

HARMONIZING THE SECURITIES ACTS OF THE CARIBBEAN COMMUNITY

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Abstract

The Caribbean Community Council for Finance and Planning (COFAP), at its Twelfth meeting held in March 2008, decided that a major element of the integration programme for capital markets should be the formulation of a uniform securities law for adoption by Member States. At the meeting of COFAP, the adoption of a uniform securities law was viewed as one of the measures to further the development and integration of the capital markets in the Community in accordance with Article 44.1(d) of the Revised Treaty of Chaguaramas. This article seeks to explore some of the issues of which regional policymakers must be cognizant in the quest to implement harmonized Securities Acts in Member States, and offers a more pragmatic approach to achieving harmonization.

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1 Introduction

The Caribbean Community ('CARICOM' or 'the Community')⁷ Council for Finance and Planning (COFAP),⁸ at its Twelfth meeting held in March 2008, decided that a major element of the integration programme for capital markets should be the formulation of a uniform securities law for adoption by Member States. At the meeting of COFAP, the adoption of a uniform securities law was viewed as one of the measures to further the development and integration of the capital markets in the Community in accordance with Article 44.1(d) of the Revised Treaty of Chaguaramas ('the Revised Treaty').⁹

⁷ See, Caribbean Community (CARICOM) Secretariat, 'History of the Caribbean Community (CARICOM)' <<http://www.caricom.org/jsp/community/history.jsp?menu=community&prmf=1>> accessed 20 October 2015

The Member States of the Caribbean Community are: Antigua and Barbuda; The Bahamas; Barbados; Belize; Dominica; Grenada; Guyana; Haiti; Jamaica; Montserrat; Saint Lucia; St. Kitts and Nevis; St. Vincent and the Grenadines; Suriname; and Trinidad and Tobago.

⁸ The Council for Finance and Planning (COFAP) is an Organ of CARICOM and consists of Ministers designated by Member States (usually finance ministers). COFAP has primary responsibility for economic policy co-ordination and financial and monetary integration of Member States. See, Caribbean Community (CARICOM) Secretariat, Revised Treaty of Chaguaramas (2001) arts 10 and 14 <http://www.caricom.org/jsp/community/revised_treaty.jsp?menu=community> accessed 3 October 2015

⁹ In 1989 the Heads of Government of Member States of CARICOM made the decision to transform the Common Market into a single market and economy in which factors move freely as a basis for internationally competitive production of goods and provision of services. It was also decided that for the transformation to take place, the Treaty of

The word 'uniform' suggests that all the Securities Acts of Member States are expected to be the same, adopted in similar mode as the Eastern Caribbean sub-region, where the eight territories that comprise the Eastern Caribbean Currency Union, have signed an agreement to provide for the regulation of the Eastern Caribbean securities markets utilizing a common Securities Act.¹⁰ The Revised Treaty contains several articles which require Member States to adopt harmonized laws and policies to further the integration movement. The Revised Treaty, however, does not elucidate how the Securities Acts are to be harmonized. It therefore, behoves the Region's policy makers, in both their national and regional capacities, to chart the way forward.

The decision by COFAP to adopt a uniform securities law is precipitous, as the factors which will drive the convergence process have not been

Chaguaramas would have to be revised. The Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy was signed by Heads of Government of the Caribbean Community on July 5, 2001 at their Twenty-Second Meeting of the Conference in Nassau, The Bahamas. <http://www.caricom.org/jsp/community/revised_treaty.jsp?menu=community> accessed 3 October, 2015

¹⁰ The Eastern Caribbean Securities Regulatory Commission Agreement was signed by Anguilla, Antigua and Barbuda, Commonwealth of Dominica, Grenada, Montserrat, St Kitts and Nevis, Saint Lucia, and St Vincent and the Grenadines in 2000 and passed into law in 2001 as a schedule to the Common Securities Act of the region. Eastern Caribbean Securities Regulatory Commission (2014) <[file:///C:/Users/owner/Downloads/1401393505_ECCBLIB-%23646324-v1-ECSRC_Information_Booklet%20\(1\).PDF](file:///C:/Users/owner/Downloads/1401393505_ECCBLIB-%23646324-v1-ECSRC_Information_Booklet%20(1).PDF)> accessed 18 October 2015

thoroughly examined to ascertain whether such a goal is achievable. The long and protracted movement towards a Caribbean Single Market and Economy (CSME) suggests that the adoption of a uniform Securities Act may not be achievable as national interests usually take precedence over Community objectives. This article seeks to explore some of the issues of which regional policymakers must be cognizant in the quest to implement harmonized Securities Acts and offers a more pragmatic approach to achieving harmonization.

2 Harmonization

What therefore does 'harmonization' entail? Alastair Hudson, eminent UK Professor of Law and author of several authoritative legal texts, writing on the European securities markets elucidates:

The word "harmonization" could mean either "equalization", in the sense of making all of the securities regulation of each Member State exactly the same; or merely "approximation", in the sense of bringing those securities regulations closer together without needing to make them identical.¹¹

Harmonization of Caribbean Securities Acts, from a practical perspective, means the adoption by Member States of common rules or standards regarding, *inter alia*: the authorization of issuers and securities; disclosure standards, including prospectus disclosure rules; standards for licensing securities market intermediaries; and risk mitigation strategies such as provision for insurance coverage and contingency funds. These matters involve cross jurisdictional issues, particularly those relating to mutual recognition where two or more States accept each other's regulations and supervisory capacity as adequate and a substitute for its own,¹² and also, issues concerning the enforcement of securities laws.

3 Some Features of Caribbean Securities Laws

Caribbean Securities Acts are composites of laws from several jurisdictions including the provincial laws of Canada, the Securities Acts of the United States of America and the securities laws of the United Kingdom. This feature has resulted in divergent and fragmented securities laws in the Community as the laws have not been uniformly adopted in Member States. Thus for instance, an issuer wishing to raise capital in two or more Member States will have to

observe different disclosure standards as the reporting obligations vary from Member State to Member State. The differences in disclosure standards in Member States' Securities Acts are further complicated by variations in the exemption provisions. The lack of consistency also results in regulatory arbitrage which is inconsistent with a core objective of securities regulation, i.e., ensuring that securities markets are fair, efficient and transparent. The absence of consistency also increases transactional costs as participants must seek interpretive guidance in order to achieve a reasonable degree of comfort.

There are also acknowledged conflicts in the legislative provisions governing takeovers and mergers. The differences in securities laws and associated legislation of Member States have been the subject of conflicts between parties to transactions which have led to litigation, as happened a few years ago, when takeover bids were made for Barbados Shipping and Trading Ltd., a company incorporated in Barbados and listed on both the Trinidad and Tobago and Barbados stock exchanges, by Neal and Massy Holdings Limited and ANSA McAl, both incorporated in Trinidad and Tobago. These inconsistencies in the legislative provisions increase transactional costs and lead to market inefficiencies.

Amendments to associated legislation, such as the Companies Acts, have also not kept pace with the development of securities markets and the ubiquitous use of technology in the conduct of securities transactions. One example is the rules governing the transfer of shares. The provisions in Securities Acts addressing clearance and settlement facilities presume that securities are fungible and that transfers will be undertaken in a dematerialized environment. Many of the Companies Acts were drafted prior to the introduction of centralized clearance and settlement facilities and the legislative provisions are based on the presumption that there will be a physical transfer of paper certificates rather than transfers by electronic entries. The provisions in the Companies Acts must be revised to address the inconsistencies.

4 Regional Cooperation

There have been attempts at functional cooperation by securities regulators through the efforts of the Caribbean Group of Securities Regulators (CGSR) which convened its first meeting in 2004 in Port of Spain, Trinidad. The CGSR meets annually to discuss matters affecting the Region's capital markets and to chart a regional approach to offering solutions to the challenges affecting the Region's capital markets. The CGSR met most recently in April 2015 in Jamaica under the theme, Capital Market Development and the Role of Financial Inclusion 'to share successful experiences and provide a forum for the exchange of information, analysis, discussion and realization of ideas that allows the Region to advance decisively in

¹¹ Alastair Hudson, *Introduction to UK Securities Law*, 16 <<http://www.alastairhudson.com/companylaw/Company%20Law%20-%20Securities%20Law%20Text.pdf>> accessed 2 June 2014

¹² See, Pierre-Hugues Verdier, 'Mutual Recognition in International Finance' *Harvard International Law Journal* (Winter 2011) vol 52, No1, 56, 63 <http://www.harvardilj.org/wp-content/uploads/2011/02/HILJ_52-1_Verdier.pdf> accessed 6 November 2014

promoting economic citizenship', among other things.¹³

Perhaps the CGSR's most significant achievement to date is the execution by some of the regulators, of a Multilateral Memorandum of Understanding for the Exchange of Information, Co-operation and Consultation (MMOU) in April 2014 in Bridgetown, Barbados.¹⁴ The Barbados Financial Services Commission, the Eastern Caribbean Securities Regulatory Commission, the Financial Services Commission of Jamaica and the Trinidad and Tobago Securities and Exchange Commission signed the MMOU which is intended 'to enhance the existing working relationship between the Commissions and to improve the effective regulation and co-operation amongst Commissions as it relates to the supervision and oversight of cross-border transactions and initiatives'.¹⁵ The execution of the Memorandum furthers regional efforts at functional cooperation among the Member States of CARICOM and represents another step towards regional integration.

Other efforts at functional cooperation by the CGSR include the 2009 initiative, supported by CARTAC, the IMF Regional Technical Assistance Center based in Barbados, to develop a Regional Take-Over Code to address the challenges experienced in cross-jurisdictional mergers and takeovers. Though the draft Code was agreed by the CGSR, there appears to be some lethargy in its implementation as the Code is yet to be enacted or incorporated in the securities laws of the Member States of CARICOM. Notwithstanding, the collaborative process adopted by the Region's regulators represents a first step towards a coordinated approach, aimed at resolving conflicts in Take-Over rules.

5 Regional Initiatives

The efforts at achieving regulatory reform by regional policy makers, particularly in the area of financial services, can be described as lethargic. One only has to examine the considerations which drove the passage of the most recent Securities Acts in the Caribbean where legislative changes were made in response to external pressures—driven by the overriding objective of satisfying the reform agenda set by international agencies and accompanied by threats and possible sanctions.

It is generally known that international agencies utilize a number of coercive tools to compel States to

comply with their reform agenda. These tools include naming and shaming and countermeasures, such as capital market sanctions, expulsion from regulatory groupings and withholding of financial assistance. An example is the motivation which drove the passage of the Jamaica Securities (Amendment) Act, of 2013 and related legislation. The passage was driven by an IMF conditionality which mandated that amendments to the Securities Laws be made 'to make less risky business models available' and 'to establish a comprehensive framework for the regulation of Collective Investment Schemes' in exchange for financial support.¹⁶

In Trinidad and Tobago, the revision of the Securities Industry Act commenced in January 2003 and a new Securities Act was proclaimed with some urgency in December 2012, ten years later. The urgency in the proclamation of the Trinidad and Tobago Securities Act in December 2012 was driven by external pressures, to ensure that the country became compliant with the terms of the IOSCO MMOU for Consultation, Cooperation and the Exchange of Information by January 01, 2013, the deadline set by IOSCO. There was also an implicit threat of measures which could have affected Trinidad and Tobago Securities and Exchange Commission's continued participation on the Inter-American Regional Committee of IOSCO and the Commission's ability to take part in other policy making deliberations.

Even though the Parliament of Trinidad and Tobago recognized that there were significant deficiencies in the Securities Bill, the requirement to achieve IOSCO 'signatory status' by January 01, 2013 drove the process and the Senate, notwithstanding the acknowledged flaws in the Bill, agreed to the passage of the new Securities Act on the condition that the Government give an undertaking to submit amendments within six months of the date of proclamation. Notably, that deadline was not met as the first reading of the Securities Amendment Bill 2013 took place in the Senate on January 14, 2014, one year later.

Another example of the Region's lethargy in implementing regional decisions is the delayed launch of the Caribbean Exchange Network (the CXN). In spite of significant expenditure and numerous attempts at start-up over the past eight years, the CXN is yet to be operationalized and it now appears to have been abandoned by its proponents. Work on the establishment of the CXN commenced in 2004 with the objective of inter-connecting the securities exchanges in Barbados, Jamaica and Trinidad and Tobago to create a common securities market through the electronic linkage of trading platforms. Some of the issues which have hindered its implementation are: lack of uniformity in the legal frameworks among the

¹³ Jamaica Financial Services Commission, 'Capital Market Development and the Role of Financial Inclusion'(2015) <<http://www.fscjamaica.org/fsc-news/news-articles/news-382.html>> accessed 1 June 2015

¹⁴ *Multilateral Memorandum of Understanding between the Commissions for the Exchange of Information and Cooperation and Consultation* (2014) <<http://www.ttsec.org.tt/content/Executed%20MMoU%20-CGSR.pdf>> accessed 1 June 2015

¹⁵ Id 2

¹⁶ See, International Monetary Fund, *IMF Country Report* (2014) No. 14/85 <<http://www.imf.org/external/pubs/ft/sr/2014/cr1485.pdf>> accessed 10 June 2014

Members States governing self-regulatory organizations; unequal and conflicting disclosure standards; and issues concerning mutual recognition of broker registration requirements.

The failure to establish a single regional securities exchange may be partly due to a perceived lack of interest shown by The Eastern Caribbean Securities Exchange which has been promoting what it believes to be the superiority of its own trading platform and the apparent reluctance of the three securities exchanges (mentioned above) to concur.

We also have the experience of the long and protracted delay in executing the CARICOM Financial Services Agreement. As far back as February 2004, in Port-of-Spain, Trinidad, a Regional Working Group on Financial Services Policy Harmonization convened to discuss and review a draft Agreement. Since then there have been numerous and protracted efforts aimed at finalizing the terms of the Agreement. The Agreement is yet to be executed despite the Ministers of Finance having approved the draft CARICOM Financial Services Agreement for finalization and signature by Member States at the Fifteenth Meeting of COFAP held on August 07, 2013.

6 Whither Harmonized Securities Acts?

The several failed attempts at launching the CXN, as well as the prolonged and protracted negotiations by COFAP, *et al* to agree to the terms of the CARICOM Financial Services Agreement suggest that any attempt at the adoption of a uniform securities law by the Community will be challenging. Moreover, if consensus on the provisions of a uniform securities law is ever arrived at, there is the added challenge of having to amend that document at future points in response to evolving financial markets and inevitable crises. These considerations do not augur well for finalization in the near term of a uniform Securities Act for the Caribbean Community.

The question which should now be posed is, how can the securities laws of Member States be harmonized so that the objectives of the Revised Treaty and the establishment of a single market are realized? There are two principal approaches which can be utilized to achieve harmonization of the securities laws. Member States can work towards the adoption of a uniform securities law as agreed at the 12th Meeting of COFAP; alternatively, Member States can work towards achieving ‘approximation’ of the securities laws. The former is static and likely to be frustrated as success is achievable only on completion and approval of a uniform law by the Member States, whereas with the latter, the approach is dynamic and the execution of each event in the process symbolizes success.

The Community’s history suggests that if the first approach is embraced, the process will be protracted and will take an inordinate period of time to

achieve consensus.¹⁷ Moreover, in the path to arriving at consensus, financial markets and standards will be evolving and it will become necessary to amend the regulatory response, further delaying the adoption of a uniform securities law. Additionally, if agreement on the provisions of a uniform securities law is ever arrived at, it will become necessary to amend the law at future points as financial markets are constantly developing. It is therefore more pragmatic to pursue a coordinated approach which embraces ‘approximation’ of the securities laws as this involves a more flexible approach to harmonization and is based on the adoption of minimum standards with a focus on specific areas which impact cross-jurisdictional activities.

7 Role of Heads of Government and COFAP

The Revised Treaty sets out the broad policy direction for the sector and the role of the Organs and Bodies of CARICOM. The principal Organs of CARICOM are the Conference of Heads of Government and the Community Council of Ministers.¹⁸ They are assisted in financial and monetary matters by COFAP.¹⁹ COFAP has primary responsibility for economic policy co-ordination and financial and monetary integration of Member States including, promoting the establishment and integration of capital markets in the Community.²⁰ The principal Organs of CARICOM assisted by COFAP determine the policy direction for the financial sector in the Community. The challenge is to determine how the policy directives, these broad high level principles are translated into both Community and municipal laws. This task is best addressed by regional sectoral standard setters such as the Caribbean Group of Securities Regulators and the competent authorities of Member States.

8 A Snapshot of the Process in the European Union

It is worthwhile at this point to briefly review the harmonization of securities laws in the European Union. ‘The EU has only achieved “approximation” [of its securities laws] through the establishment of minimum standards of regulation across the EU precisely because the securities directives grant Member States the power to create more stringent

¹⁷ Following the decision by COFAP in March 2008, the CARICOM Secretariat in late 2010 engaged a consulting firm to formulate a programme for the further development and integration of capital markets in the Caribbean Community including proposals for the design of an appropriate CARICOM Securities Law. Following a series of consultations, a draft Law was submitted to the Secretariat in 2011. The draft was circulated to Member States for feedback in 2014. No further progress has been reported.

¹⁸ RTC, art 10.1

¹⁹ RTC, art 10.2

²⁰ RTC, art 14.2

rules than are contained in the directives.²¹ The Consolidated Admission and Reporting Directive ('CARD') is intended to promote "the co-ordination" of the securities laws of member states²² without necessarily making them uniform. 'CARD's implementation takes account of the "present differences in the structures of securities markets in Member States" so as to enable member states to take into account "any specific situations with which they may be confronted".²³ The laws 'are based on a minimum level of regulation in all Member States that would permit the movement of approvals to be passported in time between Member States.'²⁴

9 A Two-Pronged Process

In light of the conflicts which exist between Community objectives and national interests, it is recommended that a coordinated approach to implementation be adopted by the Community. Convergence of securities laws can be achieved utilizing a two-pronged approach, starting with the involvement of the CARICOM Secretariat which should be tasked with the responsibility for developing a model Securities Bill for the Community. This model Bill will serve as the blueprint and will act as a guide for each Member State in the revision of its national Securities Act. Recognizing, however, the challenges in implementing a uniform Act throughout the Community, a collaborative approach that focuses on the development of minimum standards should be adopted. This assignment should be delegated to the Caribbean Group of Securities Regulators (CGSR).

10 Role of the CGSR

The lead in the development of minimum standards for the securities sector must be taken by the CGSR. The CGSR is an established network of regulators within the Community and best situated to move the integration process to the next stage. The formulation of minimum standards for the sector should begin with the engagement of industry stakeholders, those familiar with industry practices. Stakeholder involvement is imperative as the imposition of standards on the Community without the participation of those that will be affected is likely to result in a lack of ownership and buy-in.²⁵ Having developed minimum standards, these draft standards should be referred to the College of Regulators²⁶ which will play

a coordinating role, ensuring that the proposals are not inconsistent with the regulatory policies of other financial services regulators. This approach is consistent with the terms of the Liliendaal Declaration on the Financial Sector, which declares the need for closer collaboration among supervisory authorities.²⁷

11 Transparency and Consultation

The decision of the Caribbean Court of Justice (CCJ) in the case of *Myrie v Barbados*²⁸ underscores the need for increased transparency in the work of the Organs and Bodies of CARICOM. In the *Myrie* case, a decision of the Conference of Heads of Government regarding an 'automatic stay' of six months in Member States,²⁹ and which is recorded in a draft report, was relied upon and ruled by the CCJ as valid and binding on the Community. The CARICOM Secretariat also has to play a more direct role in the consultative process at both national and regional levels as the current system which delegates a significant amount of responsibility to Member States is too reliant on the discretion of the competent authorities and results in information asymmetries. It is recommended that the CARICOM Secretariat adopt a process of consultation at each stage using appropriate ICT to gain the widest participation and feedback. This will allow the Organs and Bodies of CARICOM the opportunity to hear the views of interested persons who do not belong to stakeholder groups customarily recognized by the competent authorities. This consultative process is essential as the proposed rules will impact on the wider investment public.

established. Caribbean Community (CARICOM) Secretariat, 'Liliendaal Declaration on the Financial Sector (New Framework for Financial Regulation and Supervision in the Region)' (2009)
<http://www.caricom.org/jsp/communications/meetings_state_ments/liliendaal_declaration_financial_sector.jsp>
accessed 26 June 2014

²⁷ The Liliendaal Declaration was made by Heads of Government of CARICOM at the Thirtieth Meeting in July 2009 following the 'negative fallout' from the global financial and economic crisis. The Declaration seeks to outline a coordinated and integrated approach to the regulation, supervision and oversight of the financial services sectors in the Community. Id

²⁸ *Myrie v Barbados* [2013] CCJ 3 (OJ), (2013) 83 WIR 104

²⁹ Draft Report of the Twenty-Eight Meeting of the Conference of Heads of the Caribbean Community, at that meeting: THE CONFERENCE

AGREED that all CARICOM nationals should be entitled to an automatic stay of six months upon arrival in order to enhance their sense that they belong to, and can move in the Caribbean Community, subject to the rights of Member States to refuse undesirable persons entry and to prevent persons from becoming a charge on public funds.

Cited in *Myrie v Barbados*, [2013] CCJ 3 (OJ), (2013) 83 WIR 104 [43]

At para 47, (The CCJ also took note that the Conference, the CARICOM Secretariat and the various Organs of the Community all regarded and treated the 2007 Conference Decision as valid and binding.)

²¹ Hudson (n 5) 16

²² Id 16

²³ Id 17

²⁴ Id 19

²⁵ See, Chris Brummer, *Soft Law and the Global Financial System: Rule Making in the 21st Century* (Cambridge 2012) 191

²⁶ Caribbean Community (CARICOM) Secretariat, Liliendaal Declaration on the Financial Sector (New Framework for Financial Regulation and Supervision in the Region), at paragraph 3, seeks to establish a College of Regulators. The College of Regulators has, however, to date not been

12 Establish Office of International Affairs

A key component to the success of the proposed matrix is the provision of adequate resources at a national level to drive the integration process forward. The competent regulatory authorities should establish an 'office of international affairs' or at a minimum, designate an individual to spearhead cooperation efforts with regional and international bodies.³⁰ Coupled with the recruitment of trained personnel, is the need to establish systems for the development and retention of institutional knowledge and the management and dissemination of information. The harmonization of Caribbean Securities Acts must have the attention of committed technocrats whose role is to drive the integration process in a focused and systematic way.

13 Conclusion

Given the considerations involved in its development and adoption, it is unlikely that a uniform securities law will be successfully adopted and implemented in the Member States of CARICOM. Regional policy makers should therefore focus on achieving approximation of the securities laws and ensuring that securities regulators and other standard setters are equipped with the resources to formulate minimum standards for the securities sector in the Community. The Revised Treaty³¹ creates a valid and binding obligation on the Community to harmonize the securities laws, and in light of the CCJ's rulings in *Hummingbird Rice Mills v Suriname and the Caribbean Community*³² and *Myrie v Barbados*³³ it

becomes even more urgent that Member States adopt minimum standards for the realization of harmonized securities laws.

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³⁰ See Brummer (n 19) 51, where he states that 'Virtually every regulatory agency charged with domestic supervisory responsibilities . . . has instituted an "office of international affairs" to spearhead cooperation efforts with their foreign equivalents.'

³¹ Article 9 of the Revised Treaty states, Member States shall take all appropriate measures, whether general or particular, to ensure the carrying out of obligations arising out of this Treaty or resulting from decisions taken by the Organs and Bodies of the Community. They shall facilitate the achievement of the objectives of the Community. They shall abstain from any measures which could jeopardise the attainment of the objectives of this Treaty.

³² See *Hummingbird Rice Mills Limited v Suriname and the Caribbean Community* [2012] CCJ 1 (OJ) [17], (2012) 79 WIR 448 [17] where the CCJ stated,

There is no doubt that Suriname came under a legal obligation scrupulously to observe all its treaty obligations from 1st January 2006, the date of entry into force of the Revised Treaty. From that date forward, the rule of pacta sunt servanda, enshrined in Article 26 of the Vienna Convention on the Law of Treaties, 1969, became operative: 'every treaty in force is binding upon the parties to it and must be performed by them in good faith.' The State of Suriname was simultaneously bound by Article 9 of the Revised Treaty to take all appropriate measures to ensure the carrying out of its treaty obligations.

³³ In *Myrie v Barbados* [2013] CCJ 3 (OJ)[55], (2013) 83 WIR 104, [55] the CCJ stated, 'in the absence of any indication to the contrary a valid decision of a Community Organ or Body taken in fulfillment or furtherance of the RTC or to achieve the

objectives of the Community is immediately binding at the Community Level.' citing *Hummingbird Rice Mills*, (n 26).