [Through COFAP and under a directives mechanism as obtains in the EU.]

(pp) In the transition of this Agreement to legislation, the drafter will need to be aware of the potential constitutional implications.