BEST PRACTICES IN INVESTMENT INSTRUMENTS

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Executive Summary

The Consultant was hired by the Caribbean Community (CARICOM) as part of the technical cooperation project *Support for Investment Frameworks in the Caribbean Community: Towards a Regional Harmonized "Best Practices" Regime*, which is co-financed by the IDB's Multilateral Investment Fund. This study is one of four components of this project and provides an "identification of international 'best practices' in the area of investment policy, regulatory and administrative procedures and proposals for the formulation of harmonized investment principles for CARICOM."

The results of this study complement the Diagnostic Studies on the Investment Climate already executed for all 15 CARICOM member countries (evaluated and compiled within a Summary Report) and the Investment Incentives Report.

The report has been divided in three main sections that will cover the following topics:

I. An enumeration of the laws and principles in case study countries that appear to constitute best practice investment policy and will include an extensive comparative analysis and illustrative examples. A benchmarking analysis comparing CARICOM investment practices with those of other model countries.
II. A discussion and analysis of the methods and processes used by diverse states and regional groupings to achieve investment policy harmonization.
III. A draft of investment policy principles for the consideration of CARICOM States, and procedural options that could be employed by the Community to achieve policy harmonization.

E.1. INVESTMENT POLICIES' BEST PRACTICES

To cover the first section of the report, the Consultant, based on preliminary research, discussion with other senior team members of the project, and the Consultant's own experience, selected following group of countries:

- Chile
- Costa Rica
- Dominican Republic
- Ireland
- Mauritius.

These countries are a sample of different regions of the World, although it was the Consultant's intention to have a majority located in the Western Hemisphere. Other features that are relevant to CARICOM countries are the selected countries' size (the largest market, Chile, is barely larger than CARICOM — population-wise), access to large international markets, and, with some exceptions, similar levels of development.

Investment policies to be evaluated were:

- Admission and business establishment,
- Standards of treatment
- Expropriation and compensation
- Dispute settlement

Special attention was given to the laws and policies relating to matters of major concern to CARICOM Member States, including alien landholding, employment of foreign workers, and access to resources from the domestic financial system, among others.

The case study analyses lead to conclude that there is no one-size-fits-all investment regime that guarantees the level of success in attracting FDI and local investment. There are, however, specific characteristics shared by all that have made them magnets of FDI for several decades, which are divided as follow:

- Policy and regulatory factors
- Business facilitation
- Open markets

These subjects have important subsectors which include transparency, administration of investment, non-discrimination, taxation, human resources and labor rules, and overall business environment.

All evaluated countries have been consistent with their investment policies throughout the period of attracting investment and there seem to be a policy consensus among political forces and civil society. They understood early the importance of having an open economy receptive of FDI and PSP in generating sustainable development.

This realization allowed them to position themselves ahead of their neighbors and focus on export and service oriented growth, opening new international markets for products/services generated locally. The standard policy consensus includes incorporating the attraction of FDI as a key tool to promote employment generation, export-oriented activities, education/training investment, and technology transfer, among other key elements of sustainable development.

The case of Chile's investment regime is interesting: born under authoritarian rule, the investment policies that made Chile the FDI darling of the Americas have been kept, continued, and deepened for more than 10 years by three consecutive left-of-center governments. Whatever are the ideological fault-lines dividing Chileans nowadays they are <u>not</u> about their pro-investment and PSP policy commitment. On the other hand, Ireland's case shows that a traditional liberal democracy can rise above special interests, create a very cooperative government/management/labor dynamic and implement an innovative and aggressive – and above all, very successful - investment regime.

Not all the studied countries unambiguously view private sector as the main motor for economic development. Most of the case studies have sectors that are restricted to FDI or private sector participation. Costa Rica remains a relatively protectionist and statist economy and lags behind the other evaluated countries in privatization and PSP. Nevertheless, as much as it reserves several key economic sectors for state control and has more areas close off to FDI, it is a country known for the strength of its civil society and institutions and political stability.

Four of the evaluated countries have transparent and reliable judicial systems, although not all are expeditious, as in the case of Costa Rica. A notable exception to this characteristic is Dominican Republic, where its investment climate reputation is being compromised by an inconsistent application of the law vis-à-vis foreign investors in expropriation/ compensation issues, dispute settlement, and respect of contract. Some Dominican investment sectors are less vulnerable to this situation, as they are located within special legal regimes (ex. FTZs and tourism) that help investors avoid some of these judicial deficiencies.

Most of the evaluated countries designed transparent and welcoming rules for FDI entry. They don't need to be equal, as some are effective being very open, while other are equally successful but more regulated. Nonetheless, they must be transparent, expeditious, non-discriminatory (at least in the sectors open for FDI/PSP), and consistent throughout the life of the investment.

Education and training play a very important part of the evaluated countries success. All of them apply a considerable percent of their national budgets to education, plus focus special investment in maintaining a continued flow of skilled workers to satisfy their service and export-oriented sectors, as well as their development requirements. Low-cost unskilled and skilled labor was not a major element in attraction of FDI, with the only possible exception of the Dominican Republic.

The investments in education and training have gone hand-in-hand with investments in technology and innovative capacity. All countries have set-up programs to promote linkages between FDI and local companies to facilitate transfer of knowledge, as well as research and development.

Evaluated countries has also given priority to communications and physical infrastructure, with the possible exception of Costa Rica, where telecommunications are still a public monopoly and physical infrastructure has taken a secondary role to investment in education, health, and technology.

Not all of the countries evaluated offered national treatment to countries in those sectors open to foreign investment (particularly Costa Rica, as we will see in the next chapter), but the range of those sectors is relatively narrow and the rules are well known and applied fairly. Again, investment will come as long as those sectors open to investment are under a transparent and consistent regime.

The evaluated countries approach incentive regimes using a variety of methods, from very generous tax/incentives regimes, to a more focused approach based on distinctive sectors and regions. All the countries evaluated were very active in promoting export-oriented industries and services. Corporate taxes are dropping significantly (Ireland, Costa Rica and Mauritius), as countries are setting their sights to corporate tax rates between 12.5 to 15 percent. In the case of Ireland, this tax (at 12.5 percent) already applies to all firms, both local and foreign, while Costa Rica is considering its application (at 15 percent) in the short-term. All countries are moving away from tax holidays.

One key element mentioned in several business surveys is the issue of a transparent business regulatory system. The rules of the game must be spelled out clearly and applied consistently. All countries evaluated have achieved, to a large degree, this kind of confidence from the business community. Costa Rica and the Dominican Republic have issues regarding the capacity of their judicial systems to deal with investment disputes, and, in the case of the latter country, the willingness by the government to enforce a leveled field for investors outside its free trade zones. This situation has become these countries' main blot on their investment reputations.

On the subject of free flow of workers, the countries have different approaches: the most restrictive group (Chile, Costa Rica, and the Dominican Republic) limit the amount of foreign workers in an enterprise, but this usually is more liberal when dealing with management positions. The most liberal of the evaluated countries don't have restrictions on the numbers and duration of foreign managers (Ireland) and, in the particular case of Mauritius, a significant percentage of the workers are foreigner, mainly employed in services, including banking, and export-oriented activities.

Investment promotion services are a very important feature in all the evaluated countries. All have agencies in charge of investment promotion, although with different focus. All are strongly institutionally backed. Some can make decisions without resorting to other ministries (Chile, Costa Rica). There is no doubt that having an updated and informative agency (and webpage) presenting clearly a country's opportunities, incentives, legislation, and other important data is key to attracting foreign investment.

For countries with relatively small economies, having commercial access to large international markets is key to attracting FDI and promoting development through job creation and an enlarged/diversified tax base. The evaluated countries have all made significant advances in pursuing bilateral investment treaties (Chile), double taxation agreements (Mauritius), and joining trade arrangements with that permit preferential access to the United States (Costa Rica, the Dominican Republic, Mauritius) and the European Union (Chile, Ireland, and Mauritius).

On the issue of regional cooperation, the actions of the evaluated countries were again divided: while some (Costa Rica, Ireland, and Mauritius) made significant strides in the regional trade and economic integration and cooperation efforts, other focus on strengthening their ties with traditional markets (Dominican trade with the United States) or developing bilateral ties with many countries of strategic interest (Chile). Nonetheless, Dominican Republic is moving to fully join with Central American and Caribbean integration efforts and Chile is an associated member of MERCOSUR.

All the countries also facilitate the entry of raw materials and machinery/parts required by the export-oriented sector.

E.1.1. Admission and Establishment of an Investment

The best practice for admission and establishment of an investment is to provide foreign investors and their investments with a clear, non-discriminatory and uncomplicated right of establishment. These practices are better evaluated in the same four key policy areas evaluated in the previous chapter:

- Restricted and reserved sectors for FDI and domestic investment
- Equity restrictions
- Admission of investment
- Foreign workers employment

E.1.1.1. Restricted and Reserved Sectors for FDI/PSP

The best practice regarding this policy is to maintain the external related sectors (ex. international commerce and services) open to FDI/PSP and welcome private investors in traditionally government-controlled sectors. The key factors are the following:

- Friendly environment to private participation in most economic areas
- No barriers to participation by foreign investors in the sale of state-owned companies, from privatization to administrative concessions and management contracts.

The application of open, transparent and non-discriminatory business establishment in CARICOM is uneven. Many CARICOM countries have friendly business establishment systems, but others are harmed by government interference in the form of preference for joint-ventures with local firms, limits on ownership/FDI, land ownership restrictions, reservation to local investors of export-industries, lack of any privatization efforts, and overall discriminatory establishment practices, among others.

Specifically, the key policies in CARICOM that would need to change (including examples) to adapt to the best practice regime are the following:

- Foreign investors have limits to their investment. In Bahamas, FDI is only allowed if investment is above US$500,000 in Nassau or Freeport and US$250,000 elsewhere.

Haiti limits the participation of foreign investors to minority partners in strategic economic sectors, such as utilities.

- Preference for joint-ventures and partnerships with local investors. Belize falls in this category, although 100% foreign ownership is allowed. In Guyana, privatization of public utilities is given to joint ventures between the private sector and the government, plus the Guyanese government prefers the joint ventures between private investor and FDI for large projects.
- Non-residents are required an alien's landholding license for land purchasing. This is true in many CARICOM countries. This requirement is not so much an impediment to FDI, as long as there are enclaves or specific location in which exceptions to this requirements are granted. Their most important negative impact in FDI is in the establishment of agricultural and agroindustrial businesses.
- Large government involvement in key economic sectors. As an example, Dominica has much government participation in energy, water, air/sea ports, mining, banana exports, and the control of "essential commodities". An extreme case is Suriname, where the government participation in the economy almost rival Cuba's in this hemisphere.
- No privatization efforts. Although most CARICOM member countries have state-owned and controlled industries and services, some countries are particularly slow or antagonistic in accepting this mechanism to promote PSP and FDI, such as Dominica, Haiti (with small exceptions), and Suriname.
- Discrimination in establishment process. In Haiti, foreign firms pay twice as much taxes as local firms on dividends. This is true in several of the CARICOM countries.
- FDI targeted to certain areas: Bahamas tries to channel investment to specific sectors, such as tourist resorts, upscale condos, time shares, international business centers, marinas, data processing, light assembly, high-tech service, ship registration, agro-industry, export-oriented light manufacturing, banking and other financial services, insurance, aircraft services, pharmaceuticals, offshore medical services.
- Suriname deserves a bullet apart because of its cumbersome establishment systems, as well as many restrictions to foreign and national private participation. In Suriname, land leases for agriculture are only granted to nationals but, in reality, most land is state-owned. Local legislation clearly discriminates between foreigners and locals for purchasing land and property (right of property only applies to locals). Foreign investors are expected to find local partners in joint ventures for most investments (no "local partner, no investment incentives."). Government and civil society are adverse to privatization.

The key issue of having reserved or restricted areas for private investment is the nature of the activity: investment would look more closely on the specific activities, which are being curtailed, rather than the overall government intervention in the economy. Therefore, local governments should make a strong effort to leave export-oriented sectors and large productive activities, including some utilities, to private sector participation.

E.1.1.2. Equity/Ownership Restrictions

Most of the countries evaluated for "best practices" allow for 100 percent foreign ownership in all sectors that are not specifically restricted or reserved. Equity/control restrictions are rather found in the areas of the economy in which states want to promote more efficiency through PSP without losing either state-control or local ownership. The best practices for this policy found when evaluating the case studies where:

- 100 percent ownership is allowed in all sectors open to PSP or FDI.
- Local private/FDI participation is allowed in restricted areas, even when government doesn't lose control, through a system of management concessions in strategic sectors.

In most CARICOM member countries there is no equity/ownership restrictions, with some exception such as the following examples:

- Guyana, where privatization of public utilities is given to joint ventures between the private sector and the government.
- Haiti, where there is discrimination between local and foreign firms even within the same economic activities.
- Suriname, where foreign investors are expected to find local partners in joint ventures for most investments.

The fact that most countries CARICOM countries allow for 100 percent ownership is blunted by the fact that so many of them have reserved and restricted areas to PSP or FDI. The investment climate will benefit for a larger participation of the private sector in all sectors of the economy.

E.1.1.3. Approval Requirements

The key best practices identified for approval requirements focus on having transparent, clear, non-discriminatory and uncomplicated investment entry requirements. A very important issue is that the approval procedures are expeditious and applications approved in a timely manner. One-stop-shop agencies are a very good instrument to facilitate the entry process. Moreover, in some of the countries of which best practices were evaluated, there was no screening process to control foreign investment in a country.

In CARICOM countries, the approval requirements are usually straightforward and are processed in a timely manner, although discretionary practices are pervasive:

- In Bahamas, if FDI competes with local investment, its application may be rejected.
- Application are most favorably viewed if leading to specific benefits, such as job creation, export-activity, foreign exchange earnings.
- Haiti and Suriname have no clear approval requirements (if they have any).
- Discrimination in the approval process is common, with foreign investors having to pay more for business licenses and taxes. For example, Bahamas (licenses) and Haiti (licenses and taxes).
- Very confusing and discretionary system. Investors overstep the development/investment agencies in favor of negotiating directly at ministry or

executive level for establishment and incentives. Montserrat and Suriname are examples of this practice.

E.1.1.4. Foreign Workers Employment

The best practice for this policy is to allow the entry of as many managerial and technical personnel as possible to permit the quick and efficient functioning of new investment. In most countries evaluated, this was permitted, although it also include a strong training and transfer of knowledge policies that would allow for increasing local participation on those positions.

- For the most part, visa, residence and work permit procedures for foreign investors should be a straightforward process and non-discriminatory, regardless of the country of origin of personnel.
- No restrictions on the numbers and duration of employment of foreign managers brought in to supervise foreign investment projects.
- Even in case some countries require specific quotas that limit the percentage of foreign workers that a firm may have, exception should be made for managerial and specialized technical positions.

Given the small size of their population, some CARICOM members have very restrictive work permit policies, even among CARICOM citizens. For example, in Bahamas government policy favors employment of Bahamians and is very difficult to get work permits for positions other than managerial and specialized. The process for granting work permits overall for much of CARICOM is very cumbersome, suffer from long delays, and can be very costly.

E.1.2. Standard of Treatment

The best practice for standard of treatment is to grant national treatment for all phases (establishment, acquisition, disposition, sale, etc.) of an investment, subject to country-specific exceptions in some sectors or with respect to some measures. However, in some cases, Most Favored Nation status is more favorable than national treatment, in which case it is preferred to receive that treatment that is the most favorable.

E.1.2.1. National treatment

The majority of the countries evaluated for best practices provide national treatment to foreign firms in areas open to private sector participation. The same can be said of MFN treatment (all evaluated case studies offer MFN treatment).

In these case studies, we found the following situation:

- Foreign firms compete on an equal basis with domestic firms.
- Investment registration process has the same requirements for foreign and national

investors.

- Constitution grants national treatment to foreign investors (or no less favorable than to national investors).
- No constraints preventing foreign individuals or entities from ownership or participation in private firms/corporations.
- No barriers to participation by foreign institutions in the sale of state-owned companies.

Interestingly, most countries evaluated for best practices impose some kind of alien landholding, particularly those in Latin America. In those cases, firms seeking MFN treatment could locate within specific areas or enclaves, whether FTZs, Offshore Centers, or another approved location.

Several CARICOM countries require joint-ventures or limit FDI participation in key industries (particularly those that may be most attractive to foreign investors).

- In many of the CARICOM countries foreign-owned companies must pay higher incorporation and licensing fees in several countries, including Antigua and Barbuda, Dominica, and Haiti, among others.
- In Barbados, FDI, outside financing, may not be permitted outside FTZs unless it brings significant employment. In this island, also, some locations are barred for FDI.
- Haiti discriminates, in practice, between local and foreign enterprises even within the same kind of economic activities and imposes property restrictions for individual foreigners. It also resorts in applying higher taxes on dividends for FDI, as well as additional licensing
- In Suriname only nationals have property rights protected.
- In Trinidad and Tobago, in order to qualify for a 15 percent tax credit, a company must be locally owned. Moreover, hotel incentives/requirements discriminate against foreigners

Greater efforts must be made by CARICOM countries to have non-discriminatory practices between their local investors and foreign investors, as well as between foreign investors from different countries. The use of enclaves to obviate landholding restrictions should more widely used.

E.1.2.2. Performance Requirements

In the best practices evaluated for this subject, it was found that that there are very few performance requirements that impose limits on trade and investment. In the best cases, no performance requirements are demanded from private investment.

In CARICOM countries the most common performance requirements are those related to export-performance (duty-free benefits tied to verifiable exports), local sourcing, and job creation. In many of the countries is expected that enclave enterprises must produce exports for outside CARICOM markets.

There are other requirements, as seen in these examples:

- Bahamas has a minimum amount for FDI 8US$500,000 in Nassau and US$250,00 in Freeport) and expects that FDI receiving tax benefits contributes to civic projects.
- Guyana imposes, in some cases, minimum level of investment
- Haiti requests local sourcing, new job creation, and technology transfers
- Foreign investors and exporters in Suriname are expected to maintain a higher standard of good business practices than Surinamese firms do, with discovered infractions widely publicized.

With few exception, such as the export requirements (since most CARICOM markets are very small anyway), performance requirements that burden an economic activity and, thus, discourage investment should be eliminated. Policies such as local sourcing requirements could be replaced by linkages programs in which local industries are identified and encourage to produce cost-effective inputs to export-oriented activities.

E.1.3. Expropriation and Compensation

The best practice that can be used for expropriation and compensation policies is to prohibit the direct or indirect expropriation of an investment except when done for a public purpose on a non-discriminatory basis, in accordance with due process of law, and on payment of "prompt, adequate and effective" compensation.

The following is a summary of best practices identified:

- A best practice in this matter is that material possession of an expropriated property can only take place **after** full compensation is paid.
- Indemnity is established using real estates experts to determine the market value of the property.
- Private property is expropriated only for public purposes in a non-discriminatory manner and in accordance with established principles of international law.
- Expropriations are carried out in accordance with recognized principles of due process.
- Return of the property to the original owner if it is not used for the intended purpose within ten years or, if the owner was compensated, right of first refusal to repurchase the property back at its current value;
- Requirement that the tax office itemize buildings, crops, rental income, commercial rights, mineral exploitation rights, and other goods and rights, separately and in addition to the value of the land itself; and
- Provisions providing for local and international arbitration in the event of a dispute.

Most CARICOM countries have not had historically problems with expropriations. There are some issues in some countries that must be highlighted:

- Belize has faced recently controversial expropriation of land with tardy compensation in non-negotiable Belize dollars and expropriate land has sometimes been used for other purposes than intended under expropriation claim.
- In Guyana, existing law allows the government a lot of leeway in the expropriation of land.
- Montserrat is a very special case in this matter given that has been until very recently under an emergency regime due to volcanic activity.
- The worst case in CARICOM is Suriname, where the government may claim property by a resolution signed by the President of Suriname. The Minister of Natural Resources may suspend or revoke the concession rights with no compensation obligation.

Besides the shortcomings mentioned just above, the main change required from almost all CARICOM members relates to the prompt processing of adequate compensation.

E.1.4. Dispute Settlement

It was noticed that all best cases evaluated were members of the International Center for the Settlement of Investment Disputes (ICSID) and that they agree to binding international arbitration of investment disputes between foreign investors and the state.

Among the specific best practices identified, the following are considered key for this topic:

- Bilateral investment protection agreements may allow for binding international arbitration
- The judicial system is transparent and independent of government involvement.
- International arbitration clauses in large contracts between companies and the State
- Judgments of foreign courts are generally accepted and enforced.

It was observed, however, that some of the evaluated countries did not performed well in this category. The actual conclusion is that some significant shortcomings can be overlook by investors through special investment regimes (in the case of DR, investors flock to its FTZ and tourism opportunities while shunning the power generation sector).

Many CARICOM member countries are not members of the ICSID, such as Antigua and Barbuda, Belize, Dominica, Haiti, Montserrat, St. Kitts & Nevis, St. Lucia, and Suriname. Membership in this convention would give the country more credibility among foreign investors, although the majority of the countries just mentioned have done quite well in recent years in accepting foreign arbitration, while still needing to improve its judicial system to improve the pace for dispute resolution.

The most problematic countries in this respect are Haiti, with its notoriously inefficient courts and its antiquated legal system, which has hindered resolution of most disputes, and Suriname, where no jurisprudence can be found with regard to dispute settlement between foreign and local investors.

E.1.5. Domestic Finance and Foreign Exchange Controls

This section will be evaluated using the following three elements:

- Access to domestic financing
- Remittances and repatriation
- Foreign exchange controls

Table 4.5 summarizes the findings from the evaluated cases and the CARICOM countries on this matter.

E.1.5.1. Access to Domestic Financing

The best practices identified among the case studies evaluated are the following:

- Credit is allocated on market terms and is available to foreigners
- There is no discrimination between foreign and local firms with regard to access to local credit.

In this respect, CARICOM member countries require significant changes as policies for access of foreign investors to the local financing markets tends to be discriminatory. As an example, in Antigua and Barbuda preferential financing or finance facilitation is readily available to national investors but not to foreigners. In Bahamas, The Bahamas Development Bank (BDB) provides financing for working capital and fixed assets but is not allowed to provide finance to projects, which are wholly or partially owned by non-Bahamians. Also, in Barbados, medium to large-scale projects must be 51 percent locally owned to obtain development financing. This latter situation is also true in Trinidad & Tobago. In St. Kitts & Nevis domestic loans to foreigners are levied a 2.5 percent tax.

In other kind of limitation, in Dominica, Grenada, St. Lucia, and St. Vincent, foreign investors are required to obtain permission from the Minister of Finance in order to borrow from local financial institutions.

Guyana is explicit in its preference to invite foreign capital rather than encourage foreign companies to come into Guyana and borrow from local banks. In Haiti, access to credit is restricted by the difficulty in assessing client risk and the lack of legal remedies for lenders in the event of default.

E.1.5.2. Remittances and Repatriation

From the standpoint of foreign investors, the ideal treatment would accord completely unconditional, unregulated, transfer rights without limitation of the percentage of investment that may be repatriated or restrictions on the access to and use of foreign exchange to effectuate such transfers in hard currencies.

In the studied cases the following was observed:

- No restrictions imposed on the conversion or repatriation of investment capital, earnings, interest or royalties.
- Foreign exchange is easily obtainable at market rates.
- No legal impediments to obtaining foreign exchange for any business transaction.
- There is convertibility on both capital and current accounts.
- Foreign currency accounts can be opened.
- Contracts may be negotiated in any currency.
- No divergence between central bank exchange rates and those prevailing in the market.

In most CARICOM countries there is little problem to abide to the proposed best practices presented here. Nonetheless, a problem has been identified in countries that maintain a fixed exchange in their currency, such as Belize, where significant delays in processing foreign exchange request was very problematic in 2002, The Bahamas, and Jamaica. Also, Guyana requires that people remitting or leaving the country with sums of money or articles valued in excess of US$10,000 must notify the Customs Authority and pay a 15 percent withholding tax. Another problem is the policy of making transfers of funds possible but very expensive, as it happens in Suriname, where they also have restrictions on the amount of foreign currency that may leave Suriname.

E.2. SECTION II

This study addresses the *Best Practices in Investment Instruments*. It explores the investment policy framework that CARICOM countries may wish to adopt to enhance their development prospects.by looking at how different regional groupings have harmonised their investment policy. The study covers the Asia-Pacific Economic Cooperation (APEC) Non-Binding Investment Principles adopted in Jakarta in November 1994, the Framework Agreement on the Association of Southeast Asian Nations (ASEAN) Investment Area (AIA), the Common Market of the South (MERCOSUR), the European Union (EU), the North American Free Trade Agreement (NAFTA) and similar agreements, the Revised Treaty of Chaguaramas, and the draft Multilateral Agreement on Investment (MAI).

E.2.1. Investment Rules

Traditional investment agreements generally adopt a broad, open-ended, asset-based definition of the term investment, which is more encompassing that the traditional enterprise-based definition of foreign direct investment. They set standards for the treatment and protection of investors and their investments and also typically include an admission clause, which refers to the laws and regulations of the host state for the admission of investments. They guarantee the free transfer of funds related to investment and include a non-exhaustive list of the types of payments for which the transfer of funds is to be guaranteed. With respect to expropriation, investment instruments prohibit expropriation unless it is done for a public purpose, on a non-discriminatory basis, in accordance with due process of law, and on payment of prompt, adequate, and effective compensation. Finally, dispute settlement provisions are also included, particularly with respect to investor-state disputes allowing parties to submit their claim either to an ad-hoc tribunal or a more institutionalized mechanism such as the International Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID).

These agreements, most of which are bilateral in nature, do not confer an automatic right of establishment to foreign investors and do not *per se* attract investment flows. Rather, they act as a complement to the economic determinants of these flows, and contribute to improving the investment climate of host states and reducing the risk of investing in foreign countries. Most bilateral investment treaties signed by CARICOM countries with countries other than the United States and Canada fall under this category.

Examples

Protection

European-style BITs
MERCOSUR Protocols on Investment (signed in 1994, not in force)
Andean Community (Decision 291 of 1991)
Central America-Dominican Republic FTA (signed in 1999)
Dominican Republic-CARICOM FTA

More recently, a growing number of countries, particularly in the Americas, have negotiated agreements that go beyond this traditional approach. These instruments add a “market access” or “liberalization” component to the “protection” element of a traditional investment agreement. They include a right of establishment, i.e. the right to establish a new business or to acquire an existing one, subject to admissible, negotiated, exceptions or reservations. They also incorporate a list of reservations or country-specific exceptions from key treaty obligations with a view to preserving the right to maintain non-conforming measures (even in sectors subject to legally binding liberalization undertakings). These instruments can exert a positive influence on the investment regime of a country by locking in the liberalization achieved at the domestic level. Countries can potentially benefit from the signaling effects of binding the statutory and regulatory status quo in these agreements, as well as from the considerably heightened level of regulatory transparency afforded by attempts to comprehensively list investment restrictive measures. The bilateral investment treaties between Barbados and Canada, Grenada and the United States, Jamaica and the United States, Trinidad and Tobago and Canada, and the United States and Trinidad and Tobago have adopted this approach. Chapter III of the Revised Treaty of Chaguaramas on establishment, services, capital and movement of community nationals includes a market access component with a list of country-specific reservations but does not address per se protection elements.

Investment instruments with a market access component also prohibit the use of two types of performance requirements. Mandatory performance requirements are conditions or requirements that are imposed at the pre- and/or post-establishment phases, i.e. for the establishment and/or operation of an investment. Incentive-based performance requirements are conditions that an investor must meet to secure a government advantage (subsidy) or incentive. Some performance requirements, while banned under the first type of condition, may be allowed when they condition the conferral of an advantage or a subsidy. Some examples include requirements to locate production, provide a service, train or employ workers, construct or expand particular facilities or carry out research and development.

These new instruments underline that nothing shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with the investment rules that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

Examples

Liberalisation

WTO (TRIMs and GATS)
Revised Treaty of Chaguaramas
Protocol of Montevideo on Services (MERCOSUR) (1998, not in force)
Andean Community (Decision 439 on services)
Central America (CACM) (2002)

Protection and liberalisation

EU (protection: transfers; liberalisation: right of establishment)

Free Trade Agreements (FTAs):
NAFTA (1994), Bolivia-Mexico (1995), Costa Rica-Mexico (1995),
Group of Three (1995), Canada-Chile (1997), Mexico-Nicaragua (1998),
Chile-Mexico (1999), Mexico-Northern Triangle (2001),
Central America-Panama (2002), Chile-USA (Draft, 2003)

Barbados-Canada BIT (1997), Grenada-United States BIT (1989),
Jamaica-United States BIT (1997), Trinidad and Tobago-Canada BIT (1996),
Trinidad and Tobago-United States BIT (1996),
Draft MAI (1998)

E.2.2. Harmonization of Investment Policy: The Experience of APEC, ASEAN, the EU, NAFTA and MERCOSUR

Although no regional grouping covered in this study has fully harmonized its investment policy, members of these groupings have generally opted for a common framework and common rules, as opposed to common laws and regulations. In most cases, each member country still maintains its own independent laws and policies, its legal system, and its sovereign right to control and regulate internal activities.

E.2.2.1. APEC

As a non-binding agreement, APEC is no model for CARICOM countries. A binding agreement is necessary to provide legal security to investors and contribute to foster an increase in foreign investment. However, some APEC principles, should they be binding, could serve as a model for a CARICOM Investment Code. For example, the national treatment principle states that with exceptions as provided for in domestic laws, regulations and policies, APEC member economies will accord to foreign investors in relation to the establishment, expansion, operation and protection of their investments, treatment no less favorable than that accorded in like situations to domestic investors. The Revised Treaty of Chaguaramas does include a right of establishment but remains silent on the post-establishment phase of an investment.

E.2.2.3. ASEAN

ASEAN took a different approach to increase its attractiveness for ASEAN and non-ASEAN investors and provides a model that could be replicated by CARICOM countries. The Framework Agreement on ASEAN Investment Area (AIA) adopted in 1998 and amended in 2001 aims to make ASEAN a competitive, conducive and liberal investment area through the following measures:

- Implementing coordinated ASEAN investment cooperation and facilitation programs;
- Implementing a coordinated promotion program and investment awareness activities;
- Immediate opening up of all industries for investment, with some exceptions as specified in the Temporary Exclusion List (TEL) and the Sensitive List (SL), to ASEAN investors by 2010 and to all investors by 2020;
- Granting immediate national treatment, with some exceptions as specified in the Temporary Exclusion List (TEL) and the Sensitive List (SL), to ASEAN investors by 2010 and to all investors by 2020;
- Actively involving the private sector in the AIA development process;
- Promoting freer flows of capital, skilled labor, professional expertise and technology amongst the member countries;
- Providing transparency in investment policies, rules, procedures and administrative processes;
- Providing a more streamlined and simplified investment process; and
- Eliminating investment barriers and liberalizing investment rules and policies in the sectors covered by the Agreement.

E.2.2.4. The EU

Except for the right of establishment and the freedom of capital, each individual EU state retains the right to negotiate investment agreements. In fact, it is worth noting that when the European Union negotiated a free trade agreement with Mexico and with Chile, the rules on investment were negotiated separately by member states (bilateral investment treaties), with the exception of the provisions on right of establishment and transfers of payments.

Should CARICOM countries wish to adopt the EU model, this would mean that they would not negotiate an Investment Code since each individual CARICOM economy/country would remain free to sign investment agreements with other CARICOM members or with non-members. Chapter Three of the Revised Treaty of Chaguaramas, which covers establishment, services, capital, and movement of community nationals, would be the only CARICOM agreement addressing investment-related issues.

E.2.2.5. NAFTA

The NAFTA does not impose any type of harmonization of domestic investment policy among its three Parties. Therefore, under NAFTA, each Party retains the right to maintain its own laws and regulations relating to investment *as long as* they do not violate the rules of the investment chapter. NAFTA Parties were allowed to take reservations with respect to national treatment, MFN treatment, performance requirements, and senior management and boards of directors at the entry into force of the agreement. They were also allowed to take reservations for future measures. Mexico was allowed to list activities reserved to the State, and a fourth NAFTA Annex deals with exceptions for MFN treatment with respect to international agreements.

While Chapter Three of the Revised Treaty of Chaguaramas includes some market access components such as the right of establishment, it does not address protection elements. In order for the CARICOM regime to cover both market access and protection, it would be necessary to complement what is in Chapter Three of the Revised Treaty of Chaguaramas with provisions on expropriation, transfer, and minimum standard of treatment, among others, and also to devise an investor-state dispute settlement mechanism.

E.2.2.6. MERCOSUR

As MERCOSUR has not yet ratified its two investment protocols signed in 1994, it is fair to say that there is not as such a common investment policy among MERCOSUR members. It is also fair to underline that MERCOSUR is not a model that CARICOM countries should wish to follow. The MERCOSUR Protocols on investment do not include a market access component. They are strictly contemplating the post-establishment phase of an investment. The Protocol of Montevideo in MERCOSUR does have a market access component because it includes commercial presence. However, unlike CARICOM a positive list has been used by MERCOSUR countries and, more importantly, the 1998 Protocol has yet to be ratified.

E.3. SECTION III

The harmonization of CARICOM's investment regime remains a key challenge for the region. Although other policy instruments will need to be implemented to ensure that countries of the Caribbean reap the full benefits of their efforts to attract foreign investment, the signalling effects of a negotiated binding investment instrument providing legal security to international investors would undoubtedly help position the region and improve its business environment. But countries of the Caribbean must reflect on what approach and which option would best meet their needs and priorities in this respect. The Menu of Options which follows raises a number of questions and establish a few scenarios.

E.3.1. A Binding or Non-Binding Agreement

The first question to be addressed is whether a future CARICOM Investment Agreement would be binding on Parties. As mentioned above, a binding agreement would provide legal security to investors and contribute to foster an increase in foreign investment. It would also represent an important step toward creating a single integrated market. A large unified CARICOM investment space would provide the inducement for an investor to locate production within the market rather than serving it by exports. A new CARICOM Investment Space would be particularly attractive to market-seeking investors in services sectors where a market of sufficient size is not the primary condition, as opposed to goods, to warrant the investor's location decision. The effectiveness of a binding Investment Agreement would depend on the willingness of Member States to follow through with implementation.

E.3.2. Scope and Coverage of the Agreement

In the case of a CARICOM Investment Agreement, what would be the key objectives of this Agreement? Would it cover investment in goods *and* services, taking into account what is already covered under Chapter 3 of the Revised Treaty of Chaguaramas and also the growing tendency of firms to produce and sell goods, services or ideas on an integrated basis?

E.3.3. Definitions of Investment and Investor

The definitions of investment and investor are the key elements of an investment agreement because they constitute the main parameters identifying to whom the provisions of the investment chapter will apply and who will benefit from these provisions. With respect to the definition of investment, CARICOM countries have to decide whether they would favor a broad asset-based definition of investment (encompassing all forms of investment including portfolio and intangible assets such as intellectual property) which would include new forms of an investment which could be developed in the future or whether the definition of investment should only focus on FDI; whether the definition should be broad-based but linked to the activities of an enterprise as in NAFTA and include an exhaustive list of assets; whether the definition should specifically refer to the characteristics of an investment such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk, as under the recently concluded US-Chile Free Trade Agreement; and whether the definition should clarify what does not constitute an investment.

The definition of the term investor is another key component of the scope of an investment agreement. The definition of the term investor, which includes natural (i.e. individuals) and juridical (i.e. companies) persons, plays a major role in determining who enjoys the benefits of the agreement. CARICOM countries should therefore decide whether the concept of natural person should be broadened to include not only nationals but also permanent residents; how to define an investor who is a dual national; and whether the concept of juridical person should be based on incorporation as it is in most agreements, which means that an enterprise organized under the laws of a CARICOM member would be defined as an investor but need not to be controlled by nationals of that country. The benefits of a CARICOM Investment Agreement would not apply to investors of non-CARICOM countries but may apply indirectly to them through their CARICOM subsidiaries.

E.3.4. National Treatment and MFN Treatment

Modern investment agreement require non-discriminatory treatment in *all* phases of an investment, i.e. with respect to the establishment, acquisition, expansion, management, conduct, operation, sale, or other disposition of investments. This means that CARICOM investors would encounter the same treatment throughout the region, subject to country-specific exceptions with respect to a number of measures. In fact, what is essential to highlight here is that each CARICOM country would take reservations/country-specific exceptions with respect to a limited number of provisions in the Agreement (such as national treatment, most-favoured-nation (MFN) treatment, performance requirements, and senior management and boards of directors). Each reservation in the Agreement exempts specific existing non-conforming measures (any law, regulation, procedure, requirement or practice) of a Party from one or more of these obligations. Some reservations could "consolidate" the status quo, while others would set out liberalisation commitments. Some of these commitments would take effect immediately at the entry into force of the Agreement, while others would be phased-in over time. CARICOM countries would also need to decide whether a unilateral action to liberalise a measure would imply that this measure cannot be amended or replaced with a new measure that is more non-conforming. This concept is known as "ratcheting."

E.3.5. Flexibility for Disadvantaged Countries, Regions, and Sectors

The key question under this approach is whether it is flexible enough to take into account the special circumstances of disadvantaged countries, regions and sectors. The answer to this question is affirmative. CARICOM countries would be able to have a list of reservations for future measures under which a Party to the agreement would be allowed to maintain existing non-conforming measures respecting the listed sectors and activities and, most importantly, would be allowed to adopt new measures that are more non-conforming (i.e. more protectionist) with respect to a limited number of provisions such as national treatment, MFN treatment, performance requirements, and senior management and boards of directors.

E.3.6. Performance Requirements and Incentives

In most modern investment agreements the provision on performance requirements apply to *all investments*, which means that under a CARICOM Investment Agreement, such provision would also apply to investors of non-CARICOM countries, in contrast to all the other provisions. But should a CARICOM Investment Agreement cover performance requirements and incentives? It is worth noting that no regional grouping has fully addressed the issue of investment incentives and agreed to harmonize its regime yet.

E.3.6.1. Flexibility for Disadvantaged Countries, Regions, and Sectors

As noted under national treatment and MFN treatment, CARICOM members could take country-exceptions, including to take into account the special circumstances of disadvantaged countries, regions and sector. They would then be able to maintain or adopt future measures that would violate the provision on performance requirements.

E.3.6.2. Senior Management and Boards of Directors

Modern investment agreements grant to investors covered under those agreements the right to employ, in senior management positions, personnel within the host country without regard to the nationality or citizenship of the person concerned. However, in some cases, resident or nationality requirements are permitted for the majority of boards of directors.

E.3.6.3. Flexibility for Disadvantaged Countries, Regions, and Sectors

As mentioned above for national treatment, MFN treatment, and performance requirements, CARICOM countries could list a number of country-specific exceptions for measures that would violate such provision. They could also have a second list under which they could adopt future –and more restrictive- measures.

E.3.6.4. Transfers

Generally, investment agreements guarantee the free transfers of funds relating to the operation of an investment and include a non-exhaustive list of types of payments for which the transfer of funds is to be guaranteed. In addition, the provision state that all payments relating to an investment of an investor of another Party can be transferred in a freely convertible currency or freely usable currency (as defined by the International Monetary Fund) at the market rate of exchange prevailing on the date of transfer.

What would be the limitations or exceptions permitted under the transfer provision? Would exceptions be also allowed in the case of balance-of-payment problems, as it is under several trade and investment agreements?

E.3.7. Expropriation

Investment agreements include a provision that prohibits a Party from directly or indirectly nationalizing or expropriating an investment of an investor of another Party except when done for a public purpose, on a non-discriminatory basis, in accordance with due process of law, and on payment of prompt, adequate and effective compensation. Would a provision on expropriation in a CARICOM agreement identify factors to determine the nature of an indirect expropriation, as in the recently concluded US-Chile Free Trade Agreement, where such determination must be case and fact specific, and must take into account a list of factors such as: a) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; b) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and c) the character of the government action? Would it be useful for CARICOM members to recall, as Parties do in the US-Chile FTA, that "except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations"?

E.3.8. Minimum Standard of Treatment

A CARICOM Agreement on Investment could also include a provision on minimum standard of treatment related to customary international law.

E.3.9. Compensation for Losses

Investment agreements do not, in principle, require a state to pay compensation in a situation where an investor of another Party suffers losses in the host country due to war or other armed conflict, civil disturbances, state of emergency or similar events. Most agreements, however, provide for national treatment and MFN treatment in respect to any measure a Party adopts or maintains related to those losses. Such provision would allow CARICOM member states to specify that they could discriminate in favor of national investors in the case of natural disasters such as hurricanes.

E.3.10. Dispute Settlement

Would a CARICOM Agreement on Investment include an investor-state dispute settlement mechanism whereby an investor of a CARICOM member country would be able to seek redress against another CARICOM country? Should the investor be given the choice between the local courts and international arbitration, and should this choice be final, as it is in some agreements in order to avoid simultaneous procedures and contradictory decisions?

E.3.11. Investment, Environment, and Labor Issues

A CARICOM Investment Agreement could underline that nothing in the Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with the Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns. The Parties could also recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. Similar language could be added relating to the labor issue.

1. Introduction

The Consultant was hired by the Caribbean Community (CARICOM) as part of the technical cooperation project *Support for Investment Frameworks in the Caribbean Community: Towards a Regional Harmonized "Best Practices" Regime*, which is partially financed by the IDB's Multilateral Investment Fund.

This study is one of four components of this project and would provide an "identification of international 'best practices' in the area of investment policy, regulatory and administrative procedures and proposals for the formulation of harmonized investment principles for CARICOM."

1.1. SCOPE OF WORK

The report will focus in the following components, namely:

- An enumeration of the laws and principles that appear to constitute best practice investment policy and will include an extensive comparative analysis and illustrative examples.
- A benchmarking analysis comparing CARICOM investment practices with those of other selected countries.
- A discussion and analysis of the methods and processes used by diverse states and regional groupings to achieve investment policy harmonization.
- A draft of investment policy principles for the consideration of CARICOM States, and procedural options that could be employed by the Community to achieve policy harmonization.

The results of this study will complement the Diagnostic Studies on the Investment Climate already completed for all 15 CARICOM member countries (evaluated and compiled within a Summary Report) and the Investment Incentives Report.

1.2. METHODOLOGY

The Consultant conducted this Investment Legal Framework Best Practices Report by reviewing well-know publications produced by the World Bank and the Foreign Investment Advisory Service, the U.S. State Department, U.S. Trade Representative, and U.S. Foreign Commercial publications, the Asia-Europe Meeting investment policy initiatives, The OAS's Foreign Trade Information System, and the IDB's Free Trade Agreement of the Americas publications, among others.

Based on this research, and his own experience in international investment practices, the Consultant selected five countries as relevant to the scope of this study to be evaluated for investment policies Best Practices:

- Chile
- Costa Rica
- Dominican Republic
- Ireland
- Mauritius.

These countries not only have shown sustained development in the last few decades but also have developed stable political systems, sound macro-economic policies, a skilled work force with skills needed by the private sector, effective organizations for attracting foreign investment, and inserted themselves in world markets through bilateral and multilateral trade and investment treaties. These key aspects of an investment regime are discussed in a general manner in the country profile section at the beginning of the study.

Other investment policies will be evaluated and then compared with those of CARICOM member countries, such as:

- Admission and business establishment,
- Standards of treatment
- Expropriation and compensation
- Dispute settlement

Special attention must be given to the laws and policies relating to matters of major concern to CARICOM Member States, including alien landholding, employment of foreign workers, access to resources from the domestic financial system, etc. This comparison will use the inputs provided by the Legal Reports and Diagnostic Studies.

For the analysis corresponding to a new harmonized policy for CARICOM, the Consultant approach was of evaluating multinational, regional, and bilateral treaties relating to the admission and regulation of foreign direct investment (FDI), as well as from guidelines, principles, and other aspects of texts prepared by intergovernmental and non-governmental organizations.

1.3. ORGANIZATION OF STUDY

Following the study's terms of reference requirements, this report will be divided in three sections:

- Section I. Best Practices for Investment Policies
- Section II. Investment Policy Harmonization
- Section III. Recommended Principles/Best Practices for CARICOM

Section I will include the evaluation of the selected investment policies of selected countries, identified as Chile, Costa Rica, Dominican Republic, Ireland, and Mauritius, and a comparative evaluation or benchmarking of these countries and the CARICOM members.

For the benchmarking analysis, the Consultant will use a set of matrixes to group the relevant issues and highlights the policy similarities and differences among the selected countries.

Section II will provide a discussion and analysis of the methods and processes used by diverse states and regional groupings to achieve investment policy harmonization to derive lessons of possible relevance to the process of investment policy harmonization in the CARICOM region. Among the multilateral instruments to be evaluated are:

- NAFTA
- FTAA
- Asia Pacific Cooperation
- Multilateral Agreement on Investment
- MERCOSUR: Buenos Aires Protocol

Finally, **Section III** will present the draft of a Harmonized Investment Principles Statement, including investment policy principles and procedural options, and the recommended text for the revision of the harmonized CARICOM investment protocols.

2. Selected Countries' Investment Profiles

This section will present country investment profiles that showcase the success of several countries in maintaining sustained foreign direct investment (FDI) growth in the last 10 years and that have undertaken significant investment framework reforms to promote private sector participation (PSP). The profiles will show the development of the selected countries' FDI in recent years, the main characteristics of their investment regime, and their promotion efforts to attract foreign investors and develop PSP.

Based on preliminary research, discussion with other senior team members of the project, and the Consultant's own experience, the Consultant selected the following group of countries:

- Chile
- Costa Rica
- Dominican Republic
- Ireland
- Mauritius.

These countries are a sample of different regions of the World, although it was the Consultant's intention to have a majority located in the Western Hemisphere. Other features of the profiled countries that are relevant to CARICOM countries are the selected countries' size (the largest market, Chile, is barely larger than CARICOM — population-wise), access to large international markets, and, with some exceptions, similar levels of development.

2.1. CHILE[1]

Since 1974, with the enactment of the Foreign Investment Statute, known as D.L. (Decree Law) 600, to 2001, Chile has attracted FDI totaling over US$35 billion (if local investment under D.L. 600 is included, FDI investment reached over US$75 billion over that same period). Of this FDI amount, almost 90 percent entered the country after 1990. Today, more than four thousand companies from 64 countries have investments in the country. This level of investment is particularly impressive given that Chile, with 15 million inhabitants, is barely larger in population than CARICOM (13.5 million, including Haiti).

[1] Most of the information presented in this section is sourced in the U.S. State Department Country Commercial Guide of Chile 2003, the Foreign Investment Committee promotional material, and an APEC 1999 report on Chile's foreign investment regime.

2.1.1. Investment Related Legislation

Chile's main investment related legislation is the Foreign Investment Statute Decree Law 600 of 1974 (D.L. 600) and the Compendium of Foreign Exchange Regulations of the Central Bank (Chapter XIV). Almost all investment in Chile since 1991 has taken place under D.L. 600.

Foreign Investment Statute Decree Law 600. A key feature of this decree is that all investment under this regime is by the subscription of a contract between the investor and the Chilean state. Therefore, parties cannot unilaterally change the rights and obligations issuing from its clauses and are not subject to the subsequent passage of new laws. Foreign investors are thus protected from arbitrary changes in government policies or legal interpretations. This regime also offers investors the following benefits:

- Non-discriminatory treatment;
- Participation in any form of investment;
- Holding assets indefinitely;
- Remitting or reinvesting earnings immediately (the restrictions to remit capital after one year and the permit requirements were eliminated after 2000);
- Acquiring foreign currency at the inter-bank rate of exchange; and
- Opting for either national tax treatment (under which local firms are taxed at a rate of 35 percent on fully distributed earnings) or for a guaranteed tax rate (currently set at 42 percent).

The application may be rejected, on a non–discriminatory basis, taking into account considerations related to public order, national security, and general economic policy.

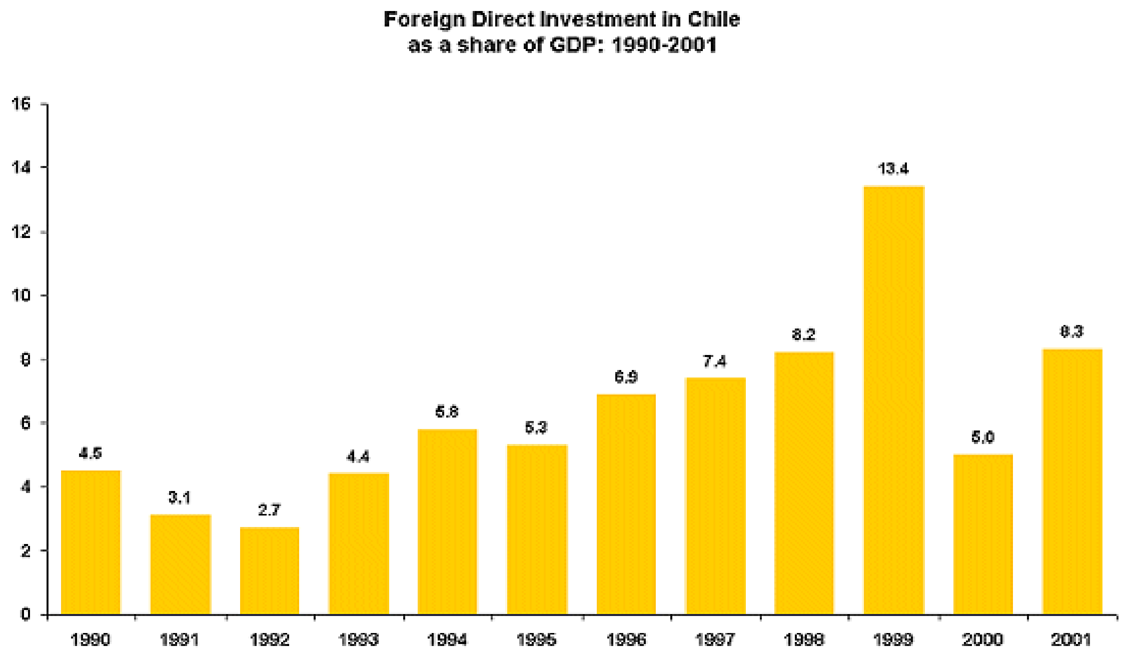
Foreign investors may request a maximum time limit of 3 years to materialize their contributions, although investments of no less than US$50 million for industrial or non mining projects may take as long as 8 years.

Chapter XIV. This regulation establishes a general mechanism of registration of foreign investment and loans. This is a simple, open, and non-discriminatory mechanism, which allows the free entry, use, and exit of investment flows that only consist of freely convertible foreign exchange. The Central Bank may not screen or otherwise reject the foreign investment.

2.1.2. FDI Statistics

According to the Chilean Foreign Investment Committee (FIC), during the 1990s FDI represented an annual average 6.3 percent of Chile's GDP, rising to 8.2 percent between 1995 and 2000, as shown in Figure 2.1.

Figure 2.1. Chile: FDI as a Share of GDP, 1990-2001



Source: Central Bank of Chile (www.bcentral.cl), Foreign Investment Committee (www.foreigninvestment.cl). Estimate total FDI considers investment flows through Chapter XIV and Foreign Investment Statute (DL 600)

The U.S., Canada, the United Kingdom, and Australia has been the leading investors in this period, as shown in Table 2.1. In 2001, the leading countries investing in Chile were the United States (US$1.76 billion), Italy (US$0.9 billion), and Australia (US$0.4 billion).

Table 2.1. Chile: FDI by Country (US$ millions), 1974-2001

Country	1999	2000	2001	1974-01
United States	1,909	734	1,759	15,320
Canada	450	665	218	6,539
United Kingdom	311	205	382	2,609
Australia	6	38	430	1,738
Japan	224	53	118	1,550
Italy	51	96	920	1,470
South Africa	40	4	12	1,395
Netherlands	181	83	93	1,334
France	608	43	57	1,217
Argentina	47	92	27	620
Finland	3	3	0	521
Switzerland	44	197	5	492

Source: Foreign Investment Committee, Ministry of Economy, 2002.

Table 2.2 shows the economic sectors in which FDI has gone since 1974 and as of 2001. The total stock of FDI was 59.6 percent of Chile's 2001 GDP, and FDI inflows equaled approximately 5.9 percent of 2001 GDP.

Table 2.2. Chile: FDI by Sector (US$ millions), 1974-2001

Sector	1999	2000	2001	1974-01
Mining	1,221	236	898	16,016
Services	1,910	684	705	11,127
Electricity, Gas, and Water	4,560	860	908	8,716
Industry	780	202	755	6,596
Transport and Communications	360	869	1,284	4,261
Construction	215	29	166	1,133
Fishing and Aquaculture	1	92	6	271
Agriculture	21	22	10	259
Forestry	19	3	1	243

Source: Foreign Investment Committee, Ministry of Economy, 2002.

2.1.3. Investment Regime Characteristics

Chile offers a stable and secure legal framework for foreign investment, characterized by transparent, non-discriminatory and non-discretionary rules. In addition, Chile is known in international investment circles for:

- Strong macroeconomics fundamentals. Sustained growth with low inflation rates, stable external accounts, declining levels of public external debt, and strong international reserves.
- Low-risk, dynamic business environment. Political and social stability, stable and transparent rules, an efficient and independent judiciary, and a dynamic and innovative private sector.
- An outward-looking, open, and competitive economy. An extensive network of international trade agreements gives Chile privileged access to markets around the world. The country's flat-rate import tariff should become 6 percent by 2003, which will further consolidate the country as one of the world's most open economies.
- High-quality human capital. The UNDP rates Chile as the Latin American country that has made most progress on human development.
- Solid guarantees for foreign investors.
- Recognition from international institutions. Chile leads Latin American countries and most emerging economies in the rankings and evaluations made by different international agencies, such as Moody's, Standard & Poor's, Transparency International, The World Economic Forum, Heritage Foundation, and most Wall Street investment banks.
- Modern business and technological infrastructure.

Besides investment in traditional areas, such as mining, Chile received significant amounts of FDI from its privatization of public utilities and infrastructure in the 1990s. This process was open to foreign capital, which competed on an equal basis with domestic firms.

Finally, although it is important to note that Chile does not offer any special tax exceptions, there are some regional incentives linked to isolated geographical zones. These incentives are: co-financing or feasibility studies, as well as incentives for the purchase of land in industrial zones, the hiring of local labor, and project financing.

2.1.3.1. Tax Regime

The Chilean tax system let companies chose between two tax regimes:

- **First Class Tax Rates.** Chilean companies are subject to a First Class Tax Rates, applied to taxable income according to the tax law. Legal entities formed under the Chilean law are considered Chilean, independent of foreign equity participation, so they are subject to the First Class Tax Rate. This tax is equivalent to a Corporate Tax. On August of 2001, Congress approved a bill to increase the First Category Tax from 15 percent to 17 percent, applied gradually on a three – year period. Therefore, the current 16 percent rate will increase to 16.5 percent in 2003, and 17 percent in 2004.

- **Common Tax Regime.** Under the Common Tax Regime, distribution or remittance of profits are levied with a 35 percent Additional Tax Rate, with right to a tax credit equivalent to the First Tax Rate. In this case, the First Category tax becomes a tax rebate to the investor's benefit. As a result, the investor only pays an additional 19 percent in 2002, 18.5 percent in 2003, and 18 percent in 2004. D.L. 600 gives the possibility to foreign investors who elect the Special Regime to maintain and invariable 42 percent total tax burden rate on their income for a period of up to ten years, starting from the date the recipient company is launched. In this case, the First Class Tax Rate relief aforementioned is also applied. This benefit may be extended for up to twenty years in the case of industrial and extractive investments of US$50 million or more.

  Foreign investors must apply for this Special Regime before signing the contract. Foreign investors under the Common Regime have no right to request the application of the Special Regime to an undergoing project. The main feature of this Special Regime is that eventual amendments to the tax legislation will not be applicable to those foreign investors who have opted for it. The Special Tax Regime can be waived and the Common Tax Regime enters in force at the current rate of 35 percent. The investor cannot reverse his/her decision.

D.L. 600 stated that foreign investment brought into the country in the form of physical goods shall be evaluated using general procedures applied to imports and shall be subjected to the general VAT taxation regime and to customs regulations applicable to domestic investments. Nonetheless, foreign investors are entitled to include a clause in their contract standing that, for the term they are authorized to materialize their investment, there shall be no changes in the taxes on sales and services, and customs duties in force at the time was signed. This invariability applies to the import of machinery and equipment not manufactured in Chile, which are detailed in a list prepared by the Minister of Economy. Local receptor companies are entitled to the same benefits.

2.1.4. Bilateral-Multilateral Agreements

Chile has been aggressive in inserting itself in the world trade and investment network, signing bilateral investment protection agreements with 51 countries, of which 37 are in force. The following is a partial list based on 1999 information:

- **The treaties in force**: Argentina, China, Croatia, Czech Republic, Denmark, Ecuador, Finland, France, Italy, Malaysia, Norway, Paraguay, Portugal, Romania, Spain, Sweden, Ukraine, United Kingdom, and Venezuela.
- **Approved by Congress** (but still not in force): Belgium/Luxembourg, Bolivia, Brazil, Uruguay, and Poland
- **Signed agreements**: Australia, Austria, Costa Rica, Cuba, El Salvador, Germany, Greece, Guatemala, Honduras, Hungary, the Netherlands, Panama, Peru, Philippines, South Africa, South Korea, and Switzerland.
- **Under negotiations**: Dominican Republic, Egypt, Haiti, Indonesia, Israel, Latvia, Morocco, New Zealand, Russia, Singapore, Slovenia, United States, Thailand, Tunis, Turkey, and Vietnam.

The most relevant aspects of these bilateral investment treaties (BITs) are:

- the option of changing to resorting to international arbitration in case of differences between the recipient country of the investment;
- the right of ownership and the free transfer of capital and profits in accordance with the legal regime of each country is guaranteed;
- certain fundamental principles for the protection of foreign investments, like that of nondiscrimination and change to most favored nation are consecrated;
- the principle of subrogation in benefit of the entities which have insured the investor is included; and future investments and also those made prior to the treaty are protected, but in the latter case, in reference to controversies arising, after the agreement goes in effect.

Chile already has free trade agreements with Canada, Colombia, Central America, Ecuador, the European Union, MERCOSUR, Mexico, and Venezuela, and is also currently negotiating with Peru, South Korea, and the United States (which is being voted on by the U.S. Congress in May 2003). In terms of investment, only the FTAs with Canada, Mexico, the US, and Korea cover this subject.

With regard the European Union, the agreement covers the right of establishment and also address trade in services (including investment in services). Each EU country is in the process or has negotiated a bilateral investment treaty with Chile (therefore, the protection elements of an investment agreement are not covered in the Chile-EU FTA. It is left to each EU member to negotiate their own BITs with Chile).

With Colombia, Ecuador, and Venezuela: there is no chapter on investment (just a short paragraph). The FTA with the 5 Central American countries calls for future negotiation.

Chile is a member of the Overseas Private Investment Corporation (OPIC) since 1984 and signed the convention of the World Bank's Multilateral Investment Guarantee Agency (MIGA) in 1986.

2.1.5. Investment Promotion

In terms of investment promotion and administration, Chile has a one-stop-shop, the FIC, which is the only local entity authorized to accept the inflow of foreign capital into the country under the Foreign Investment Statute (D.L. 600). FIC conducts all operational tasks related to the legal framework that regulates foreign investment, engages in promotional activities, screens applications, set time for an investment is to be implemented, and participates in international negotiations relating to foreign investment in Chile.

Its main functions are to:

- Administer the legal framework stated in the Foreign Investment Statute (D.L. 600);
- Conduct all appropriate activities aimed at informing, promoting, coordinating and executing actions that foster the entry of foreign investment into Chile at the national, sector-specific and regional levels;
- Provide foreign investments in Chile and Chilean investment abroad with a growing level of stability and security through bilateral and multilateral agreements, and to represent Chile before international dispute-resolution entities in case of investment related disputes; and
- Maintain an up-to-date and accurate statistics database of foreign investment in Chile authorized and materialized under the DL 600.

The FIC has very strong institutional backing, having among its members the Ministers of Economy (who acts as President of the Committee), Finance, Foreign Relations and Planning, plus the President of the Central Bank. Additionally, ministers who represent sectors to which a specific investment will be devoted to are required to participate at the FIC sessions.

2.2. COSTA RICA[2]

Long the most politically stable country in Central America, Costa Rica recently celebrated half a century of democratic rule, which began in 1948. In recent years, it has attracted the attention of investors and scholars by becoming a recipient for very visible, high technology investments, such as INTEL's largest microchip processing plant outside the

[2] Most of the information gathered in this section was sourced from the U.S. Commerce Department, Foreign Commercial Service's Country Commercial Guide for 2003 and CINDE's promotional information.

United States. Costa Rica has a population of 3.5 million people, about the same as Ireland.

2.2.1. Investment Related Legislation

Costa Rica does not have a specific foreign investment law in its books. Nevertheless, the equal treatment of foreigners is enshrined in the Constitution. There are, nonetheless, several key investment-related laws for export-oriented activities:

- **Incentives to Tourist Development Law 1985.** All business entities engaged in the running or construction of hotels are exempted from import duties on goods imported for the purposes of their trade, purchase (sales) taxes on supplies (excluding those payable on the purchase of vehicles and fuels), and the 25 percent annual rates tax. They also benefit from accelerated depreciation allowances. All business entities engaged in the air transportation of tourists are exempted from import duties on goods imported for the purposes of their trade and purchase taxes on supplies required for the operation of airplanes. Furthermore, they can purchase their fuel at favorable prices and are entitled to accelerated depreciation allowances. Businesses engaged in maritime transportation of tourists are exempted from import duties and purchase taxes on goods imported for the purposes of the construction of marinas, bathing resorts and aquariums. Furthermore, they are entitled to accelerated depreciation allowances and are exempted from all taxes relating to the purchase of a boat with the exception of import duty. All business entities engaged in car rentals are entitled to a 50 percent reduction in all taxes relating to vehicles imported for rental.

- **Law No. 1155 of 1950 (Residence Law).** Residence permits obtained under this law carry no restrictions on the sorts of economic activity that a resident permit holder can engage in. However permits under this law are granted on a very selective basis and only to businessmen and professionals.

- **Law No. 5162 of 1972 (Drawback Law).** This law encouraged the establishment in Costa Rica of assembly plants. Enterprises that wish to assemble products in Costa Rica and re-export the finished products to other markets can import all their capital machinery and raw materials including the parts to be re-assembled free of all import duties. The final product which is re-exported is not assessed to any business income tax on profits.

- **Law No. 6982 of 1984 (Retirement Law).** Under this law, a foreigner may acquire residence in Costa Rica if he/she can show sufficient income, whether from investments or from a pension, irrespective of whether the income is sourced locally or abroad. Residence obtained under this law allows an individual to work in Costa Rica but does not allow him to work in areas that would have the effect of displacing national workers. A resident under this law is expected to reside in Costa Rica for at least 4 months in each calendar year.

- **Law No. 6955 and Law No. 7092 (Investment Incentives).** Export Contracts, under these laws, are signed by the Government with individual enterprises, usually for a period of 10 years. Export Contracts bring together incentives available under various laws, and typically include:

- exemption from import duties;
- simplified procedures;
- special port tariffs;
- accelerated depreciation;
- tax credit certificates.

The Temporary Admission Regime, also under laws 7092 and 6955, allows goods or equipment to be imported for use in or during processing for subsequent export or re-export.

- **Law No. 7201 (Public Companies) of 1990**. A Public Limited Liability Company is a stock corporation whose shares can (unlike private companies) be openly and freely traded on the stock exchange. Law 7201 was passed to allow for the creation of these corporate entities. The minimum share capital of a Public Limited Liability Company is 50 million colons and it must have at least 10 shareholders. A Public Limited Liability Company remains under the permanent supervision of the Central Bank.

- **Law No. 7210 (Export Processing Law).** The Government created Free Export Zones under law no 7210 (known as the "Export Processing Law"). Substantial tax incentives including 100% exemption from virtually all taxes and Government finance for the training of employees are available to companies which locate within one of the 8 free export zones (6 of which are privately managed). The Zones are located next to Calderas and Puntarenas (2 Pacific ports), Limon (an Atlantic port near Panama), Alajuela (the airport serving the capital city of Costa Rica) and Turrialba.

- **Law No 7558 of 1995 (Organic Law of the National Banking System).** The state banking monopoly ended in 1995 and there are now some 25 private commercial banks and 3 public banks in Costa Rica. Banking matters are governed by law No 1644 of 1953 as amended by law No 7558. Financial institutions in Costa Rica are regulated by the Central Bank, through the General Superintendent of Financial Entities (SUGEF). The revised legislation reduced the reserve liquidity requirements to 15 percent of the value of the balance sheet, prohibits loans to an individual customer which exceed 20 percent of a bank's capital and specifies that a bank's capital cannot be less than 9 percent of its loans.

2.2.2. FDI Statistics

Costa Rica attracted about US$3,400 million in FDI from 1990 to 2001 (Table 2.3.)

Table 2.3. Costa Rica: FDI 1999-2001

Year	Amount (US$ million)	Percent of GFCF
2001	448.0	Na
2000	409.0	14.8
1999	620.0	20.6
1998	612	21.0
1997	407	17.3
1985-1995	171	12.0

Na. Not available.
Source: Ministry of Foreign Trade, 2002.

FDI originated mainly from the United States (Table 2.4) and mostly went into the industrial and tourism sectors (Table 2.5).

Table 2.4. Costa Rica: FDI by Country (US$ million), 2001

Country	Amount	Percentage
USA	13.2	59.0
Canada	2.6	11.7
Mexico	1.4	6.1
Panama	1.1	5.0
Spain	0.8	3.5
El Salvador	0.6	2.5
Nicaragua	0.4	1.9
Taiwan	0.4	1.9
Germany	0.3	1.3
Italy	0.2	1.0
Guatemala	0.2	0.7

Source: Ministry of Foreign Trade, 2002.

Table 2.5. Costa Rica: FDI by Sector (US$ millions), 2001

Sector	Amount
Agriculture	17.9
Agro-industry	6.1
Commerce	6.1
Industry	231.6
Services	34.1
Financial	29.8
Tourism	121.8
Other	0.6
Total	448.0

Source: Ministry of Foreign Trade, 2002

The industry and tourism sectors has received the lion share of FDI inflows. Tourism attracted large amounts of FDI since the 1980s as Costa Rica positioned itself as the leading "green" destination in the region. That sectoral investment has since diversified to other tourism products. The FDI inflows into industry are the results of the interest of technology giants, lead by Intel, in using Costa Rica as a production base for many of its high-value, high-technology products. Investment in this sector skyrocketed since 1999, being responsible for most of FDI in the country ever since. This type of investment has cooled down since 2001 given the overall sluggishness of the technology industry world-wide.

2.2.3. Investment Regime Characteristics

Among the policies made responsible for Costa Rica's success in attracting FDI the following are most repeated in recent studies[3]:

- High levels of investment in education – 95 percent literacy rate
- Best infrastructure in Central America (with the exception of Panama)
- Liberalized trade and investment laws
- Corporate incentives and free trade zones
- IPR protection
- Founding member of the WTO
- National treatment for foreign firms
- Geographic location and climate favorable to tourism
- Access to U.S. market through the Caribbean Basin Initiative (CBI) program

In addition to these policies, according to a recent survey of foreign companies present in Costa Rica[4], the reasons for establishing their operations there are cited as follows:

- Country's political, economic, and social stability
- Absence of capital controls
- Pleasant living conditions

Other favorable factors include highly educated and skilled human resources; rule of law, transparency and economic freedom; and preferential access to important international markets. The Government of Costa Rica is considering a plan to reduce corporate income tax to fifteen percent for all companies operating within the country.

Some of the less favorable aspects of the Costa Rican investment climate are the following:

- Local legal system, although fair, it is notoriously slow and prone to appeals, thus dragging investment-related disputes for a long time (an average of 10 years!).

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[3] *The Costa Rican Model: FDI and the Economic Success of Costa Rica*, USAID's Access to Microfinance & Improved Implementation of Policy Reform, 1999.

[4] Costa Rica Investor Attitude Survey, Office of Latin America and the Caribbean, U.S. Department of Commerce, 1998.

- Invasion of lands are not uncommon and squatters rights in rural areas are very liberal.
- State monopolies in key sectors, such as telecommunication and energy generation (now partially liberalized) and distribution. There are no privatization plans in the future.

Since passing the Export Processing Law in 1981, this regime has seen the establishment of eight FTZ’s operate throughout Costa Rica, six of which are privately managed. Companies in FTZ’s receive exemption from virtually all taxes for eight years and at a **reduced rate** following this period. In addition to those benefits, companies operating in FTZ's enjoy simplified investment, trade, and customs procedures.

In Costa Rica, there are three special WTO-complaint investment incentives regimes: the Active Performance Regime, Free Zone Regime, and a duty drawback procedure (provides for rebates of duties or other taxes that have been paid by an importer for goods subsequently incorporated into an exported good). These incentives are available equally to foreign and domestic investors and include tax holidays (scheduled to phase out beginning in 2007 according to WTO agreements), free or subsidized infrastructure and industrial parks, training of specialized labor force, and protective tariffs, in some cases.

2.2.3. Bilateral/Multilateral Agreements

Costa Rica is a founding member of the WTO and has signed free trade agreements with Canada, Mexico, the Central American Common Market, the Dominican Republic, Trinidad y Tobago, and Chile. Other agreements are awaiting ratification (Canada) or are being negotiated (Panama). Costa Rica is preparing to negotiate a free trade agreement with the United States as part of the Central American Free Trade Agreement (CAFTA) initiative.

2.2.4. Investment Promotion

Investors interested in establishing a business in Costa Rica are encouraged to contact Costa Rican Investment and Development Board (CINDE) and/or the Costa Rican Foreign Trade Corporation (PROCOMER). Both organizations are involved in providing support and information for prospective investors to Costa Rica. Each organization maintains extensive information databases that are useful to potential investors in evaluating operating costs, taxation issues, availability of employees, and related investment questions.

CINDE works to foster Costa Rica's development, by attracting and facilitating FDI in the country into specific sectors, primarily:

- Medical Devices
- Electronics
- Services, which includes shared services / back-up offices, call centers, data centers, and software development, among others.

- Special Projects, which focuses in assisting tourism, infrastructure, apparel and automotive industry projects and those initiatives that will generate investments of more than $150.000, and employ at least 15 people.

This agency analyzes specific market segments and tendencies, identify subsectors of interest, study and generate relevant information and lists of potential investors. It also advises on how to do business in the country, creates customized itineraries according to the investor's needs, and provides support during and after the establishment of operations. Finally, CINDE maintains a long-relationship with investors, with follow ups, data/attitudes collection, and assistance as may be required.

PROCOMER began operations in 1996 with the merger of the Trade Promotion Office and the Free Trade Zones Corporation. Its mission is to promote the successful entry of export companies based in Costa Rica (local or foreign-owned) in international markets. It is a center for technical and strategic information on foreign trade and is the official contact point in consolidating the relationship between exporters and importers.

PROCOMER main objectives are the following:

- Continually update and modernize the institution's processes
- Promote export diversification in a sustainable fashion
- Expedite and modernize the formalities related to international commerce
- Develop a region-sector-market emphasis
- Encourage an export culture
- Inform and train the export sector
- Attend to the proper functioning of the mechanisms that ensure the effectiveness of the special control systems.

PROCOMER has a Board of Directors whose members include the Minister of Foreign Commerce, who heads the board, three delegates from the Executive Branch, the presidents or vice-presidents from the Chamber of Commerce, the Chamber of Industries and the Chamber of Exporters, and a representative from small- and medium-sized exporters.

2.3. DOMINICAN REPUBLIC[5]

The Dominican Republic has been attracting FDI in a significant volume since the 1980s, particularly into *maquila*-style activities within its dynamic free trade zones, the tourism sector, and energy generation. Situated in the Caribbean region, a population of just above 8 million people and in process of becoming a CARICOM member, the Consultant felt that this country's investment regime could be quite relevant to the improvements sought for CARICOM's investment protocols.

[5] Most of the information gathered in this section was sourced from the U.S. Commerce Department, Foreign Commercial Service's Country Commercial Guide for 2003.

2.3.1. Investment Related Legislation

The key legislation affecting investment in the Dominican Republic are the following:

- **Foreign Investment Law 16-95.** This law sets clear ground rules and provides essentially equal treatment of both Dominican and foreign investors. Under this law, foreign investors are free to make unlimited repatriation of profits and capital, after paying local taxes. The law provide for investors the areas and percentages of ownership in which foreign investment is possible. Annual earnings remitted abroad are within 25 percent of the foreign registered Capital. Tax incentives for investors include:

  - Exemption from income Tax during a specific period.
  - Exemption from construction taxes.
  - Exemption from corporation and capital taxes.
  - Exemption from duties and imported materials and equipment beyond the 5 percent ad valorem tax.

- **Free Trade Zone Law 8-90.** This legislation is managed by the Free Trade Zone National Council (CNZF in its Spanish acronym). The CNZF is a joint private sector/Government body. Law 8-90 provides 100 percent exemption on all taxes, duties, charges and fees affecting production and export activities in the zones. These incentives are for 25 years for zones located near the Dominican-Haiti border and 15 years for zones located in the rest of the country. The Free Trade Zone National Council has discretionary authority to extend the time limits on these incentives.

- **Tourism Development Promotion Act Law 158-01**. This legislation provides for the promotion of tourism development in the areas and regions of the Dominican Republic which had previously only been marginally promoted as tourism hubs, and for the development of new tourism destinations in the provinces and other localities that have great potential for tourism development. Act 158-01 also sanctions the creation of the Tourism Promotion Trust Fund.

2.3.2. FDI Statistics

Overall, Dominican Republic attracted more than US$5.5 billion in the 1993-2001 period, mostly from U.S., Canadian, and European Union (mainly Spanish) sources, as shown in Table 2.6. It is estimated that FDI is currently responsible of about 350,000 local jobs.

Table 2.6. Dominican Republic: FDI (US$ millions), 1997-2001

FDI/Source Country	1997	1998	1999	2000 (est.)	2001 (est.)
FDI	420.6	699.8	1,337.8	952.9	1,198.4
FDI by source country:					
Canada	199.0	127.8	94.8	133.2	13.5
U.S.	157.8	180.4	181.2	201.6	724.3
Spain	52.4	205.6	457.1	190.1	216.9
Grand Cayman	45.6	45.5	179.2	37.0	0.1
UK	41.4	22.9	75.7	17.4	0.4
Switzerland	14.7	7.7	Na	Na	na
Italy	0.3	33.1	Na	Na	na
Chile	na	Na	88.9	21.6	-
France	na	Na	34.4	97.5	80.0
Netherlands	na	Na	61.5	36.0	1.2
Other	na	Na	134.6	189.0	153.7

Na: not available.
Source: Central Bank of the Dominican Republic, 2001-2003.

It is important to point out that almost 85 percent of this FDI flows came into the country after the 1995 enactment of a foreign investment law (No. 16-95), when nearly all sectors of the economy became open to foreign investment.

Moreover, a late 1990s privatization push in the electricity, airport management, and sugar sectors also contributed to FDI inflows. Other areas that has been a magnet for FDI in recent years has been telecommunications, commerce, and financial services, among others (Table 2.7).

Table 2.7. Dominican Republic: FDI by Sector (US$ millions), 1993-2001

FDI by Sector	1993	1994	1995	1996	1997	1998	1999	2000	2001	Total
Tourism	73.1	42.5	111.2	61.2	114.2	312.2	296.9	73.7	167.1	1,252.1
Commerce	16.6	33.9	140.8	59.8	216.5	177.4	182.6	153.7	130.5	1,111.8
Communications	93.1	123.7	149.3	(36.2)	32.8	117.1	98.0	272.2	287.8	1,137.8
Electricity	-	-	-	7.5	42.9	33.4	631.4	281.9	318.1	1,315.2
Financial	6.5	6.7	13.0	4.2	14.2	29.5	40.9	45.3	89.0	249.3
Free Zones	-	-	-	-	-	-	40.5	42.5	61.0	144.0
Others	-	-	-	-	-	30.2	47.6	83.7	144.9	306.4
Total	189.3	206.8	414.3	96.5	420.6	699.8	1,337.8	952.9	1,198.4	5,516.4

Source: Central Bank of the Dominican Republic, 2003.

2.3.3. Investment Regime Characteristics

There are no special investment incentives or other types of favored treatment given to foreign investors. Among the key features of the Dominican Republic investment climate are the following:

- Attractive investment climate

- Political stability
- Fast growing economy. From 1996 to 2002, real GDP growth has averaged an annual rate of 7.7 percent.
- Qualified human resources
- Access to markets through multilateral trade agreements
- Investment possibilities in a variety of sectors
- Strategic location
- Attractive incentive regime
- Regional leader in communication technology

The post-1996 investment regime made much easier to invest in the Dominican Republic. Among the key features of this new regime are:

- Investment-related laws were reoriented for the promotion and support of FDI, instead of its control and regulation.
- Repatriation of capital and the return of dividends and profits was liberalized.
- Opening of previously off-limit or restricted areas of economy activity to foreign investment (ex. utilities).
- Established an equal national treatment for foreign investors.
- Allowed direct promotion and development of importation, sales or other forms of commercial operations for goods produced outside the country.
- Limited the areas that are restricted to FDI to those related to national security, public health, or environmental preservation.
- Eased restrictions on technology transfer agreements.

There are no limits on foreign control or screening of foreign investment. Foreign investors have participated and been treated without discrimination in the privatization of state enterprises, such as the electric company, airport management, and sugar mills.

Nevertheless, the Dominican Republic has serious deficiencies in its judicial system that is damaging its investment profile outside of the traditional FTZ and tourism sectors.

2.3.4. Bilateral/Multilateral Agreements

The Dominican Republic is a member of the World Trade Organization. Since the late 1990s, it has pursued efforts to join other trade blocks in the region, such as the Central American-Dominican Republic Free Trade Area, the Caribbean Basin Initiative, and CARICOM. It also joined at the Second Hemispheric Summit in Santiago, Chile, with other Western Hemisphere governments in committing itself to completing negotiation of a free trade agreement for the hemisphere by the year 2005. The Dominican Republic has a bilateral investment treaty with Spain.

2.3.5. Investment Promotion

In 1997, the Government created the Office for Investment Promotion (OPI) with a specific mandate to promote FDI, especially in sectors such as tourism, mining, transportation, energy, agriculture, technology, electronics, and telecommunications; and such regions as La Vega, Puerto Plata, Montecristi, Santiago, Barahona, Samana and San Pedro de Macoris.

This one-stop-shop has strong institutional support, incorporating among its officials the key ministers in charge of the economy and international relations, as well as the main business associations and private groups.

Its main functions and activities, as stated in it own promotional material, include:

- Promote, fortify and increase FDI and national investment flows in the entire territory of the Dominican Republic.
- Identify, contact and to provide the necessary guidance to investors, as well as to facilitate the attainment of his objectives.
- Direct the investment toward those economic sectors declared priorities by the government (ex. tourism, mining, transportation, energy, agriculture, technology, electronics, and telecommunications) or that are considered of priority and high benefit for the development and economic growth of the country.
- Design, finance, coordinate and supervise and evaluate new promotion plans with the purpose of increasing the investments, reason why it should obtain the cooperation and maximum use of the resources and programs of both sectors.
- Recommend to the Executive Power the adoption of measures that improve the investment climate through changes, adjustments, substitutions and/or modifications to the effective legal and administrative dispositions on the matter.
- Research the flow and trends of FDI, the role of transnational companies and its impact on the international competitiveness of the Dominican Republic.
- Serve as library and distribution center for investment-information.
- Pursue international negotiations related to investment and propose participation alternatives in bilateral, regional and multilateral agreements.

Moreover, OPI also has, as part of its functions, to evaluate the overall country's competitiveness vis-à-vis regional competitors, through activities such as:

- Evaluate the Dominican offer in the regional and international context in terms of legal framework, costs of operation or production, added value, preferential access to markets, etc.
- Coordinate with the Division of Legislative Studies the pursuit and the proposal of laws or studies tending to preserve and increase the Dominican competitiveness.
- Make comparative studies by sectors in coordination with the management of analysis of markets, to design with the respective directions strategies to take advantage of the comparative advantages of the Dominican Republic.

Finally, OPI is in charge of coordinating *Ventana Unica* for the Investor.

2.4. IRELAND

Ireland, also known as the “Celtic Tiger”, has shown outstanding rates of growth and development in the past two decades, overcoming almost within a generation a large income/development gap with its continental neighbors. Ireland has a population of 3.2 million people and it achieved its economic success by focusing efforts in attracting FDI in activities that promoted job creation, especially in high-technology and high-skill industries.

2.4.1. Investment Related Legislation

Irish investment regime is based on low-tax statutes, the most important of which are listed below (in alphabetical order):

- Capital Gains Tax Act 1975
- Central Bank Acts 1942 to 1997
- Central Bank Act 1989
- Companies Acts 1963 to 1998
- Companies (Amendment) (no.2) Act 1999
- E-Commerce Bill 1999
- EU Second Banking Directive 89/646/EEC
- European Communities (Life Assurance) Framework Regulations 1994
- European Communities (Non-Life Assurance) Framework Regulations 1994
- Film Board Act 1980
- Finance Act 1980
- Finance Act 1996
- Finance Act 1999
- Investment Limited Partnerships Act 1994
- Limited Partnership Act 1907
- Partnership Act 1890 (UK)
- Stamp Act 1891 (UK)
- Statutory Instrument No. 78 1989
- Stock Exchange Act 1995
- Taxes Consolidation Act 1997
- Unit Trusts Act 1990

2.4.2. FDI Statistics

As an example of its success in attracting FDI, Ireland, with one percent of the European Union’s population, attracted 25 percent of all new U.S. investment in the EU from 1993-2001. As of end-2001, U.S. companies operating in Ireland employed about 5 percent of total employment, mostly in the following sectors: chemicals, pharmaceuticals and healthcare, computer hardware and software, electronics, and financial services.

Ireland does not compile statistics on FDI inflow value or direct investment outflows. However, using data from the Industrial Development Agency (IDA)-assisted companies, the number of foreign companies operating in Ireland in manufacturing and internationally traded services increased by over 50 percent since 1988. Employment generated by IDA-assisted firms more than doubled from 1988 to 2001: 65,874 to 148,790. As an additional way to gauge the impact of foreign firms in Ireland's development, we will use the stock of U.S. investment in Ireland, which, according to data from the U.S. Department of Commerce, reached US$33.8 billion in 2001.

2.4.3. Investment Regime Characteristics

As the Dominican Republic, Ireland does not offer special investment incentives or other types of favored treatment to foreign investors, besides the tax regime, which is open to all investors, whether local or foreign. The following policies have been touted in recent studies as responsible for Ireland's success in attracting FDI[6]:

- High levels of investment in education;
- Improvements/investment in research and development programs and comprehensive training programs
- Coordinated FDI promotion programs
- Comprehensive FDI screening programs
- Commitment to the European Union and WTO
- Responsible fiscal policies
- Partnership agreements between government, businesses, and labor unions
- Reduced personal income taxes
- Wage concessions
- Opening and liberalization of the economy
- Corporate incentives and free trade zones

In additional to these policies, according to a recent business survey, these companies are attracted to Ireland for the following reasons:

- Access to the European Union trading bloc;
- 10 percent special rate of corporation tax and generous state subsidies;
- Pulling power of existing companies operating successfully here (a sort of "bandwagon" effect).

Much is made of the efforts made by the Irish as a people, to come to a consensus on a development policy. Government, business and labor unions have also a high level of understanding, resulting in good labor-management relations. It is this effort to bring all sectors to agree on an investment policy that made the difference in the 1990s: many of the "right" policies were in place in the 1980s, but it was not until there was a partnership agreement between management and labor, with government providing more education/ training and lower taxes that the investment strategy really took off. There is also significant investment in education and training, with the government sponsoring

[6] *The Irish Model: FDI's Role in Economic Prosperity,* USAID's Access to Microfinance & Improved Implementation of Policy Reform, 1999.

numerous research and development programs throughout the country and, in many cases, providing grants to businesses to cover the cost of training employees.

Ireland has also based its success in attracting FDI on a very liberal (actually, quite aggressive) tax policy. Until the end of 2002, the pillars of this regime were a 10 percent special corporate tax and a 16 percent standard corporate tax[7]. As of January 2003, the corporate tax was unified to a 12.5 for all companies.

The changes on the tax regime came from pressure of the European Commission and other EU member states, which viewed Ireland's special 10 percent tax rate as a state subsidy to industry. The Irish government responded by eliminating the special 10 percent tax rate and lowering the standard rate of corporate tax to just 12.5 percent in January 2003, thereby eliminating any differential treatment for specific sectors.

2.4.3.1. Ireland's New Corporate Tax Regime

The following are the main provisions of the agreement reached between the Irish government and the European Commission on corporate taxation:

- General 12.5 percent rate of tax for all trading profits will apply from January 1, 2003;

- Existing operations which are eligible for the ten percent rate of tax will retain their entitlement to this rate until 2010 in the case of manufacturing and certain internationally traded services and until 2005 in the case of the international financial services center and the Shannon industrial zone;

- New projects established after July 22, 1998 in manufacturing, certain internationally traded services and in the IFSC or Shannon will be eligible for the ten percent rate of tax until December 31, 2002 after which they will then be subject to the 12.5 percent rate of tax;

- Overall number of new IDA-supported projects (mainly foreign companies in manufacturing and internationally traded services) established in Ireland is not to exceed 77 per year in 1998-2002 inclusive (this figure is based on the average number of IDA-supported projects established in Ireland in recent years);

- Deadline for the approval of new projects at the IFSC and Shannon will be brought forward by one year to Decembers 31, 1999; new projects establishing at the IFSC and Shannon after this date will be liable for the standard rate of corporation tax then applying. The number of new projects at the IFSC in 1998-99 will be limited to 67 per year.

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[7] The companies originally eligible for the special corporate tax were manufacturers, international financial services companies (IFSC), data processing, research and development, and other priority industries. Financial services companies located in the Shannon duty-free zone at Shannon airport were also eligible.

Major potential shortcomings to Irish investment climate over the coming years have been identified as shortages of skilled and unskilled labor, as well as rising infrastructure (traffic, aviation, telecommunications) congestion.

2.4.4. Multilateral Agreements

Ireland's only BIT agreement is with the Czech Republic. In addition, Ireland has bilateral tax treaties with the following countries: Australia, Austria, Belgium, Canada, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Hungary, Italy, Israel, Japan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, Netherlands, New Zealand, Norway, Pakistan, Poland, Portugal, Russia, Slovak Republic, South Africa, Spain, Sweden, Switzerland, UK, USA, Zambia and Romania. These agreements serve to promote trade and investment between Ireland and the partner counties that would otherwise be discouraged by the possibility of double taxation. Ireland is expected to enter at least three new Double Taxation Treaties over the coming year.

2.4.5. Investment Promotion

In terms of investment promotion, Ireland has the following four state organizations dedicated to this task:

- The Industrial Development Agency of Ireland (IDA Ireland) has overall responsibility for promoting and facilitating foreign direct investment in all areas of the country, except the Shannon Free Zone. IDA Ireland also has responsibility for attracting foreign companies to Dublin's International Financial Services Center (IFSC). IDA Ireland maintains offices in New York, Boston, Chicago, Los Angeles, San Jose, and Atlanta, as well as at locations in Europe and Asia;
- Enterprise Ireland promotes joint ventures and strategic alliances between indigenous and foreign companies;
- Shannon Free Airport Development Company (SFADCO) handles investment in the Shannon Free Zone and is generally responsible for economic development in the Shannon region;
- *Udaras na Gaeltachta* has responsibility for economic development in those areas of Ireland where Irish (Gaelic) is the predominant language, and works with IDA Ireland to promote overseas investment in these regions, which are mainly concentrated in less developed areas in the west of the country.

2.5. MAURITIUS

Mauritius is a small island state that shares several common elements with many of the CARICOM-member states, key among them is an established democracy with a liberal economy, French and British-based legal institutions, multiethnic society, and relatively small population (just over one million strong). Its economy was originally dependent on sugar, then moved to depend on textiles/apparel and tourism, and, most recently, on financial services.

The most noteworthy fact about Mauritius is that its economy has experienced high 5-6 percent annual growth for the last two decades. In 2000, GDP grew by 8.9 percent and per capita income was close to US$4,000. Today Mauritius is the leading manufacture exporter, as well as one of the highest per capita incomes, in sub-Saharan Africa.

According to U.S. government sources, average annual growth in the medium term is expected at 5 percent. In 1998 and 1999, the World Economic Forum ranked Mauritius as the most competitive economy in Africa.

2.6.1. Investment Related Legislation

- The **Export Processing Zone (Non-Citizen) Act** enacted in the mid-1970s, offered a package of tax concessions and other incentives, to attract manufacturers. This has since been extended to services and companies in the freeport and the offshore banking and business center.
- **Investment Promotion Act (2000).** The goal of this legislation is to streamline the legal framework and to better provide for the promotion and facilitation of investments in Mauritius. The act provided for the establishment the Board of Investment, which became operational in early 2001, which will be further discussed in section 2.1.6.4.
- **Permanent Residence Scheme (2001).** This incentive provides permanent resident status to any investor with a minimum of US$500,000 for any qualifying business activity, which include manufacturing, tourism, financial services, agro-industry/agriculture, fishing and marine resources, and operational headquarters of multinational companies, Freeport operations, IT, concession projects, and film production. .
- **Regional Headquarters Scheme (2001).** This scheme is aimed at favoring the establishment of companies wishing to provide headquarters services to related corporations in countries of the region.

2.6.2. FDI Statistics

The following statistical tables, supplied by the Bank of Mauritius, show inflow of FDI by industry (1997-00) and country of origin (1996-99). However, according to the Mauritius Export Development and Investment Authority, these figures may under-represent the actual amounts of FDI because foreign investors' dealings no longer have to go through the Central Bank for registration since the abolition of foreign exchange controls in 1994. Also, the offshore services sector, although quite significant, does not show up in the country's FDI data. Eleven major international banks and over 16,000 business entities operate in the offshore sector, which has become the second-largest source of FDI into India. Table 2.8 shows the origin of FDI for the 1996 to 1999 period.

Table 2.8. Mauritius: FDI by Country of Origin, 1996-99 (US$ million)

Country	1996	1997	1998	1999
Dubai	-	0.9	1.7	6.2
France	0.9	1.6	2.1	1.3
Germany	0.3	0.1	-	0.5
Hong Kong	-	1.3	-	-
India	2.2	3.4	2.4	0.5
Luxembourg	-	-	2.9	-
Malaysia	1.3	-	-	1.0
Pakistan	1.2	0.9	0.7	0.6
Singapore	26.0	-	-	-
South Africa	-	46.0	-	23.0
Switzerland	-	-	0.1	0.2
U.K.	1	0.7	2.2	16.0
Others	0.1	1.1	0.6	0.7
Total	33.0	56.0	12.7	50.0

Source: Bank of Mauritius, 2001.

In the late 1990s, South Africa became the main source of FDI in Mauritius, followed by U.K., Dubai, India and France. Table 2.9 shows in which sectors FDI has gone in the last few years.

Table 2.9. Mauritius: FDI by Industry, 1997-00 (US$ million)

Industry	1997	1998	1999	2000
Export Processing Zone	0	1.1	12.0	0.3
Tourism	1.0	3.1	1.0	0.4
Banking	54.0	5.0	8.5	0
Telecommuniations	0	0	0	273.0
Other	1.0	3.0	28.0	1.6
Total	56	12.2	55.5	257.3

Source: Bank of Mauritius

The two large investment shown in 1997 in the banking sector and in 2000 in the telecommunications sector were the result of the purchase of 20 percent share capital in the State Bank of Mauritius by its strategic partner, Nedcor of South Africa, and the 40 percent sale of Mauritius Telecom's shares to France Telecom, respectively.

2.6.3. Investment Regime Characteristics

In 1970 Mauritius enacted the Export Processing Zone Act (the first in Africa) to take advantage to preferential access to European and U.S. markets. The original investors were from Asian countries, but currently the main exporters are national companies. FDI is governed by the investment regulations are consistent with the WTO's Agreement on Trade Related Investment Measures (TRIMS).

The Mauritius investment regime has the following characteristics:

- Detailed screening of new investors
- 15 percent corporate tax, no tax on dividends and capital gains
- Free repatriation of profits, capital and dividends
- Duty free access to inputs for export
- Cost competitive export processing zones

Among the policies made responsible for Mauritius' success in attracting FDI the following are most repeated in recent studies[8]:

- High levels of investment in education. As other case studies in this report, Mauritius invests significantly on education: 17 percent of national budget (1999)
- Social and political stability
- Founding member of the WTO, member of the Lome Convention and the Common market for Eastern and Southern Africa (COMESA) and the Indian Ocean Commission
- Bilateral treaty with the United States
- Incentives for foreign investment and export
- Geographic location and climate favorable to tourism
- Good quality of life.

Currently, incentives are available in three broad areas: (i) the Export Processing Zone (EPZ), which caters to export-oriented manufacturing; (ii) the freeport, which provides warehousing, packaging, assembly, and logistics facilities for re-export activities; and (iii) offshore business.

- **EPZ** incentives include 15 percent corporate tax (against a 25 percent normal tax rate), no tax on dividends, free repatriation of capital, profits, and dividends, and relief from customs duty and value added tax on raw materials, machinery and spare parts. In 2000, the government extended the 15 percent corporate tax facility to internet service providers, network service providers, information technology training schools, and other providers of services such as multimedia development and hosting of web sites. The EPZ regime in Mauritius is not limited to a specific geographical area: firms eligible for EPZ certificates can operate anywhere on the island.
- Companies in the **Freeport** receive exemption from company tax and tax on dividends, preferential rates for warehousing, reduced port handling charges (50 percent of normal rates), and exemption from import duty and value added tax on finished goods, machinery, equipment and materials. Freeport operations may be 100 percent foreign-owned and use offshore banking facilities.
- In the **Offshore Sector**, the main incentives include exemption from withholding tax on interest, royalties and dividends; no capital gains tax; exemption from customs duty, excise duty and VAT on essential imported office equipment and furniture. For companies registered in the offshore business center after July 1, 1998 profit is taxed at a uniform rate of 15 percent. However, they are entitled to a foreign tax credit of 90 percent, which brings the effective tax rate to 1.5 percent. Offshore companies

[8] *Mauritius: A Bridge Between Asia and Africa,* USAID's Access to Microfinance & Improved Implementation of Policy Reform, 1999.

registered before July 1, 1998 may choose to pay tax at any rate between 0-35 percent, or opt for the 15 percent rate introduced in 1998. To ensure a level playing field for both offshore and onshore companies, effective July 2003, all offshore entities will be taxed at 15 percent. The main attraction for companies to conduct offshore operations in Mauritius is its network of Double Taxation Avoidance Treaties with developed European and emerging African and Asian economies.

Beginning the 2000s, the government introduced further measures to make their investment climate more attractive, as globalization and a regional trend for economic liberalization, eroded some of the competitive advantages that Mauritius originally enjoyed. To address these new challenges, Mauritius introduced the Investment Promotion Act, the Permanent Residence Scheme and the Regional Headquarters Scheme to attract new investors and multinationals to Mauritius.

In addition, the government in 2001 committed itself to massive investment in education and training, information and communication technology, infrastructure, and environment. As part of this effort, sixteen new high schools are being open, as well as 354 computer laboratories. Also a cyber-city, a business park, three new hospitals, a 150,000 ton waste incinerator, two desalination plants, several sewage projects, and 1,000 housing units (5,000 over 5 years) will be constructed.

Negative elements in Mauritius investment climate have been identified as high interest rates; bureaucracy (delays in getting approvals); limited targeting of selected activities and investors; little success in upgrading FDI into high skill activities; inadequate resources for FDI promotion and incentives for technological upgrading, local linkages and R&D; and lack of aftercare for existing investors, among others. Moreover, Mauritius maintains the differentiation between foreign and local investors, needs to move forward in its privatization efforts, and focus on issues of market competition.

2.6.4. Multilateral Agreements

Mauritius signed investment promotion and protection agreements with Germany, France, U.K., China, Mozambique, Pakistan, Indonesia, Portugal, South Africa, India, Switzerland, the Czech Republic, Nepal, Rumania, Singapore, Swaziland, Zimbabwe, Benin, Burundi, Ghana, Mauritania, Chad, Comoros, and the Republic of Guinea. Agreements with Malawi, Uganda, Chile, Turkey, and Korea are awaiting signature. A revised investment incentive agreement was signed with OPIC in 1997. The new agreement clarifies the tax and regulatory treatment afforded to OPIC in Mauritius and applies to the full range of OPIC's programs.

Mauritius has double taxation avoidance treaties with 28 countries: France, U.K., Germany, India, Sweden, Zimbabwe, Malaysia, Swaziland, Italy, China, Pakistan, Madagascar, Luxembourg, Botswana, Namibia, Belgium, Russia, South Africa, Indonesia, Sri Lanka, Singapore, Mozambique, Kuwait, Lesotho, Thailand, Oman, Cyprus, and Nepal. Treaties with Bangladesh, Malawi, Croatia, Tunisia, and Uganda are awaiting signature while negotiations are still going on with Canada, Greece, Portugal, Zambia, Vietnam, Nigeria, and Czech Republic.

2.6.5. Investment Promotion

The new Board of Investment (BOI), set up by the government in 2001, was created to streamline the legal framework and improve the promotion and facilitation of investment. On top of its promotion responsibilities, it is charged with the three investment schemes mentioned in the previous section. It provides a one-stop-shop service to both local and foreign investors. It is also expected to come up with specific incentives that will attract investors, particularly in the advanced technology industries as well as skill-intensive and knowledge-intensive services.

Prior to the creation of BOI, FDI (with few exceptions, such as the offshore business center, the Freeport, and the stock exchange) required prior approval of the Prime Minister's Office. The BOI now receives all applications for an investment certificate and acts as a one-stop service to obtain all relevant permits from various public sector agencies.

Under the new system, offshore business and freeport licenses are still approved directly by the Mauritius Offshore Business Activities Authority (MOBAA) and the Mauritius Freeport Authority (MFA).

Other investment related agencies are the Mauritius Industrial Development Authority (MIDA), which objective is to develop export-oriented manufacturing and promote exports by local companies, as well as build and manage industrial sites and estates.

The Export Processing Zone Development Authority (EPZDA) facilitates all export-oriented activities through the improvement in productivity, quality, innovation, and creativity.

The MOBAA is the regulator and supervisor of non-banking offshore financial services. It functions as a one-stop-shop for this activity, serving as facilitator for the offshore companies, promoting the offshore center, and advising the government on offshore development and its competitiveness.

3. Section I. Best Practices for Investment Policies

This chapter focuses on the specific laws and principles that appear to constitute best practice investment policy. Investment policies to be evaluated are:

- Admission and business establishment,
- Standards of treatment
- Expropriation and compensation
- Dispute settlement

Special attention must be given to the laws and policies relating to matters of major concern to CARICOM Member States, including alien landholding, employment of foreign workers, and access to resources from the domestic financial system, among others.

3.1. ADMISSION AND ESTABLISHMENT OF AN INVESTMENT

The concept of “admission and establishment of an investment” refers to the legal regime and legal/regulatory/administrative process through which FDI that is proposed or has already occurred is recognized as such and legitimized within a nation's sovereignty sometimes referred to as "establishment". This section will focus on the following four areas:

- Restricted and reserved sectors for FDI and domestic investment
- Equity restrictions
- Admission of investment
- Foreign workers employment

Each section will discuss these policies in a comparative manner to highlight their similarities, as well as their disparities.

3.1.1. Restricted and Reserved Sectors

All of the evaluated countries had sectors restricted for FDI or reserved for local investors. This section will focus exclusively in those areas that may be of interest to foreign investors (ex. avoid discussion of foreign investor entry into small retail/business sectors). Also, some areas that are traditionally excluded will not be covered in the analysis, such as disposal and storage of toxic, hazardous or radioactive waste; public health and the sanitary/ecological protection; and, activities directly linked to national security.

Chile, Ireland, and Mauritius have the most liberal regimes for admission of FDI among the 5 case studies. Ireland has no off-limit areas to investment to foreign firms (that is, that is also open to local PSP), with few exception: Irish airlines must be at least 50 percent owned by EU residents in order to have full access to the single European aviation market.

Chile only restricts the following areas from foreign participation: coastal trade, air transportation, and mass media. The navigation law (D.L. 222) states that vessels fishing in Chile's 200-mile Exclusive Economic Zone (EEZ) must have majority Chilean ownership (although exceptions are made for some distant waters). However, the law permits bilateral agreements to allow foreign-owned vessels to fish in Chile's EEZ, but no such agreements have been concluded. Also, although automatic national treatment is denied for cabotage, reciprocity is applied. In Chile, foreign investors openly and freely participated in the privatization of government assets over the last decade. Some exceptions are that FDI going to the media sector require FIC approval and that top management (but not ownership) of radio and television broadcasting firms is reserved for Chilean nationals. Although the State retains participation in several industries, businesses are predominantly owned and controlled by private interests. The most important public corporation is CODELCO, the world's largest copper company, which the government is unlikely to privatize in the foreseeable future. Nevertheless, it must be noted that the mining sector, including much of the copper industry, is open to private investment.

The **Irish** government still reserves for itself control over key sectors, such as telecommunications, transport, energy, and banking, although the recent flotation of Ireland's biggest telecommunications company is likely to be followed by further privatization of some state-owned companies in the above-mentioned sectors. Nonetheless, there are no barriers to participation by foreign institutions in the sale of Irish state-owned companies, though residents of Ireland may be given priority access in share allocations to retail investors, as was the case with telecommunications.

Mauritius has a quite liberal economy and a lesser degree of government participation in its GDP (only 11 percent in 2001), but still it has some control in various activities, such as key utility and public services: electricity, water, postal services, and telecommunications (except cellular), and broadcasting. Nonetheless, the government embarked in the last 3 years in a program to raise the efficiency of utility companies through strategic alliances and management contracts with PSP, which also welcomes the participation of foreign investors. This was achieved through the 1997 Concessions Project Act, which allows for local and foreign PSP, through build-operate-and-transfer (BOT), build-own-operate (BOO), and similar mechanisms. Energy, roads, and public transport are some of the sectors identified by the government for implementation under this legislation. In the energy sector, the government allowed in 1998 all new production and distribution capacity to be taken over by the private sector; by 2001 more than one third of the country's electricity needs was supplied by private co-generation plants on sugar estates. The broadcasting sector became open to PSP in 2001.

In the case of **Costa Rica** the range of restricted and reserved sectors are significantly wider and includes road transport, sea transport and port services, air transport and airport services, telecommunications, energy distribution, petroleum refining, insurance and some banking services. Opening some of these sectors, either through privatization or allowing foreign/local participation, face strong opposition by labor union and some sectors of civil society and the current government is not pushing to further this matter at this time. There is a 1998-concession law that allows for building and managing public works projects, but there is yet a concession to be closed successfully.

The **Dominican Republic** is in a relatively similar situation as Costa Rica in terms of government participation in the country's economic life, but with one fundamental difference: the Dominican government is actively pursuing policies to remedied this. This process began with the 1997 law to allow for the privatization or "capitalization" (participation of private sector and FDI) of state-owned enterprises and have resulted, so far, in the privatization/capitalization of flour mills, distribution and generation units of the state-owned electricity company, and all sugar industry state-owned assets. This privatization of assets and services accounts for a significant slice of the recent upsurge of FDI into the country. Government-owned hotels and several companies are already scheduled for privatization. The Government still owns most public utilities (with the significant exception of telecommunications), an insurance company, the country's largest bank (*Banco de Reservas*), and factories producing a variety of goods.

In most of the countries evaluated, with the notable exception of Chile, government has a significant role in utilities' ownership and management. Nonetheless, Dominican Republic, Ireland, and Mauritius are taking steps to remedy this in the short run, while Costa Rica would likely remain in the near to medium future as the group's hold-out in allowing PSP into those sectors.

3.1.2. Equity Restrictions

Equity/control restrictions are rather found in the areas of the economy in which states want to promote more efficiency through PSP without losing either state-control or local ownership. This was found to be true, in less or more degree, in most cases evaluated.

Chile stands alone in being the only case in which 100 percent ownership is allowed in all sectors open to PSP or FDI. Only in the fisheries sector is required that Chileans have the controlling equity. In the case of **Ireland,** the same is true with the exception of the EU ownership restriction on airlines flying into its economic zone, as mentioned in the previous section. However, Ireland has more reserved areas of government control than Chile, although is currently engaged in a process of privatization of certain activities.

Capitalization is among the most important mechanisms to allow PSP in state-controlled activities, as it allows for local private/FDI participation in restricted areas without the government losing control. This is the case of **Dominican Republic** and **Mauritius**, where both use a system of management concessions. Nevertheless, in Mauritius foreign participation may be limited to 50 percent in investments serving the domestic market and is generally not encouraged in areas where local businesses have mastered the technology.

In **Costa Rica** several sectors open to private participation and that allow foreign participation require a certain percentage of Costa Rican citizen or resident participation. These sectors include energy generation, broadcasting services, coastal tourism development, professional services, and wholesale distribution. Current law limits foreign equity in power-generating projects to sixty-five percent. Regulations also state that enterprises seeking loans from the three state-owned commercial banks, the country's largest, must have majority Costa Rican equity. These regulations are rarely enforced, however. Beachfront concessions, important for tourism investments, are subject to certain local ownership and residency requirements.

3.1.3. Admission of Investment

Formal admission refers to the process by which actual or prospective FDI is screened, approved, and/or otherwise regulated under legal norms and administrative procedures. Generally, the criteria for admission of FDI in a country with formal admission requirements will reflect the desire of the country to relate such FDI to its economic needs and development priorities and/or to direct it to geographical areas or economic/industrial sectors.

3.1.3.1. Approval Requirements and Process

One key aspect for the approval requirements and its process is that the evaluated countries have transparent, clear, and not cumbersome investment entry requirements. Actually, most of the case studies try to keep the whole investment process within the purview of the designated one-stop-shop agencies.

Chilean investment system has, by the contractual nature of its premier regime, D.L. 600, a more strict control on private sector flows, including FDI. This regime requires pro-forma screening and FIC approval of investment proposals. However, it does not try to direct investment to certain sectors or impose performance requirements. The FIC differentiates between investments below or above US$5 million: below this mark, the application is reviewed and approved/disapproved by the Vice-Presidency, while for investments above that mark a Committee agreement is required. This agreement is also required for all investments going into the utilities and media sectors, and those made by foreign governments or foreign public entities. However, approval procedures are expeditious and applications are typically approved within a matter of days and almost always within one month.

The first step is to designate a legal representative and fill out an application (available through the internet) that must include a brief description of the project, including amounts, terms, form of capital contributions, and tax treatment. It must also include notarized copy of the articles of incorporation (translated into Spanish), a notarized certificate of incorporation, and power of attorney. Once approved, a foreign investment contract will be signed between the investor and the State of Chile, which will be recorded in a public deed.

Costa Rica does not screen FDI in sectors not reserved for the State. It does target specific areas, such as light manufacturing, services, tourism, infrastructure, apparel, and automotive industry projects or by size/ employment impact (more than US$150.000 and employ at least 15 people), for FDI investment.

Dominican Republic does not screen investment and only requires that, within 90 days of making its investment, any foreign company or investor should register the investment with the Central Bank. This process requires the following:

- Application for registration, containing all the information relevant to the invested capital and the area in which the investment has been made;
- Proof of entry into the country of the foreign currency or physical or tangible goods.
- Formative documents of the commercial corporation or the authorization of the operation of branch offices via the setting of domicile.

Once the document filing requisites have been met, the Central Bank will issue immediately to the applicant a Registration Certification of Foreign Direct Investment. In the case of companies operating in Industrial Free Zones, the registration and delivery of information shall be made in the National Council of Export Free Zones, which shall have the obligation of communicating this immediately to the Central Bank.

In **Ireland,** to qualify for special corporate tax rates and state grants, some foreign investors must place their investment in a specified location. As an example, financial services companies must locate in the International Financial Services Center in Dublin, or another approved location, to qualify for the special corporate taxes. Also, the Irish government assesses potential investment projects for eligibility for grant aid, which is tied to job creation and linkages with the local economy in the more remote western and border regions of Ireland, where unemployment is higher and infrastructure less developed. Three Irish organizations, SFADCO, IDA and *Udaras*, have regulatory authority for administering grant-aid to investors for capital equipment, land, buildings, training, research and development, etc. Screening mechanisms for grant aid purposes are transparent and do not impede investment, limit competition or protect domestic interests.

In the case of **Mauritius**, foreign investment, except in the offshore business center, the freeport and the stock exchange, requires advance approval from the Prime Minister's Office. Offshore business and freeport licenses are approved directly by the Mauritius Offshore and Business Activities Authority (MOBAA) and the Mauritius Freeport Authority (MFA), respectively, and do not require Cabinet-level approval and takes about two weeks from application to approval. Outside of those areas, all applications for an investment certificate have to be made to the BOI, which also acts as a one-stop service to obtain all relevant permits from various public sector agencies. These agencies are given four weeks to process the application for relevant permits, except in the case of a project requiring an environmental impact assessment or developments permit, where the deadline will be eight weeks. In practice, the approval of foreign investment can take a significant amount of time.

3.1.4. Foreign Workers Employment

The most liberal schemes to allow foreign workers employment are **Ireland** and **Mauritius**. In Ireland, visa, residence and work permit procedures for foreign investors are non-discriminatory. There are no restrictions on the numbers and duration of employment of foreign managers brought in to supervise foreign investment projects. In Mauritius almost 4 percent of all workers in the economy are foreign, employed mostly in textile factories but also in the construction and hotel and catering sectors, as well as the more sophisticated financial sector.

In Latin America, controls are manifested through very specific quotas that limit the percentage of foreign workers that a firm may have: in Chile this ceiling is 15 percent, in Costa Rica 10 percent, and in the Dominican Republic 20 percent. In **Chile**, however, there is an exception for technicians, who cannot be replaced by Chilean personnel, as well as foreigners resident for more than five years and those married to Chileans. Foreign workers are subject to the same laws as nationals, although in some sectors management positions are reserved to Chileans, such as merchant marine, air transport, broadcasting, and advertising. The **Dominican Republic** makes a significant exception on this issue, as management or administrative staff of a foreign company is exempt from the 20 percent restriction.

In **Costa Rica**, the exceptions to the foreign worker restriction can be found in negotiations with the Executive for special investment or, in case a firm with only five employees or less, at least one of them can be a foreigner. This latter restriction is not applicable to managerial staff, as long as there is no more than 2 in the firm.

3.2. STANDARD TREATMENT

Standard treatment refers to the manner in which FDI is received and treated within a country; in particular, the standards of treatment accorded to foreign investors from differing nations and/or compared with domestic investors. If specifically provided for, an investment code generally will accord either "Most Favored Nation" (MFN) or "National" Treatment or some variant of "fair and equitable treatment." MFN Treatment means that the host country will extend to investors from a particular foreign country treatment *no less favorable* than the treatment it applies to nationals of any other foreign country. "National Treatment" implies that foreign investors and their investments will be accorded treatment exactly similar to that accorded domestic direct investors, that is, they will receive the *same treatment* as nationals of the host country, or as often stated, "treatment no less favorable than" that accorded domestic investors. "Fair and equitable treatment" constitutes a less specific standard that implies a broad range of possibilities but usually relates to treatment within a defined system of rules and regulations related to established constitutional and legal standards and internationally recognized considerations of due process. Many bilateral investment treaties guarantee "National Treatment or MFN

Treatment, whichever is *more favorable*. Frequently, however, foreign direct investors and their investments may be accorded *better* treatment than nationals of the host country, that is, accorded certain fiscal or other FDI incentives not otherwise available to host country nationals.

3.2.1. National/MFN Treatment

The majority of the countries evaluated provide national treatment to foreign firms in such areas that are open to private sector participation. The same can be said of most favorable nation (MFN) treatment.

In this subject, **Chile** leads the way as FDI is open to most sectors. Even in the privatization of public services, foreign firms compete on an equal basis with domestic firms. All firms, local and foreign, that request the investment incentives under the D.L. 600 regime must undergo the same registration process, with the same basic requirements. The Constitution grants national treatment to foreign investors (or no less favorable than to national investors). There are however, some exceptions discussed in previous sections of this report: limitation on access to local financing (although not applied), fisheries activities, cabotage, insurance, media, and border lands. In addition, the numerous bilateral investment treaties (more than 50) establish that there are no exceptions to MFN treatment principle in relation to the establishment, expansion, and operation of foreign investment.

In **Ireland**, all firms incorporated locally are treated on an equal basis. With only a few exceptions, there are no constraints preventing foreign individuals or entities from ownership or participation in private firms/corporations. There are no barriers to participation by foreign institutions in the sale of Irish state-owned companies, though residents of Ireland may be given priority access in share allocations to retail investors. Moreover, Irish central and local government procurement is administered according to EU regulations, which is open to foreign suppliers, both from inside and outside the EU. There are, however, deficiencies regarding MFN treatment as EU citizens enjoy more rights to acquire property (ex. rural land) and ownership (ex. airlines) than citizens from other countries.

To receive better than national treatment, financial services companies must locate in approved locations. For most Irish and overseas companies, however, the Irish tax authorities will ultimately decide whether companies qualify for the special 12.5 percent rate of corporation tax, depending on the nature of its operations rather than its geographic location. There are no restrictions, de jure or de facto, on participation by foreign firms in government-financed and/or subsidized research and development programs on a national basis.

In **Costa Rica,** foreign investors operating in the electrical power generation sector, radio or television broadcasting, or who seek concessions for beachfront property (if corporations) must have Costa Rican equity partners. Also, foreign individuals wishing to participate in some service sectors may be discouraged by rigorous controls: medical practitioners, lawyers, certified public accountants, engineers, architects, teachers and other professionals must be members of one of the guilds or "colegios." These organizations stipulate training, residency, examination and apprenticeship requirements that can only be met by long-time residents of Costa Rica, whether citizens or foreigners.

3.2.2. Performance Requirements

All the countries evaluated have some type of performance requirements for foreign firms, although these are not pervasive in their systems. The only exception is **Mauritius**, where the government offers local and foreign investors the same incentives with no performance requirements.

Standard performance requirements may include:

- Export a given level or percentage of goods or services
- Achieve a given level or percentage of domestic content
- Purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory
- Relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment
- Restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.
- Local employment targets

Chile imposes very few performance requirements on trade and investment: in broadcasting, 40 percent of the transmissions must be Chilean productions and in the mining sector, copper companies must establish a local reserve that benefits local manufacturing entities depending on their annual production.

Through its Active Finishing Regime, **Costa Rica** suspends taxes for renewable six-month periods on imported inputs of qualifying companies, and then exempts the inputs from those taxes when the finished goods using or containing them are exported. The regime also facilitates a five-year renewable suspension of taxes on capital goods used to manufacture exported goods. Companies within this regime may sell to the domestic market if they have registered to do so and pay pro rata import duties on capital equipment used for the domestic market. The drawback procedure provides for rebates of duties or other taxes that have been paid by an importer for goods subsequently incorporated into an exported good.

Dominican Republic requires local sourcing when components are of approximately equal cost and quality compared to imports, but this law has not hindered investors. In addition, there are no requirements that foreign equity be reduced over time or that technology be transferred according to certain terms. Otherwise, the Government imposes no location, local ownership, local content, or export requirements or conditions on foreign investors.

In **Ireland** performance requirements are only required of those enterprises that want grant aid from the government, which is generally based on employment creation targets established between the state investment agencies and foreign investors. Grant-aid is paid out only after externally-audited performance targets have been attained. Grant agreements generally have a term of five years after the date on which the last grant is paid. There are no requirements that foreign investors purchase from local sources or allow nationals to own shares.

3.2.3. Remittances of Profit and Repatriation of Capital/Foreign Exchange Controls

A particular area of concern for investors in the treatment of FDI has to do with the rights accorded or withheld regarding freedom to transfer to an investor's home country (or "repatriate") capital and profits from the investment. From the standpoint of foreign investors, the ideal treatment would accord completely unconditional, unregulated, transfer rights without limitation of the percentage of investment that may be repatriated or restrictions on the access to and use of foreign exchange to effectuate such transfers in hard currencies. Some countries guarantee the unrestricted right of repatriation for either capital or profits, or both. Others frequently condition it on a degree of reinvestment or subject to the availability of foreign exchange or to other national priorities. Many specifically tax such transfers through withholding on the amounts transferred in addition to applicable local income taxes on corporate profits. Even where repatriation transfers are explicitly or generally authorized, freedom to effect them may be diluted by collateral regulations imposed in unrelated or non-FDI-targeted laws and regulations.

The countries with the most liberal system of capital and profits transfer are **Ireland** and **Mauritius**. Ireland enjoys full current and capital account liberalization and, thus, there are no restrictions on the conversion or repatriation of investment capital, earnings, interest or royalties. Foreign exchange is easily obtainable at market rates. On January 1, 1993, all exchange control regulations were completely abolished. In the case of Mauritius, the government abolished foreign exchange controls in 1994 and, since then, there are no legal impediments to obtaining foreign exchange for any business transaction or transferring funds associated with an investment. There is convertibility on both capital and current accounts. Foreign currency accounts can be opened. The Africa Competitiveness Report 2000/2001 of the World Economic Forum ranks Mauritius first in Africa with regard to availability of foreign exchange to businesses.

Dominican Republic allows for remittance of all capital and profits. A private sector exchange rate system exists for most commercial banking transactions and the Central Bank uses the market-determined rate of exchange, with some exceptions. Importers may obtain hard currency directly from commercial banks, as well as from the Central Bank. In practice, there is no queuing for foreign exchange. Although the Central Bank must receive all dollars resulting from exports of goods manufactured by non-free trade zone companies, in practice this requirement is applied flexibly. Moreover, for exporters of non-traditional products (i.e., manufactured goods and processed agricultural goods) and the tourism sector, dollars can be sold at the free market rate rather than the Central Bank rate.

Costa Rica has no restrictions on receiving, holding or transferring foreign exchange, plus no delays for foreign exchange, which is readily available at market rates. No restrictions are imposed on reinvestments or on the repatriation of earnings, royalties, or capital except when these rights are otherwise stipulated in contractual agreements with the government of Costa Rica. Contracts may be negotiated in any currency. The Central Bank establishes exchange rates through auctions and a well-publicized policy of daily mini-devaluations. There is no divergence between Central Bank exchange rates and those prevailing in the market. The Central Bank records inflows from exports but places no requirements on where those proceeds must be deposited.

One characteristic of **Chile's** exchange system is the Central Bank requirement to use the formal market for all financial transactions. Although the system have been considerably liberated in 2002, particularly with the removal of the reserve requirements for foreign capital (it had to stay up to one year in the country), it is interesting to note that much of the FDI investment came into the country when the system was quite regulated[9]. Prior to 2001, Chile imposed a reserve requirement for external capital, restricted incoming and outgoing foreign capital, including capital and profit repatriation, required the use the formal market import/export foreign exchange transactions, and the prior authorization to enter funds associated with external loans, investment, working capital, bonds, among other measures. Nowadays, investors, importers, and others are guaranteed access to foreign exchange in the official inter-bank currency market without restriction.

However, the Central Bank reserves the right to disallow access to the inter-bank currency market for royalty payments in excess of five percent of sales. The same restriction applies to payments for the use of patents that exceed five percent of sales, although in such cases, firms would have access to the informal market. As a general rule, currency may be freely traded in two markets—the informal and the inter-bank market (formal). Prior to receiving authorization, the Central Bank still requires that the trade finance transactions, foreign loans, capital flows, and profit repatriation be executed only through a commercial bank (formal market).

3.2.4. Alien Landholding

All the countries evaluated impose some kind of alien landholding. The countries that use those restrictions in a more limited manner are Ireland and Chile.

Ireland requires approval for non-EU citizens for acquiring rural land and the border areas and seashore. Under the Land Act of 1965, all non-EU nationals must get the written consent of the Land Commission before acquiring an interest in agricultural land, though there are many stud farms and racing facilities in Ireland that are owned by foreign nationals. There are no restrictions on the acquisition of urban land. Foreign nationals (citizens of countries other than Ireland and the other EU member states) can acquire land for private residential purposes and for industrial purposes. In the case of **Chile**,

[9] It must be noted that through its capital controls, Chile avoided the panic capital flight resulting from the 1997 international financial crisis.

this is limited to border areas, where only Chileans can obtain property within 10 kilometers from the border (this can only be exempted through an Executive Order).

In **Costa Rica** there are also limitations on foreign investors owning coastal lands, unless they have Costa Rican equity partners. The main land problem is with the invasion and occupation of private property by squatters, who seek to take advantage of laws permitting occupants to receive title to unused agrarian land. This is, however, a problem that affects both local and foreign investors. The Costa Rican police and judicial system have at times failed to deter or to peacefully resolve such invasions.

Landholding for foreigners is a much more complicated affair for foreign investors in the **Dominican Republic** (issues of rule of law) and **Mauritius** (location, size restrictions and approval requirements). Although not specified by law, the Dominican government can take land without compensation and judicial procedures in the land courts have been unreliable. When a judgment in favor of a foreign investor is rendered, the judicial system is often unable to enforce its decision.

Foreign citizens in Mauritius cannot acquire property without special government approval. A foreign investor who has incorporated a company locally can apply to acquire real estate in that company's name. The acquisition must be connected with the investment. Under the Permanent Residence Scheme introduced by government in 2000, an investor may purchase one immovable property, not exceeding one a little more than an acre, for his personal use. The investment in property can amount to 20 percent of the original investment made in a qualifying business activity. The property to be purchased should not be on coastal land with sea frontage. The government is currently considering a program to enable rich foreigners to purchase a limited amount of coastal property.

3.3. EXPROPRIATION AND COMPENSATION

Expropriation refers to a taking, formally or otherwise, by the State or agencies or instruments thereof, by asserting ownership or a public right to control FDI-based property for public purposes, either without color of law or under constitutional or legal provisions that specify the grounds for such action, procedures therefor, and legal rights of investors including, most importantly, compensation and the method of calculating the value of the property seized. Most countries specify that such taking may occur only "in the public interest" or for "public purposes", and laws or authorities therefor usually will specify the manner of valuation and the form of compensation, although only a few require that compensation occur *before* the taking. The standard for assessing value and quantifying compensation may specify "fair and equitable" (usually found in bilateral investment treaties) or simply "fair" and/or "just", with the determination in specific situations delegated to a host country court or administrative body.

Most of the evaluated countries have an adequate expropriation and compensation standard, with the exception of Dominican Republic. The best cases for adequate and prompt expropriation and compensation are Chile, Ireland, and, getting there, Costa Rica. Expropriation is considered very unlikely in Mauritius. The worst case is the Dominican

Republic, where, beside the land problem mentioned earlier, compensation delays can last for more than 20 years (although this used to be the same problem with Costa Rica) and they have a problem for appropriation of services in its energy generation system.

Chilean law grants protection to private property "in a full and absolute manner". Material possession of the property can only take place after full compensation is paid. The government only has the authority to expropriate property, including property of foreign investors, for public use, and national interest. The 1973-1990 military regime and the three subsequent democratic governments have not nationalized any private firms, and nothing suggests that this is likely to occur in the foreseeable future. Compensation is established by mutual agreement between the parties and, if this is not the case, the courts of justice determine compensation. In this latter case, the indemnity is established using real estates experts to determine the market value of the property.

In **Ireland** private property is expropriated only for public purposes in a non-discriminatory manner and in accordance with established principles of international law. Expropriations are carried out in accordance with recognized principles of due process. Where there are disputes between owners of private property subject to a government taking, the Irish courts provide a system of judicial review and appeal.

In **Costa Rica**, the Constitution stipulates that no property can be expropriated from a Costa Rican or foreigner without adequate payment and demonstrable proof of public interest. Moreover, an expropriation law enacted in 1995 requires that the government must provide owners with adequate, full and advanced payment <u>before</u> seizing properties. Provisions providing for both local and international arbitration in the event of a dispute. Foreigners and Costa Ricans receive equal treatment. Provisions include:

- Return of the property to the original owner if it is not used for the intended purpose within ten years or, if the owner was compensated, right of first refusal to repurchase the property back at its current value;
- Requirement that the expropriating institution complete registration of the property within six months;
- One-month period during which the tax office must appraise the affected property; and
- Requirement that the tax office itemize crops, buildings, rental income, commercial rights, mineral exploitation rights, and other goods and rights, separately and in addition to the value of the land itself.

The expropriation law was amended in 1998 to expedite some procedures, particularly those necessary for the construction of new roads. Nevertheless, there are still pending cases prior to the law that continue to affect Costa Rican and foreign investors. These incidents usually involved land expropriated to create national parks, indigenous reserves, or agricultural projects for poor farmers. Some cases date back over 25 years and still await settlement in the Costa Rican judicial system, although the government intends to resolve these cases by 2003 by means of binding arbitration.

Dominican expropriation standards are very weak and do affect the country's outside perception as a FDI destination. There are a number of pending outstanding disputes concerning expropriated property with the government. Even when a local court has ordered compensation, or when the government has recognized the claim, actual payment has been extremely difficult to obtain. A law passed in 1999 authorized the issuance of bonds to settle a large number of claims against the Dominican government, including for expropriated property. Some long-standing cases are already using this mechanism to settle the claims. Besides the expropriation of property, there are other issues of state appropriation that affects private investment in the country, specifically when the government delays payments to private sector suppliers. The national electrical utility has a history of slow payment to the generating companies, and there has been pressure on some companies to renegotiate power purchase agreements. These delays have resulted in some providers suspending their services as they were no longer able to meet their financial commitments. The U.S., the main source of FDI investment into the country, has officially recommended investors to stay away from this type of investment until the government utility resolves its problems of chronic slow payment and default and honors the sanctity of contracts.

3.4. DISPUTE SETTLEMENT LAWS AND MECHANISMS

Unless otherwise explicitly governed under an investment code or international treaty, investment disputes between foreign investors and host country governments or their public or quasi-public agencies are subject only to adjudication in a local judicial or administrative system under the laws of the host country. When addressed in investment laws or regulations, or in treaties, disputes may be subject to different types of arbitration, specific fora, local or foreign laws and arbitral procedures, or other conditions. Often, codes or FDI regimes will specify that the dispute may be referred to local courts only if arbitration or conciliation has proved unavailing in resolving the dispute. A number of treaties, however, provide for standing of foreign investors before international arbitral tribunals to challenge actions by host countries.

Ireland has no specific domestic laws governing investment disputes with foreign firms. The Irish legal system is based on common law, legislation and the constitution. The judiciary is independent and litigants are entitled to trial by jury in commercial disputes. Ireland is a member of the International Center for the Settlement of Investment Disputes (ICSID), and the Irish Government has been willing to agree to binding international arbitration of investment disputes between foreign investors and the state.

Mauritius is also a member of the ICSID and the Multilateral Investment Guarantee Agency of the World Bank. The Mauritian legal system is largely based on English and French law. Criminal and civil litigation is mainly English while substantive law is modeled on the French Napoleonic code. The domestic legal system is generally non-discriminatory and transparent. Members of the judiciary are independent of the legislature and the government. The highest court of appeal is the judicial committee of the Privy Council of England. Mauritius is a member of the international court of justice.

Latin American countries tend to require that local disputes should be handled locally and without provision for private sector-government dispute settlement, although this has changed progressively since the late 1980s. Being the regional investment maverick, Chile found an alternative way of this local legal requirement through the BITs it has signed with over 50 countries to this date, all of which allows for binding international arbitration.

In **Chile** foreign investment is subject to the common legal regulation applicable to national investment. Complaints are first brought to the attention of FIC. Disputes involving investors are typically settled in negotiations between the investor and the concerned government entity. Disputes that fail to resolve the dispute through this channel, are referred to local courts for adjudication. Since this may take considerable time, litigants often choose to settle out of court. Bilateral investment protection agreements between Chile and other countries allow for binding international arbitration, although different agreements contain varying procedures; some allow the investor to choose either the host country's legal system or international arbitration but not both, while others specify that disputes must pass through the host country's legal system before recourse to international arbitration.

The judicial system of Chile is transparent and independent of government involvement. If a state-dependent firm is involved in the dispute, the government of Chile may become involved through the Defense Council of the State (*Consejo de la Defensa del Estado*). Judgements made by foreign courts are valid in Chile upon the approval of the Chilean Supreme Court.

Costa Rica has been an ICSID member since 1993 and also joined the World Bank Multilateral Investment Guarantee Agency (MIGA), which provides a forum for international arbitration in investment disputes, as well as investment guarantees. Private energy producers include international arbitration clauses in their contracts. Costa Rica, along with most countries in the region, uses civil, or statutory, law rather than common law. The courts are independent, and their authority is respected. Judgments of foreign courts are generally accepted and enforced. The Constitution specifically prohibits discriminatory treatment of foreign nationals. Monetary judgments are usually made in Costa Rican Colones. However, if the dispute involves a dollar-denominated transaction, the award may first be calculated in dollars and then converted to Colones for payment.

Litigation can be long and costly. The legal system is significantly backlogged, and civil suits take over five years on average. The process to resolve squatter cases through the courts can be especially cumbersome. The legal owner of land is at a disadvantage in a system that quickly recognizes rights acquired by squatters, especially when the disputed land is rural and is not being actively worked.

The **Dominican Republic** has not generally recognized the right of investors to submit disputes to binding international arbitration, although the government recently ratified the New York Convention recognizing investors' right to submit disputes to international arbitration. Several foreign investors, have payment-related, expropriation, or contractual disputes with the Dominican Government. The most notable of these is the government's continuing failure to implement the terms of an agreement reached with independent power producers in connection with the capitalization of most functions of the state electric company. To give an idea of the scope of the problem, the U.S. Embassy estimates the total value of U.S. investor claims as at least US$300 million, of which more than one-third is owed to the independent power producers. Both free trade zone and non-free trade zone companies face dispute resolution problems in the Dominican Republic.

3.5. CONCLUSIONS

There is no one-size-fits-all investment regime that guarantees the level of success in attracting FDI and local investment as shown by the country cases evaluated in the previous chapters. There are, however, specific characteristics shared by all that have made them magnets of FDI for several decades, which are divided as follow:

- Policy and regulatory factors
- Business facilitation
- Open markets

These subjects have important subsectors which includes transparency, administration of investment, non-discrimination, taxation, human resources and labor rules, and overall business environment.

3.5.1. Policy and Regulatory Factors

All these countries have been consistent with their investment policies throughout the period of attracting investment and there seem to be a policy consensus among political forces and civil society. They understood early on the importance of having an open economy receptive of FDI and PSP in generating sustainable development. This realization allowed them to position themselves ahead of their neighbors and focus on export and service oriented growth, opening new international markets for products/services generated locally. The standard policy consensus includes incorporating the attraction of FDI as a key tool to promote employment generation, export-oriented activities, education/training investment, and technology transfer, among other key elements of sustainable development.

The case of Chile's investment regime is interesting: born under authoritarian rule, the investment policies that made Chile the FDI darling of the Americas have been kept, continued, and deepened for more than 10 years by three consecutive left-of-center governments. Whatever are the ideological fault-lines dividing Chileans nowadays they are <u>not</u> about their pro-investment and PSP policy commitment. On the other hand, Ireland's case shows that a traditional liberal democracy can rise above special interests, create a very cooperative government/management/labor dynamic and implement an innovative and aggressive – and above all, very successful - investment regime.

Not all the studied countries unambiguously view private sector as the main motor for economic development. Most of the case studies have sectors that are restricted to FDI or private sector participation. Costa Rica remains a relatively protectionist and statist economy and lags behind the other evaluated countries in privatization and PSP. Nevertheless, as much as it reserves several key economic sectors for state control and has more areas close off to FDI, it is a country known for the strength of its civil society and institutions and political stability.

Four of the evaluated countries have transparent and reliable judicial systems, although not all are expeditious, as in the case of Costa Rica. A notable exception to this characteristic is Dominican Republic, where its investment climate reputation is being compromised by an inconsistent application of the law vis-à-vis foreign investors in expropriation/ compensation issues, dispute settlement, and respect of contract. Some Dominican investment sectors are less vulnerable to this situation, as they are located within special legal regimes (ex. FTZs and tourism) that help investors avoid some of these judicial deficiencies.

Most of the evaluated countries designed transparent and welcoming rules for FDI entry. They don't need to be equal, as some are effective being very open, while other are equally successful but more regulated. Nonetheless, they must be transparent, expeditious, non-discriminatory (at least in the sectors open for FDI/PSP), and consistent throughout the life of the investment.

Education and training play a very important part of the evaluated countries success. All of them apply a considerable percent of their national budgets to education, plus focus special investment in maintaining a continued flow of skilled workers to satisfy their service and export-oriented sectors, as well as their development requirements. Low-cost unskilled and skilled labor was not a major element in attraction of FDI, with the only possible exception of the Dominican Republic.

The investments in education and training have gone hand-in-hand with investments in technology and innovative capacity. All countries have set-up programs to promote linkages between FDI and local companies to facilitate transfer of knowledge, as well as research and development.

Evaluated countries has also given priority to communications and physical infrastructure, with the possible exception of Costa Rica, where telecommunications are still a public monopoly and physical infrastructure has taken a secondary role to investment in education, health, and technology.

Not all of the countries evaluated offered national treatment to countries in those sectors open to foreign investment (particularly Costa Rica, as we will see in the next chapter), but the range of those sectors is relatively narrow and the rules are well known and applied fairly. Again, investment will come as long as those sectors open to investment are under a transparent and consistent regime.

The evaluated countries approach incentive regimes using a variety of methods, from very generous tax/incentives regimes, to a more focused approach based on distinctive sectors and regions. All the countries evaluated were very active in promoting export-oriented industries and services. Corporate taxes are dropping significantly (Ireland, Costa Rica and Mauritius), as countries are setting their sights to corporate tax rates between 12.5 to 15 percent. In the case of Ireland, this tax (at 12.5 percent) already applies to all firms, both local and foreign, while Costa Rica is considering its application (at 15 percent) in the short-term. All countries are moving away from tax holidays.

3.5.2. Business Facilitation

One key element mentioned in several business surveys is the issue of a transparent business regulatory system. The rules of the game must be spelled out clearly and applied consistently. All countries evaluated have achieved, to a large degree, this kind of confidence from the business community. Costa Rica and the Dominican Republic have issues regarding the capacity of their judicial systems to deal with investment disputes, and, in the case of the latter country, the willingness by the government to enforce a leveled field for investors outside its free trade zones. This situation has become these countries' main blot on their investment reputations.

On the subject of free flow of workers, the countries have different approaches: the most restrictive group (Chile, Costa Rica, and the Dominican Republic) limit the amount of foreign workers in an enterprise, but this usually is more liberal when dealing with management positions. The most liberal of the evaluated countries don't have restrictions on the numbers and duration of foreign managers (Ireland) and, in the particular case of Mauritius, a significant percentage of the workers are foreigner, mainly employed in services, including banking, and export-oriented activities.

Investment promotion services are a very important feature in all the evaluated countries. All have agencies in charge of investment promotion, although with different focus. All are strongly institutionally backed. Some can make decisions without resorting to other ministries (Chile, Costa Rica). There is no doubt that having an updated and informative agency (and webpage) presenting clearly a country's opportunities, incentives, legislation, and other important data is key to attracting foreign investment.

3.5.3. Open Markets

For countries with relatively small economies, having commercial access to large international markets is key to attracting FDI and promoting development through job creation and an enlarged/diversified tax base. The evaluated countries have all made significant advances in pursuing bilateral investment treaties (Chile), double taxation agreements (Mauritius), and joining trade arrangements with that permit preferential access to the United States (Costa Rica, the Dominican Republic, Mauritius) and the European Union (Chile, Ireland, and Mauritius).

On the issue of regional cooperation, the actions of the evaluated countries were again divided: while some (Costa Rica, Ireland, and Mauritius) made significant strides in the regional trade and economic integration and cooperation efforts, other focus on strengthening their ties with traditional markets (Dominican trade with the United States) or developing bilateral ties with many countries of strategic interest (Chile). Nonetheless, Dominican Republic is moving to fully join with Central American and Caribbean integration efforts and Chile is an associated member of MERCOSUR.

All the countries also facilitate the entry of raw materials and machinery/parts required by the export-oriented sector.

4. Benchmarking Analysis

Having discussed the best practices for investment policies for specific case studies in the previous chapter, this chapter will focus on comparing those practices with the current investment policies in the CARICOM member countries. As before, the investment policies to be evaluated are:

- Admission and business establishment,
- Standards of treatment
- Expropriation and compensation
- Dispute settlement
- Domestic finance and foreign exchange controls

The following sections will explain the criteria deemed "best practice" and then use it as comparison with CARICOM practices. These criteria are the product of the case studies analyses.

4.1. ADMISSION AND ESTABLISHMENT OF AN INVESTMENT

The best practice for admission and establishment of an investment is to provide foreign investors and their investments with a clear, non-discriminatory and uncomplicated right of establishment. These practices are better evaluated in the same four key policy areas evaluated in the previous chapter:

- Restricted and reserved sectors for FDI and domestic investment
- Equity restrictions
- Admission of investment
- Foreign workers employment

For a summary comparison of evaluated case studies and CARICOM countries, see Table 4.1.

4.1.1. Restricted and Reserved Sectors for FDI/PSP

The best practice regarding this policy is to maintain the external related sectors (ex. international commerce and services) open to FDI/PSP and welcome private investors in traditionally government-controlled sectors. The key factors are the following:

- Friendly environment to private participation in most economic areas
- No barriers to participation by foreign investors in the sale of state-owned companies, from privatization to administrative concessions and management contracts.

The application of open, transparent and non-discriminatory business establishment in CARICOM is uneven. Many CARICOM countries have friendly business establishment systems, but others are harmed by government interference in the form of preference for joint-ventures with local firms, limits on ownership/FDI, land ownership restrictions, reservation to local investors of export-industries, lack of any privatization efforts, and overall discriminatory establishment practices, among others.

Specifically, the key policies in CARICOM that would need to change (including examples) to adapt to the best practice regime are the following:

- Foreign investors have limits to their investment. In Bahamas, FDI is only allowed if investment is above US$500,000 in Nassau or Freeport and US$250,000 elsewhere. Haiti limits the participation of foreign investors to minority partners in strategic economic sectors, such as utilities.
- Preference for joint-ventures and partnerships with local investors. Belize falls in this category, although 100% foreign ownership is allowed. In Guyana, privatization of public utilities is given to joint ventures between the private sector and the government, plus the Guyanese government prefers the joint ventures between private investor and FDI for large projects.
- Non-residents are required an alien's landholding license for land purchasing. This is true in many CARICOM countries. This requirement is not so much an impediment to FDI, as long as there are enclaves or specific location in which exceptions to this requirements are granted. Their most important negative impact in FDI is in the establishment of agricultural and agroindustrial businesses.
- Large government involvement in key economic sectors. As an example, Dominica has much government participation in energy, water, air/sea ports, mining, banana exports, and the control of "essential commodities". An extreme case is Suriname, where the government participation in the economy almost rival Cuba's in this hemisphere.
- No privatization efforts. Although most CARICOM member countries have state-owned and controlled industries and services, some countries are particularly slow or antagonistic in accepting this mechanism to promote PSP and FDI, such as Dominica, Haiti (with small exceptions), and Suriname.
- Discrimination in establishment process. In Haiti, foreign firms pay twice as much taxes as local firms on dividends. This is true in several of the CARICOM countries.
- FDI targeted to certain areas: Bahamas tries to channel investment to specific sectors, such as tourist resorts, upscale condos, time shares, international business centers, marinas, data processing, light assembly, high-tech service, ship registration, agro-industry, export-oriented light manufacturing, banking and other financial services, insurance, aircraft services, pharmaceuticals, offshore medical services.
- Suriname deserves a bullet apart because of its cumbersome establishment systems, as well as many restrictions to foreign and national private participation. In Suriname, land leases for agriculture are only granted to nationals but, in reality, most land is state-owned. Local legislation clearly discriminates between foreigners and locals for purchasing land and property (right of property only applies to locals). Foreign investors are expected to find local partners in joint ventures for most investments (no

"local partner, no investment incentives."). Government and civil society are adverse to privatization.

The key issue of having reserved or restricted areas for private investment is the nature of the activity: investment would look more closely on the specific activities, which are being curtailed, rather than the overall government intervention in the economy. Therefore, local governments should make a strong effort to leave export-oriented sectors and large productive activities, including some utilities, to private sector participation.

4.1.2. Equity/Ownership Restrictions

Most of the countries evaluated for "best practices" allow for 100 percent foreign ownership in all sectors that are not specifically restricted or reserved. Equity/control restrictions are rather found in the areas of the economy in which states want to promote more efficiency through PSP without losing either state-control or local ownership. The best practices for this policy found when evaluating the case studies where:

- 100 percent ownership is allowed in all sectors open to PSP or FDI.
- Local private/FDI participation is allowed in restricted areas, even when government doesn't lose control, through a system of management concessions in strategic sectors.

In most CARICOM member countries there is no equity/ownership restrictions, with some exception such as the following examples:

- Guyana, where privatization of public utilities is given to joint ventures between the private sector and the government.
- Haiti, where there is discrimination between local and foreign firms even within the same economic activities.
- Suriname, where foreign investors are expected to find local partners in joint ventures for most investments.

The fact that most countries CARICOM countries allow for 100 percent ownership is blunted by the fact that so many of them have reserved and restricted areas to PSP or FDI. The investment climate will benefit for a larger participation of the private sector in all sectors of the economy.

4.1.3. Approval Requirements

The key best practices identified for approval requirements focus on having transparent, clear, non-discriminatory and uncomplicated investment entry requirements. A very important issue is that the approval procedures are expeditious and applications approved in a timely manner. One-stop-shop agencies are a very good instrument to facilitate the entry process. Moreover, in some of the countries of which best practices were evaluated, there was no screening process to control foreign investment in a country.

In CARICOM countries, the approval requirements are usually straightforward and are processed in a timely manner, although discretionary practices are pervasive:

- In Bahamas, if FDI competes with local investment, its application may be rejected.
- Application are most favorably viewed if leading to specific benefits, such as job creation, export-activity, foreign exchange earnings.
- Haiti and Suriname have no clear approval requirements (if they have any).
- Discrimination in the approval process is common, with foreign investors having to pay more for business licenses and taxes. For example, Bahamas (licenses) and Haiti (licenses and taxes).
- Very confusing and discretionary system. Investors overstep the development and development agencies in favor of negotiating directly at ministry or executive level for establishment and incentives. Montserrat and Suriname are examples of this practice.

4.1.4. Foreign Workers Employment

The best practice for this policy is to allow the entry of as many managerial and technical personnel as possible to permit the quick and efficient functioning of new investment. In most countries evaluated, this was permitted, although it also include a strong training and transfer of knowledge policies that would allow for increasing local participation on those positions.

- For the most part, visa, residence and work permit procedures for foreign investors should be a straightforward process and non-discriminatory, regardless of the country of origin of personnel.
- No restrictions on the numbers and duration of employment of foreign managers brought in to supervise foreign investment projects.
- Even in case some countries require specific quotas that limit the percentage of foreign workers that a firm may have, exception should be made for managerial and specialized technical positions.

Given the small size of their population, some CARICOM members have very restrictive work permit policies, even among CARICOM citizens. For example, in Bahamas government policy favors employment of Bahamians and is very difficult to get work permits for positions other than managerial and specialized. The process for granting work permits overall for much of CARICOM is very cumbersome, suffer from long delays, and can be very costly.

Table 4.1. CARICOM/Case Studies: Admission and Establishment of an Investment

Countries	Restricted and Reserved Sectors for FDI/PSP	Equity/Ownership Restrictions	Approval Requirements	Foreign Workers Employment
1. Antigua and Barbuda	• Restricted: Utilities and air/sea transport • Reserved: Some areas of service sector are reserved for nationals and non-nationals are required a license.	• Na	• Non-citizens are required a license to hold or transfer shares or dentures or to be a director in a domestic company.	• Liberal system but requires that position is advertised locally first. • Permit may be given in 6 weeks. • CARICOM nationals exempted.
2. Bahamas	• Restricted: Foreign investors are only allowed if investment is above US$500,000 in Nassau or Freeport and US$250,000 elsewhere. • Reserved for locals: Printed media, real estate and property management companies, wholesale and retail operations, import/export commission agencies, other SMEs	• Na	• Highly centralized process. If FDI[i] competes with local investment application may be rejected • FDI must be above US$500,000 in Nassau or Freeport and US$250,000 elsewhere. Licenses for businesses that compete with local ones may not be granted. • FDI targeted to certain areas: tourist resorts, upscale condos, time shares, int'l business centers, marinas, data processing, light assembly, high-tech service, ship registration, agro-industry, export-oriented light manufacturing, banking and other financial services, insurance, aircraft services, pharmaceuticals, offshore medical services • Higher payment of incorporation/annual fees	• Government policy favors employment of Bahamians. • Work permits for key foreign employees are readily granted. • Permits for unskilled labor are very difficult, even when not available in Bahamas. • Fees for work permits can run up to several thousand dollars each

Countries	Restricted and Reserved Sectors for FDI/PSP	Equity/Ownership Restrictions	Approval Requirements	Foreign Workers Employment
3. Barbados	• Restricted: Telecom, access to dev. Loans by Enterprise Growth Fund (EGFL) • Reserve for gov't: Water, some banking services, insurance • Reserved for locals: travel services, car rental, water sports • Privatization efforts: Telecom, manufacturing, cement, hotels (most to FDI) • In practice, FDI focuses almost exclusively on tourism/banking	• 51% local ownership to apply for EGFL loans	• Screening on investment • Application to Barbados Investment and Development Corp. • Takes 1.5 to 6 months • Application are most favorably view if leading to job creation, export-activity, foreign exchange earnings	• No restriction on the number of foreign workers in a country • Positions must be advertise first locally to give opportunity to local employees first
4. Belize	• Restricted: Preference for joint-ventures and partnerships with local investors as a preferred mechanism for investment., although 100% foreign ownership is allowed • Reserved for locals: fishing, internal transport, professional services • Privatization efforts: Telecom, energy (FDI) • The ownership of land by non-residents requires an alien's landholding license.	• Na	• Business registration is an uncomplicated and straightforward process in Belize. Foreign firms have exactly the same steps and fees as local firms. This registration must be renewed annually. • Although non-Belizeans can invest in any sector of the economy, certain activities require special permits and licenses, which may not be granted to non-Belizeans	• Foreign investors are permitted to bring in skilled personnel to complement their local labor force, provided that appropriate training programs for Belizean nationals are established. • Work permits will not be issued to aliens who seek employment as waiters, vendors, domestic and farm workers. • Within FTZs, work permits at no cost for all professional and technical staff and, if necessary, for a 20% foreign workforce • The application process takes approximately four (4) weeks and require payment of fees

Countries	Restricted and Reserved Sectors for FDI/PSP	Equity/Ownership Restrictions	Approval Requirements	Foreign Workers Employment
5. Dominica	• Restricted: Telecom (PSP needs licensing[ii]) • Reserved for gov't: energy, water, air/sea ports, mining, banana exports, control of "essential commodities" • Privatization efforts: none	• None	• Licensing requirements for FDI	• Foreign workers welcome if no local can fill the available position. • CARICOM Skilled Nationals Act should be put into effect
6. Grenada	• Reserved: utilities (exception energy), sea/air ports • Privatization efforts: energy sector, mining activities (gravel/cement)	• Na	• Licensing requirements for FDI in local firms (hold/transfer of management control)	• Work permits are discriminatory against extra-regional workers • CARICOM Skilled Nationals Act should be put into effect
7. Guyana	• Restricted: Privatization of Public utilities is given to joint ventures between the private sector and the government. • The government prefers the joint ventures between private investor and FDI for large projects • Privatization efforts: telecom, energy, agro-business	• Privatization of public utilities is given to joint ventures between the private sector and the government.	• Foreign firms have exactly the same steps and fees as local firms. • Companies seeking to raise capital from the public must first file and register a prospectus with the Registrar of Companies.	• To work in Guyana, foreign nationals must obtain a work permit from the Ministry of Home Affairs. • Permits take two to three weeks to process, are valid for up to three years, and renewable.
8. Haiti	• Restricted to FDI: utilities, telecommunications, mining, and ports/airports. • Foreigners may participate in those activities, but as minority partners. • Foreign firms pay twice as much taxes as local firms on dividends. • Privatization efforts: almost none (except for cement and flour mills – FDI/locals)	• Haitian government supports 100% foreign ownership of an enterprise. • In practice, there is discrimination between local and foreign firms even within the same economic activities.	• There are no approval requirements. • Foreign enterprises pay more for their business licenses and need an additional license to engage in trading. • Foreign enterprises operating in Haiti have a discriminatory imposition on dividends (30% instead of 15% for locals)	• Foreigners need four basic documents: Residence Visa, Work permit, License, and Registration Certificate. • Foreign worker will not need to pay for additional licensing taxes after the first 3 months, but the firm must request a special working permit.

Countries	Restricted and Reserved Sectors for FDI/PSP	Equity/Ownership Restrictions	Approval Requirements	Foreign Workers Employment
9. Jamaica	• Restricted: There are no restricted areas for FDI. • Reserved: No areas reserved for locals. • Privatization efforts: telecom (FDI), hotels (locals/FDI9, port facilities (locals), broadcasting (locals), agro-business (local), banking (local), airlines (local), refinery (FDI)	• None • Government supports 100% ownership in all sectors not reserved or restricted.	• Foreign investors must establish local company • Approval requirements at Ministry level for investments outside FTZs[iii] • Incentives system is discretionary with exception of FTZ, tourism and bauxite sectors.	• Na
10. Montserrat	• Restricted: Land ownership depending on location. • Reserved: Electricity, water, air/sea transport • Privatization efforts: Fuel import and distribution	• Government supports 100% ownership in all sectors not reserved or restricted.	• Very confusing system. Investors over step the development agency and negotiate directly at ministry level for establishment and incentives.	• Publish position first for local. • Given urgent need of labor, labor permits has been liberal during crisis, but they are becoming more difficult to obtain as the situation stabilizes and the government promotes the return of former residents.
11. St. Kitts & Nevis	• Privatization efforts: Telecom • Reserved for government: utilities, air/sea ports, mining. • Restricted: Telecom	• 100% foreign ownership outside of restricted/ reserved areas	• License is required for foreigners wanting to hold/transfer shares of a local company.	• CARICOM Skilled Nationals Act should be put into effect • No nationality quotas
12. St. Lucia	• Privatization efforts: Telecom • Reserved for the government: utilities, air/sea ports, mining, and banana exports. • Restricted: Telecom	• 100% foreign ownership outside of restricted/ reserved areas	• License is required for foreigners wanting to hold/transfer shares of a local company.	• Working permits available to non-nationals as long as position cannot be filled by local • CARICOM Skilled Nationals Act should be put into effect
13. St. Vincent	• Privatization efforts: Telecom • Reserved for the government: utilities, air/sea ports and quarries • Restricted: Telecom	• 100% foreign ownership outside of restricted/ reserved areas	• License is required for foreigners wanting to hold/transfer shares of a local company.	• Working permits available to non-nationals as long as position cannot be filled by local • CARICOM Skilled Nationals Act should be put into effect

Countries	Restricted and Reserved Sectors for FDI/PSP	Equity/Ownership Restrictions	Approval Requirements	Foreign Workers Employment
14. Suriname	• Reserved for Gov't: utilities (energy and waterworks), natural resources, telecom and airports • Land leases for agriculture are only granted to nationals but in reality most land is state-owned. • Local legislation clearly discriminates between foreigners and locals for purchasing land and property. • Foreign investors are expected to find local partners in joint ventures for most investments. No "local partner, no investment incentives." • Right of property only applies to locals • Privatization efforts: Gov't/ society adverse this mechanism to promote PSP	• Foreign investors are expected to find local partners in joint ventures for most investments.	• System is based on approval of incentives by Executive	• Work permits are required for foreigners. • The processing time varies from 30 to 60 days. • In order to apply for a working permit, a residence permit (or proof of application) is required.
15. Trinidad and Tobago	• Privatization efforts: Telecom, Manufacturing (local), agro-business (local/FDI), cement (local/FDI), financial services (FDI), petrochemical industry (FDI), refinery (FDI), steel (FDI), energy (FDI), airlines (local/FDI), postal service. • Restricted: Telecom (51% government)	• Telecom (49% PSP) • Equity, ownership restrictions on FDI (for 30% or more of shares of public companies) and land	• Waivers on foreign ownership restrictions are freely granted • No screening of FDI unless when requesting incentives and concessions • Bureaucratic delays	• No quotas for management positions, but there are delays • Technicians have more limits now for short-term stays • Bias to favor with work permits companies that joint-venture with locals or set up formal training programs

Countries	Restricted and Reserved Sectors for FDI/PSP	Equity/Ownership Restrictions	Approval Requirements	Foreign Workers Employment
16. Chile	• Restricted: Fisheries, coastal trade, air transport, media • Reserved: None • Privatization efforts: steel (FDI), telecom (FDI), airline (local/FDI), energy (FDI), services (local), sanitation (local), mining (local), broadcasting (local), sea transport (local), railways (local/FDI), water utilities (local/FDI)	• Fisheries sector: Chileans must have majority control • Foreign investors allow 100% ownership in all sector not restricted or reserved.	• D.L. 600 requires contract with government. Takes about a month.	• Quota system: 85% nationals. • Exceptions for technicians not available locally, legal foreign residents, and management positions. • Reserved sectors: merchant marine, air transport, advertising, and broadcasting.
17. Costa Rica	• Reserved: road/sea/air transport, port services, telecom, energy distribution, oil refining, insurance, some banking services • Restricted: Energy generation, broadcasting, coastal tourism development, professional services • Privatization efforts: very narrow and favors locals over FDI: cement, sugar, retail, fertilizer (all local)	• Energy generation sector (65% local equity) • Local equity control of coastal tourism development and mass media • Loans from state-banks must go to firms majority owned by locals • Foreign investors allow 100% ownership in all sector not restricted or reserved.	• No screening of investment, but registration is required.	• Quota system: 90% nationals. • No quotas valid for management and flexibility with other position as negotiated with government.
18. Dominican Republic	• Restricted: energy • Reserved: Utilities • Privatization efforts: on-going, energy and hotels (FDI)	• Flexible enforcement	• No screening, but registration with Central Bank is required up to 90 days after investment is done.	• Quota system: 80% nationals. • No quotas valid for management and administrative staff in foreign firms.
19. Ireland	• Restricted: Airlines, rural land • Reserved: Telecom, transportation, energy • Privatization: on-going	• Airlines: 50% EU citizens • Rural land: Majority of local equity	• No screening unless requesting grant-aid	• Liberal, particularly for management positions. • Nationals from EU[iv] have free right of investment in Ireland. Others must request permits.

Countries	Restricted and Reserved Sectors for FDI/PSP	Equity/Ownership Restrictions	Approval Requirements	Foreign Workers Employment
20. Mauritius	• Restricted: Energy roads, public transport, coastal land ownership, businesses serving local market • Reserved: water services, postal service, telecom (except cellular) • Privatization efforts: on-going	• Companies serving local market must be 50% own locally.	• Screening for Freeport/offshore. 2 weeks application. • Outside incentive enclaves, licensing required. Takes 2-6 months.	• Very liberal. Up t 4% of all employment is made up of foreigners, who concentrate in textile industries, construction, hotels and banking sector.

4.2. STANDARD OF TREATMENT

The best practice for standard of treatment is to grant national treatment for all phases (establishment, acquisition, disposition, sale, etc.) of an investment, subject to country-specific exceptions in some sectors or with respect to some measures. However, in some cases, Most Favored Nation status is more favorable than national treatment, in which case it is preferred to receive that treatment that is the most favorable. Table 4.2. shows the summary table for the evaluated case studies and CARICOM countries.

4.2.1. National treatment

The majority of the countries evaluated for best practices provide national treatment to foreign firms in areas open to private sector participation. The same can be said of MFN treatment (all evaluated case studies offer MFN treatment).

In these case studies, we found the following situation:

- Foreign firms compete on an equal basis with domestic firms.
- Investment registration process has the same requirements for foreign and national investors.
- Constitution grants national treatment to foreign investors (or no less favorable than to national investors).
- No constraints preventing foreign individuals or entities from ownership or participation in private firms/corporations.
- No barriers to participation by foreign institutions in the sale of state-owned companies.

Interestingly, most countries evaluated for best practices impose some kind of alien landholding, particularly those in Latin America. In those cases, firms seeking MFN treatment could locate within specific areas or enclaves, whether FTZs, Offshore Centers, or another approved location.

Several CARICOM countries require joint-ventures or limit FDI participation in key industries (particularly those that may be most attractive to foreign investors).

- In many of the CARICOM countries foreign-owned companies must pay higher incorporation and licensing fees in several countries, including Antigua and Barbuda, Dominica, and Haiti, among others.
- In Barbados, FDI, outside financing, may not be permitted outside FTZs unless it brings significant employment. In this island, also, some locations are barred for FDI.
- Haiti discriminates, in practice, between local and foreign enterprises even within the same kind of economic activities and imposes property restrictions for individual foreigners. It also resorts in applying higher taxes on dividends for FDI, as well as additional licensing

- In Suriname only nationals have property rights protected.
- In Trinidad and Tobago, in order to qualify for a 15 percent tax credit, a company must be locally owned. Moreover, hotel incentives/requirements discriminate against foreigners

Greater efforts must be made by CARICOM countries to have non-discriminatory practices between their local investors and foreign investors, as well as between foreign investors from different countries. The use of enclaves to obviate landholding restrictions should more widely used.

4.2.3. Performance Requirements

In the best practices evaluated for this subject, it was found that that there are very few performance requirements that impose limits on trade and investment. In the best cases, no performance requirements are demanded from private investment.

In CARICOM countries the most common performance requirements are those related to export-performance (duty-free benefits tied to verifiable exports), local sourcing, and job creation. In many of the countries is expected that enclave enterprises must produce exports for outside CARICOM markets.

There are other requirements, as seen in these examples:

- Bahamas has a minimum amount for FDI (US$500,000 for Nassau and US$250,000 for Freeport) and expects that FDI receiving tax benefits contributes to civic projects.
- Guyana imposes, in some cases, minimum level of investment
- Haiti requests local sourcing, new job creation, and technology transfers
- Foreign investors and exporters in Suriname are expected to maintain a higher standard of good business practices than Surinamese firms do, with discovered infractions widely publicized.

With few exception, such as the export requirements (since most CARICOM markets are very small anyway), performance requirements that burden an economic activity and, thus, discourage investment should be eliminated. Policies such as local sourcing requirements could be replaced by linkages programs in which local industries are identified and encourage to produce cost-effective inputs to export-oriented activities.

Table 4.2. CARICOM/Case Studies: Standard of Treatment

Countries	National treatment	MFN treatment	Performance Requirements
1. Antigua and Barbuda	• No restrictions on ownership, but foreign-owned companies must pay higher incorporation and fees • Equal treatment for not restricted/reserved sectors	• MFN for BITs (UK)[v] • Special provisions for less developed CARICOM members	• Na
2. Bahamas	• Equal treatment for not restricted/reserved sectors	• Special provisions for less developed CARICOM members	• Has minimum level for FDI • FDI receiving tax benefits are expected to contribute to civic projects.
3. Barbados	• Equal treatment for not restricted/reserved sectors • FDI, outside financing, may not be permitted outside FTZs unless significant employment • Some locations are barred for FDI	• MFN for BITS • Special provisions for less developed CARICOM members	• No requirement of local sourcing • Enclave enterprises must produce exports for outside CARIOCM markets
4. Belize	• Generally foreigners are now free to invest in all areas open to local investors and firms with foreign participation are not treated any differently from locally owned firms. • No national treatment for land purchasing	• MFN for BITs (UK) • Special provisions for less developed CARICOM members • Belize does not discriminates among foreign investors	• Preference for joint-venture and partnership with locals
5. Dominica	• Licensing requirements for FDI • Must obtain permit to borrow from local sources • When licensing are required for both locals and FDI, FDI fees are higher	• MFN for BITs (Germany, UK) • Special provisions for less developed CARICOM members	• Na
6. Grenada	• FDI requires licensing for participation in local firms • Alien Landholding: For foreign persons, firms or companies wishing to transfer or acquire any land or interest in land, share or debenture, applications for a license must be made to the Prime Minister's Ministry. A fee of ten (10%) percent on the value of the land or interest in land, share or debenture is payable at the Inland Revenue Department.	• MFN for BITs (US, UK) • Special provisions for less developed CARICOM members, but not in place	• No performance requirements for BITs

Countries	National treatment	MFN treatment	Performance Requirements
7. Guyana	• There is little statutory differentiation in the treatment of investors • Larger FDI, both regional and extra-regional enjoy an unofficial 'preferred investor' status • Alien landholding: Property restrictions for individual foreigners	• No	• In some cases, minimum level of investment
8. Haiti	• FDI permitted to fully own a company or subsidiary • In practice, there is some discrimination between local and foreign enterprises even within the same kind of economic activities. • Property restrictions for individual foreigners • Higher taxes on dividends for FDI • Additional licensing	• No	• To be approved for incentives • Local sourcing • New jobs • Technology transfers
9. Jamaica	• Equal Treatment	• Special provisions for less developed CARICOM members	• Hard currency earners, job creating investment is preferred, local sourcing
10. Montserrat	• Equal treatment, but for land	• No • Special provisions for less developed CARICOM members	• Performance review of companies receiving incentives at end of tax holidays.
11. St. Kitts & Nevis	• National treatment under alien landholding regulations act, non-citizens require a license to hold/transfer shares of a local company.	• Special provisions for less developed CARICOM members	• N.A.
12. St. Lucia	• National treatment under alien landholding regulations act, non-citizens require a license to hold/transfer shares of a local company.	• Special provisions for less developed CARICOM members	• N.A.
13. St. Vincent	• National treatment under alien landholding regulations act, non-citizens require a license to hold/transfer shares of a local company.	• Special provisions for less developed CARICOM members	• N.A.
14. Suriname	• No. Only nationals have property rights protected	• No	• Foreign investors and exporters are expected to maintain a higher standard of good business practices than Surinamese firms do, with discovered infractions widely publicized.

Countries	National treatment	MFN treatment	Performance Requirements
15. Trinidad and Tobago	• Yes, with US, CARICOM • In order to qualify for a tax credit of 15% of the chargeable income for seven (7) years a company must be locally owned. • Tax credits of 15% only available for local firms. • Hotel incentives/requirements discriminates against foreigners	• No	• Companies in FTZs must export 80% of production • Preference for employment and foreign exchange, training and technology transfer, local content, increase export and substitute imports.
16. Chile	• Equal treatment for foreign firms in sectors not restricted or reserved.	• MFN Treatment for all investors	• Few performance requirements: 40% of all broadcasts must be Chilean set-asides for local copper sector suppliers.
17. Costa Rica	• Equal treatment for foreign firms in sectors not restricted or reserved.	• MFN Treatment for all investors	• Duty free benefits tied to verifiable exports. Products that end-up in local market pay pro-rata.
18. Dominican Republic	• Equal treatment for foreign firms in sectors not restricted or reserved.	• MFN Treatment for all investors	• Local sourcing for export-activities when local products are competitive in price and quality. Production that leads to import substitutions is granted tax holidays.
19. Ireland	• Equal treatment for foreign firms in sectors not restricted or reserved.	• Deficiencies in MFN as EU citizens enjoy more rights to acquire property (rural land), ownership (airlines), and workers rights	• Only for firms requesting grant-aid: location (western part of country) and employment targets.
20. Mauritius	• Equal treatment for foreign firms in sectors not restricted or reserved.	• MFN Treatment for all investors	• No performance requirements

4.3. EXPROPRIATION AND COMPENSATION

The best practice that can be used for expropriation and compensation policies is to prohibit the direct or indirect expropriation of an investment except when done for a public purpose on a non-discriminatory basis, in accordance with due process of law, and on payment of "prompt, adequate and effective" compensation. Table 4.3 summarizes the findings from the evaluated cases and the CARICOM countries on this matter.

The following is a summary of best practices identified:

- A best practice in this matter is that material possession of an expropriated property can only take place **after** full compensation is paid.
- Indemnity is established using real estates experts to determine the market value of the property.
- Private property is expropriated only for public purposes in a non-discriminatory manner and in accordance with established principles of international law.
- Expropriations are carried out in accordance with recognized principles of due process.
- Return of the property to the original owner if it is not used for the intended purpose within ten years or, if the owner was compensated, right of first refusal to repurchase the property back at its current value;
- Requirement that the tax office itemize buildings, crops, rental income, commercial rights, mineral exploitation rights, and other goods and rights, separately and in addition to the value of the land itself; and
- Provisions providing for local and international arbitration in the event of a dispute.

Most CARICOM countries have not had historically problems with expropriations. There are some issues in some countries that must be highlighted:

- Belize has faced recently controversial expropriation of land with tardy compensation in non-negotiable Belize dollars and expropriate land has sometimes been used for other purposes than intended under expropriation claim.
- In Guyana, existing law allows the government a lot of leeway in the expropriation of land.
- Montserrat is a very special case in this matter given that has been until very recently under an emergency regime due to volcanic activity.
- The worst case in CARICOM is Suriname, where the government may claim property by a resolution signed by the President of Suriname. The Minister of Natural Resources may suspend or revoke the concession rights with no compensation obligation.

Besides the shortcomings mentioned just above, the main change required from almost all CARICOM members relates to the prompt processing of adequate compensation.

Table 4.3. CARICOM/Case Studies: Multilateral Agreements

Countries	Double taxation treaties	Investment Treaties	Bilateral Trade Treaties	Regional/Global Trade Treaties
1. Antigua and Barbuda	• Canada, CARICOM, Denmark, New Zealand, Norway, Sweden, Switzerland, UK	• Bilateral: UK • Multilateral: No MIGA, OPIC	• CARICOM-Dominican Republic • CARICOM-Colombia • CARICOM-Venezuela	• CARIBCAN • CARICOM • CBI • Lomé • WTO
2. Bahamas	• None	• Multilateral: MIGA, OPIC	• CARICOM-Venezuela	• CARIBCAN • CARICOM • CBI • Lomé
3. Barbados	• Canada, CARICOM, Finland, Norway, Switzerland, Sweden, UK, US	• Bilateral: Canada, China, Cuba, Germany, Italy, Switzerland, UK, Venezuela • Multilateral: MIGA, OPIC	• CARICOM-Dominican Republic • CARICOM-Colombia • CARICOM-Venezuela	• CARIBCAN • CARICOM • CBI • Lomé • WTO
4. Belize	• CARICOM, UK	• Bilateral: UK • Multilateral: MIGA, OPIC	• United States, Austria, El Salvador, Republic of China, Republic of Cuba, UK • CARICOM-Dominican Republic • CARICOM-Colombia • CARICOM-Venezuela	• CARIBCAN • CARICOM • CBI • Lomé • WTO
5. Dominica	• CARICOM	• Bilateral: Germany, UK • Multilateral: MIGA, OPIC	• CARICOM-Dominican Republic • CARICOM-Colombia • CARICOM-Venezuela	• CARIBCAN • CARICOM • CBI • Lomé • WTO
6. Grenada	• CARICOM, UK, US	• Bilateral: UK, US • Multilateral: MIGA, OPIC	• CARICOM-Dominican Republic • CARICOM-Colombia • CARICOM-Venezuela	• CARIBCAN • CARICOM • CBI • Lomé • WTO

Countries	Double taxation treaties	Investment Treaties	Bilateral Trade Treaties	Regional/Global Trade Treaties
7. Guyana	• Canada, CARICOM, UK	• Bilateral: Germany, UK • Multilateral: MIGA, OPIC	• Germany, UK • CARICOM/Dominican Republic • CARICOM/Colombia • CARICOM/Venezuela	• CARICOM • CBI • WTO • CARIBCAN
8. Haiti	• None	• Bilateral: US, France, Germany, Canada, UK • Multilateral: MIGA, OPIC	• CARICOM/Venezuela • CARICOM/Colombia • CARICOM/Dominican Republic	• CARICOM • CBI • CBTPA • Lomé Convention • WTO
9. Jamaica	• Canada, CARICOM, China, Denmark, France, Germany, Israel, Norway, Sweden, Switzerland, UK, US	• Bilateral: Argentina, China, Cuba, Egypt, France, Germany, Indonesia, Italy, Netherlands, Switzerland, UK, US, Zimbabwe • Multilateral: MIGA, OPIC	• Canada/Textiles • CARICOM/Venezuela • CARICOM/Colombia • CARICOM/Dominican Republic • US/Textiles	• CARIBCAM • CARICOM • CBI • Lomé Convention • WTO
10. Montserrat	• UK	• None	• CARICOM/Venezuela • CARICOM/Colombia • CARICOM/Dominican Republic	• CARIBCAM • CARICOM • CBI
11. St. Kitts & Nevis	• CARICOM, Canada, Denmark, New Zealand, Norway, Sweden, Switzerland, UK, US	• Bilateral: US • Multilateral: MIGA, OPIC	• CARICOM/Venezuela • CARICOM/Colombia • CARICOM/Dominican Republic	• CARIBCAN • CARICOM • CBI • Lomé • WTO
12. St. Lucia	• CARICOM	• Bilateral: Germany, UK • Multilateral: MIGA, OPIC	• CARICOM/Venezuela • CARICOM/Colombia • CARICOM/Dominican Republic	• CARIBCAN • CARICOM • CBI • Lomé • WTO
13. St. Vincent	• CARICOM	• Bilateral: Germany • Multilateral: MIGA, OPIC	• CARICOM/Venezuela • CARICOM/Colombia • CARICOM/Dominican Republic	• CARIBCAN • CARICOM • CBI • Lomé • WTO

Countries	**Double taxation treaties**	**Investment Treaties**	**Bilateral Trade Treaties**	**Regional/Global Trade Treaties**
14. Suriname	• The Netherlands	• Multilateral: No MIGA, OPIC	• CARICOM/Venezuela • CARICOM/Colombia • CARICOM/Dominican Republic	• CARIBCAN • CARICOM • Lomé • WTO
15. Trinidad and Tobago	• Canada, CARICOM, China, Denmark, France, Italy, Luxembourg, • Norway, Sweden, Switzerland, UK, US, Venezuela	• Bilateral: US, Canada, France, Spain, UK • Multilateral: MIGA, OPIC	• CARICOM/Venezuela • CARICOM/Colombia • CARICOM/Dominican Republic	• CARIBCAN • CARICOM • CBI • Lomé • WTO
16. Chile	• Argentina, Brazil, Canada, Ecuador, Norway, Peru, Poland, S. Korea	• Bilateral: 51 countries • Multilateral: OPIC, MIGA	• Canada, Colombia, Ecuador, Mexico, U.S. (2003?), Venezuela	• WTO, EU, MERCOSUR
17. Costa Rica	• None	• Bilateral: Argentina, Canada, Chile, France, Germany, Paraguay, Switzerland, UK • Multilateral: OPIC, MIGA	• Canada, Chile, Dominican Republic, Mexico, Trinidad & Tobago	• CACM, CBI, WTO
18. Dominican Republic	• Canada	• Bilateral: Ecuador, Spain • Multilateral: OPIC, MIGA	• Costa Rica	• CARICOM, CBI, CA–DR FTA, WTO
19. Ireland	• 37 countries	• Bilateral: Czech Republic • Multilateral: OPIC, MIGA	• None	• EU, WTO
20. Mauritius	• 28 countries	• Bilateral: 29 countries • Multilateral: OPIC, MIGA	• Kenya, Uganda, and Zimbabwe (negotiating)	• EU, SADC, U.S., WTO

4.4. DISPUTE SETTLEMENT

It was noticed that all the best cases evaluated were members of the International Center for the Settlement of Investment Disputes (ICSID) and that they agree to binding international arbitration of investment disputes between foreign investors and the state. Table 4.4 summarizes the findings from the evaluated cases and the CARICOM countries on this matter.

Among the specific best practices identified, the following are considered key for this topic:

- Bilateral investment protection agreements may allow for binding international arbitration
- The judicial system is transparent and independent of government involvement.
- International arbitration clauses in large contracts between companies and the State
- Judgments of foreign courts are generally accepted and enforced.

It was observed, however, that some of the evaluated countries did not performed well in this category. The actual conclusion is that some significant shortcomings can be overlook by investors through special investment regimes (in the case of DR, investors flock to its FTZ and tourism opportunities while shunning the power generation sector).

Many CARICOM member countries are not members of the ICSID, such as Antigua and Barbuda, Belize, Dominica, Haiti, Montserrat, St. Kitts & Nevis, St. Lucia, and Suriname. Membership in this convention would give the country more credibility among foreign investors, although the majority of the countries just mentioned have done quite well in recent years in accepting foreign arbitration, while still needing to improve its judicial system to improve the pace for dispute resolution.

The most problematic countries in this respect are Haiti, with its notoriously inefficient courts and its antiquated legal system, which has hindered resolution of most disputes, and Suriname, where no jurisprudence can be found with regard to dispute settlement between foreign and local investors.

Table 4.4. CARICOM/Case Studies: Expropriation and Remedies

Countries	Expropriation	Dispute Settlement
1. Antigua and Barbuda	• No investor has ever had assets nationalized. • Property can only be nationalized in exceptional circumstances and even in such cases the country's constitution demands that fair compensation must be determined by an independent authority and must be paid promptly.	• No ICSID • Arbitration Act incorporates UN protocol on Arbitration Clauses and the New York Convention (1989)
2. Bahamas	• MIGA • OPIC • Property can be expropriated upon prompt and adequate compensation • No major problems so far	• ICSID (1995) • Very little historical problems regarding investment disputes • New York Convention
3. Barbados	• MIGA • No outstanding expropriation claims for foreign firms • Compulsory acquisition upon prompt payment of compensation at fair market value	• ICSID (1983) • New York Convention (not ratified)
4. Belize	• The Constitution of Belize states that no property shall be compulsorily expropriated by the Government, except under circumstances prescribed in the Land Acquisition (Public Purposes) Act • Controversial expropriation of land with tardy compensation in non-negotiable Belize dollars • Expropriate land has sometimes been used for other purposes than intended under expropriation claim • MIGA	• No ICSID • UK International Investment Disputes (1966) • Alternative dispute resolution procedures are gaining recognition as a means of settling disputes in Belize. • New York Convention (1980)
5. Dominica	• MIGA	• No ICSID • New York Convention (1988)
6. Grenada	• Land Acquisition Act provides for compensation at fair market values • MIGA	• ICSID (1991) • New York Convention

Countries	Expropriation	Dispute Settlement
7. Guyana	• Constitution protect against deprivation of property without compensation, and from compulsory acquisition of property without compensation. • Existing law allows the government a lot of leeway in the expropriation of land. • Property may be expropriated for public purposes following international law principles of due process, adequate compensation, and transparency. • MIGA	• ICSID (1969) • International arbitration decisions are enforceable under Guyana's (then British Guiana) Arbitration Act of 1931 • New York Convention
8. Haiti	• The 1987 constitution permits expropriation only for public use or land reform or public services, and requires payment in advance of just compensation as determined by an expert. In case of expropriation, the Constitution provides that compensation shall be given at a valuation according to expert advice. • If expropriated property/land is not used as intended, it must be return to former owners • MIGA	• No ICSID • Non-transparent and weak mechanism in place • Haiti's notoriously inefficient courts and its antiquated legal system have hindered resolution of most disputes. As an alternative, the Civil Procedure Code has rules regarding arbitration procedures if the party decide to arbitration, but most people settle outside of system • New York Convention (1983)
9. Jamaica	• Expropriation through legislation for public interest • MIGA • OPIC	• Local Courts • ICSID (1966) • New York Convention
10. Montserrat	• Complicated by current situation • Much land is being expropriated for new development at northern part of island, but process is working slowly, and is quite controversial for local landowners. • Volcanic activity can make some section of the island out-of-limits to property/land owners	• No ICSID • New York Convention • Local courts / UK Supreme Court
11. St. Kitts & Nevis	• MIGA	• No ICSID • New York Convention
12. St. Lucia	• MIGA	• No ICSID • New York Convention
13. St. Vincent and the Grenadines	• MIGA	• ICSID (2003) • New York Convention (2000)

Countries	**Expropriation**	**Dispute Settlement**
14. Suriname	• No MIGA • The government may claim property if it has been declared by an Act that the property will be used for public benefit or in case of fire, floods, wartime, war risk and revolt by a resolution signed by the President of Suriname. The person whose property is claimed may ask compensation from the new owner, such within 14 days after the resolution of the President has taken effect. If there is no mutual agreement, the Suriname's high court will determine the amount of the compensation. In other cases, The Minister of Natural Resources may suspend or revoke the concession rights with no compensation obligation. • There are no pending expropriation cases at this time • MIGA	• No ICSID • No New York Convention • No jurisprudence found with regard to dispute settlement between foreign and local investors. • Local dispute settlement mechanisms: arbitration and mediation.
15. Trinidad and Tobago	• No expropriation since mid-1980's and all has been fairly compensated • MIGA	• ICSID (1967) • New York Convention
16. Chile	• Reason: Public Use and national interest • Material possession only after full compensation is paid. • MIGA	• Preference to deal with disputes locally • ICSID (1991) • New York Convention (1975) • BITs allow for international arbitration • Judgments made by foreign courts are valid in Chile upon approval of the Chilean Supreme Court
17. Costa Rica	• Reason: Public interest • Material possession only after full compensation is paid. • MIGA	• Preference to deal with disputes locally • ICSID (1993) • New York Convention (1958) • Judgments made by foreign courts are valid • Monetary judgments are made in local currency • Litigation can be long and costly • Problem with land invasions by rural squatters

Countries	Expropriation	Dispute Settlement
18. Dominican Republic	• Reason: Public interest • Major problems with expropriation of property and appropriation of services. Attempts to change contracts • Very weak judicial system, which jeopardize "rule of law". • MIGA	• Preference to deal with disputes locally • No ICSID • New York Convention (2002) • Does not recognize right of investors to submit disputes to international arbitration • Judicial decisions are sometimes ignored • Failure to implement contract agreements or attempts to change contract clauses
19. Ireland	• Reason: Public purpose • No discriminatory manner, international standards/ • MIGA	• ICSID (1981) • New York Convention (1981) • English-based Common law • Government is willing to abide to international arbitration
20. Mauritius	• Expropriation unlikely • MIGA	• ICSID (1969) • No New York Convention • System based in English and French law.

4.5. DOMESTIC FINANCE AND FOREIGN EXCHANGE CONTROLS

This section will be evaluated using the following three elements:

- Access to domestic financing
- Remittances and repatriation
- Foreign exchange controls

Table 4.5 summarizes the findings from the evaluated cases and the CARICOM countries on this matter.

4.5.1. Access to Domestic Financing

The best practices identified among the case studies evaluated are the following:

- Credit is allocated on market terms and is available to foreigners
- There is no discrimination between foreign and local firms with regard to access to local credit.

In this respect, CARICOM member countries require significant changes as policies for access of foreign investors to the local financing markets tends to be discriminatory. As an example, in Antigua and Barbuda preferential financing or finance facilitation is readily available to national investors but not to foreigners. In Bahamas, The Bahamas Development Bank (BDB) provides financing for working capital and fixed assets but is not allowed to provide finance to projects, which are wholly or partially owned by non-Bahamians. Also, in Barbados, medium to large-scale projects must be 51 percent locally owned to obtain development financing. This latter situation is also true in Trinidad & Tobago. In St. Kitts & Nevis domestic loans to foreigners are levied a 2.5 percent tax.

In other kind of limitation, in Dominica, Grenada, St. Lucia, and St. Vincent, foreign investors are required to obtain permission from the Minister of Finance in order to borrow from local financial institutions.

Guyana is explicit in its preference to invite foreign capital rather than encourage foreign companies to come into Guyana and borrow from local banks. In Haiti, access to credit is restricted by the difficulty in assessing client risk and the lack of legal remedies for lenders in the event of default.

4.5.2. Remittances and Repatriation

From the standpoint of foreign investors, the ideal treatment would accord completely unconditional, unregulated, transfer rights without limitation of the percentage of investment that may be repatriated or restrictions on the access to and use of foreign exchange to effectuate such transfers in hard currencies.

In the studied cases the following was observed:

- No restrictions imposed on the conversion or repatriation of investment capital, earnings, interest or royalties.
- Foreign exchange is easily obtainable at market rates.
- No legal impediments to obtaining foreign exchange for any business transaction.
- There is convertibility on both capital and current accounts.
- Foreign currency accounts can be opened.
- Contracts may be negotiated in any currency.
- No divergence between central bank exchange rates and those prevailing in the market.

In most CARICOM countries there is little problem to abide to the proposed best practices presented here. Nonetheless, a problem has been identified in countries that maintain a fixed exchange in their currency, such as Belize, where significant delays in processing foreign exchange request was very problematic in 2002, The Bahamas, and Jamaica. Also, Guyana requires that people remitting or leaving the country with sums of money or articles valued in excess of US$10,000 must notify the Customs Authority and pay a 15 percent withholding tax. Another problem is the policy of making transfers of funds possible but very expensive, as it happens in Suriname, where they also have restrictions on the amount of foreign currency that may leave Suriname.

Table 4.5. CARICOM/Case Studies: Domestic Finance and Foreign Exchange Controls

Countries	Access to Domestic Financing	Remittances and Repatriation	Foreign Exchange Controls
1. Antigua and Barbuda	• Discriminatory against foreigners: 3% stamp tax for local loans. License requirements to purchase/transfer stocks	• Investors have the right to repatriate all capital royalties, dividends and profits free of all taxes or any other charges on foreign exchange transactions. • However, approval is required	• MOF approval for purchases above EC$270,000. One percent tax on al purchases of foreign currency.
2. Bahamas	• The Bahamas Development Bank (BDB) provides financing for working capital and fixed assets but is not allowed to provide finance to projects which are wholly or partially owned by non-Bahamians.	• Foreign investors enjoy complete freedom in the repatriation of their investments and profits.	• Central Bank control to defend local currency parity with US dollar. • Bahamian and resident companies are granted personal allowance cards or "dollar cards" to permit them to purchase foreign currency drafts up to $10,000.00 per annum for the payment of, for example, credit card purchases. • If a company has a physical presence whether it be locally or foreign owned, if it is in financial services it will be treated as "non-resident", but if it is manufacturing for export, operating a hotel, or some other foreign exchange sensitive business, it will be designated "resident" for foreign exchange purposes and would have to apply for the right to operate a foreign account. • Authorized Dealers are permitted to grant approvals for foreign currency purchase requests (per annum) for: - Educational purposes up to a maximum of $10,000 per beneficiary; - not exceeding $100,000 for non-oil import payments; - up to a $1,000 limit for holiday travel of persons above the age of 18 and $500 for those under that age; - a $10,000 per person maximum for business and professional travel; and ceilings of $3,000 for educational travel and - $1,000 for medical travel.

Countries	Access to Domestic Financing	Remittances and Repatriation	Foreign Exchange Controls
3. Barbados	• Discriminatory against foreigners: medium to large-scale projects must be 51% Barbadian owned to obtain EGFL financing. • Local credit is available to non-nationals except for the purchase of fixed assets	• Foreign investors must registered the amount of their investment in the Central Bank • Profits and capital from foreign direct investment may be repatriated if the investment was registered with the Bank at the time the investment was made.	• Foreign exchange for imports can be directly accessed through commercial banks but the Central Bank must approved it. • Individuals may apply through a local bank to convert the equivalent of US$3,750 per year for personal travel and US$25,000 for business travel. Amounts in excess of those indicated may be obtained upon application to the Central Bank. • Businesses, which serve an international market exclusively, are allowed to have foreign currency accounts and to borrow in foreign currency. • The Central Bank may limit or delay conversions depending on the level of international reserves under the Bank's control.
4. Belize	• There are no restrictions that would affect access by an investor, local or foreign, to local or international credit other than those that would apply to the granting of credit by a lender in the ordinary course of business.	• Foreign investors are required to register any investments made in Belize with the Central Bank of Belize to facilitate the repatriation of profits, dividends, etc • Repatriation of profits or dividends is subject to the Exchange Control Regulations and the permission of the Central Bank. • Freedom to make financial remittances • The Central Bank should approved the repatriation of profits and dividends in foreign currency or other transactions involving the flow of foreign exchange remains a deterrent to foreign investment.	• Belize allows companies with proper documentation to go directly to the commercial banks to request foreign exchange. Also, foreign exchange accounts can be opened at local banks with the consent of the Central Bank • The Central Bank may limit or delay conversions depending on the level of international reserves under the Bank's control. Foreign exchange is currently scarce in Central Bank, causing significant delays in obtaining foreign exchange
5. Dominica	• Discriminatory for foreign investors: Under the Exchange Control Act they are required to obtain permission from the Minister of Finance in order to borrow from local financial institutions. • Other sources of financing comes from Trinidad & Tobago-based commercial banks, which have no bias against foreign investors.	• Repatriation of funds is allowed, to the extent of the percentage of the foreign participation in the company. • Repatriation of profits is allowed provided that all local tax liabilities where they exist have been settled.	• The Exchange Control Act requires approval from the Ministry of Finance for the purchase of foreign currency in excess of EC$ 250,000. The approval can be obtained immediately. • Foreign denominated accounts are allowed as long as holder demonstrate sources of foreign income

CARICOM, July 2003

Countries	Access to Domestic Financing	Remittances and Repatriation	Foreign Exchange Controls
6. Grenada	• Discriminatory for foreign investors: Under the Exchange Control Act they are required to obtain permission from the Minister of Finance in order to borrow from local financial institutions.	• Profits or dividends arising in connection with a non-resident investment duly registered with the Ministry of Finance, will be approved for remittance. There is no withholding tax. The Ministry of Finance must be notified of all outward transfer of funds. • No restrictions on remittances of capital, earnings on, and liquidation proceeds from direct non-resident investment in Grenada. The foreign investor will be permitted to repatriate the full proceed from the disposal of his investment.	• The Exchange Control Act requires approval from the Ministry of Finance for the purchase of foreign currency in excess of EC$ 270,000; the approval is granted within a day.
7. Guyana	• Access to local credit in Guyana has traditionally been through the commercial banking system. • Access to loans in Guyana by foreign firms is restricted by the Foreign Exchange Act, which emphasizes the Government preference to invite foreign capital rather than encourage foreign companies to come into Guyana and borrow from local banks	• Persons remitting or leaving the country with sums of money or articles valued in excess of US$10,000 must notify the Customs Authority and pay a 15% withholding tax. • Besides paying the withholding tax, there are no restrictions on remittances of profits and dividends, which can be freely converted into foreign exchange.	• The local currency floats freely in the exchange markets without government intervention. Moreover, there are no foreign exchange controls currently in effect in Guyana. • Restrictions on purchasing were removed and foreign exchange could be repatriated with little restrictions. • With the liberalization of the foreign exchange regimes, companies both foreign and local operating in Guyana has almost unrestricted rights to repatriate capital and profits.
8. Haiti	• Access to credit is restricted by the difficulty in assessing client risk and the lack of legal remedies for lenders in the event of default, although there is legislation under preparation to facilitate liens on moveable property.	• Haiti allows for the free movement of capital to and from Haiti. Foreign investors may export or keep all or part of their earnings in any Haitian commercial bank, if they deem the rates competitive.	• There are no restrictions or controls on foreign payments or other fund transfer transactions, nor is there anything to indicate that this policy might be changed. • Foreign exchange is freely and readily available. Banks and exchange houses are free to set their own exchange rates. The Central Bank publishes a daily reference rate that is a weighted average of exchange rates offered in the formal and informal exchange markets.

CARICOM, July 2003

Countries	Access to Domestic Financing	Remittances and Repatriation	Foreign Exchange Controls
9. Jamaica	• Investment projects, which are engaged in exports, are greatly favored and given preference in terms of loan financing. • However, this finance facilitation is limited to local owned productive sector	• There are no restrictions on the repatriation of capital or the remittance of profits and gains, but such transactions are subject to the availability of foreign exchange.	• Foreign exchange transactions must be done through authorized dealers, which are commercial banks and registered *cambios*. • 5% of all foreign exchange purchases must be paid to the Bank of Jamaica. • Although foreign exchange is freely available under the liberalized regime, there is generally a waiting period of one to two weeks if the amount is large, as demand usually exceeds the available supply of foreign exchange.
10. Montserrat	• There is little financing of investment projects going on right now in Montserrat, as local banking sector got hammered by the destruction of Plymouth and continued volcanic activity.	• A 1.75% foreign exchange levy is payable on remittances of foreign currency, unless specific exemption has been granted (ex. remittances from foreign currency denominated account). Exemptions are usually granted to an approved enterprise under Fiscal Incentives Ordinance • Remittances above EC$200,000 or US$75,000 need a government's exchange control approval (through the Financial Secretary), although the Bank of Montserrat representative claims that this is not a permit, but for monitoring and reporting purposes.	• A 1.75% foreign exchange levy is payable on purchase of foreign currency, unless specific exemption has been granted (ex. remittances from foreign currency denominated account). Exemptions are usually granted to an approved enterprise under Fiscal Incentives Ordinance. • Payment of interests, dividends, royalties, service fees, etc. requires Exchange Control approval after the Financial Secretary is satisfied that any relevant income taxes or withholding taxes have been paid. • Foreign currency accounts also require approval and it may be open under certain restrictions, such as that the account must be serviced with funds from abroad. • There are no exchange control restriction to pay for imports, but export proceeds must be converted into local currency unless deposited into an approved foreign currency account. All foreign exchange coming into the country must be registered with the Min. of Finance. This registration is assisted by the local commercial banks.

Countries	Access to Domestic Financing	Remittances and Repatriation	Foreign Exchange Controls
11. St. Kitts & Nevis	• Domestic loans to foreigners are levied a 2.5% tax • Development Bank offers long term financing but prefers local investors • Other sources of financing comes from Trinidad & Tobago-based commercial banks, which have no bias against foreign investors. • OECS stock exchange offers another way to raise investment funds, but license requirements for non-nationals complicate this alternative for foreigners	• Repatriation of profits, dividends, royalties, and imported capital by arrangement with the Ministry of Finance	• Exchange control Act requires that purchase of foreign currency in excess of EC$250,000 must be approved by Ministry of Finance • Approvals are expeditious and usually obtained within a day. • The operation of foreign currency accounts is permitted
12. St. Lucia	• Discriminatory for foreign investors: Under the Exchange Control Act they are required to obtain permission from the Minister of Finance in order to borrow from local financial institutions. • Other sources of financing comes from Trinidad & Tobago-based commercial banks, which have no bias against foreign investors.	• Unrestricted repatriation of profits and capital	• The Exchange Control Act requires approval from the Ministry of Finance for the purchase of foreign currency in excess of EC$ 250,000; however, such approvals appear to be automatic.
13. St. Vincent	• Discriminatory for foreign investors: Under the Exchange Control Act they are required to obtain permission from the Minister of Finance in order to borrow from local financial institutions.	• Foreign investors are allowed to repatriate their profits but are encouraged to reinvest proportions of their earnings locally.	• The Exchange Control Act requires approval from the Ministry of Finance for the purchase of foreign currency in excess of EC$ 250,000; however, such approvals appear to be automatic, and they usually are obtained within a day.
14. Suriname	• Financing is very high (20-25 percent interest rates), but instead of supporting more liberalization for the sector, government is talking of regulating "fair" rates. • Banks don't want to lend for investment and prefer to finance trade (imports).	• There are restrictions on the amount of foreign currency that may leave Suriname. Transferring more than US$10,000 of foreign currency out of Suriname requires permission. • Transfer of funds into and out of Suriname can be expensive.	• The Central Bank of Suriname is the legal supplier of the foreign exchange market, and, based on the Central Bank's ability to meet demand, foreign-exchange shortages or delay are frequent. • Most foreign exchange is based on the market rate, although some companies' contracts with the government may require that they use the official rate. • Central Bank keeps a band range for the value of the foreign exchange for banks and *cambios*.

Countries	Access to Domestic Financing	Remittances and Repatriation	Foreign Exchange Controls
15. Trinidad and Tobago	• A bank may not provide more than 25% of the capital requirements of a project. • There are no restrictions on loan financing to foreign projects • Development loans with preferential rates are only available to local businesses.	• The repatriation of capital, dividends, interest and other distributions and gains on investment may be freely transacted without limits. The average period for remitting all kinds of investment returns is 24 hours. • All companies operating in any area designated as a Free Zone are exempt from withholding taxes on remittances of profits, dividends, and other distributions in perpetuity.	• There are no Exchange controls on foreign currency and securities. • Some delays are sometimes encountered because of imbalances which occur between the supply of, and demand for, certain foreign currencies. • Ministry of Finance has a levy of 5% on the interest earned on locally held U.S. dollar accounts as well as on local currency accounts.
16. Chile	• Credit is allocated on market terms and is available to foreigners, although the Central Bank does reserve the right to restrict foreign investors' access to internal credit if a credit shortage exists. To date, this authority has never been exercised	• There are no restriction to profit and capital repatriation	• Investors, importers, and others are guaranteed access to foreign exchange in the official inter-bank currency market without restriction • The Central Bank reserves the right to disallow access to the inter-bank currency market for royalty payments in excess of five percent of sales. The same restriction applies to payments for the use of patents that exceed five percent of sales, although in such cases, firms would have access to the informal market.
17. Costa Rica	• Foreign investors are able to borrow in the local market, but the small scale of the economy and close-knit society foster conservatism in credit criteria for foreigners wishing to obtain domestic financing. • Foreigners are free to borrow from abroad.	• There are no restrictions on receiving, holding or transferring foreign exchange. • No restrictions are imposed on reinvestments or on the repatriation of earnings, royalties, or capital except when these rights are otherwise stipulated in contractual agreements with the government of Costa Rica.	• There are no delays for foreign exchange, which is readily available at market clearing rates and readily transferable through the banking system. Dollar bonds and other dollar instruments may be traded legally.

Countries	Access to Domestic Financing	Remittances and Repatriation	Foreign Exchange Controls
18. Dominican Republic	• Foreign investors are able to obtain credit on the local market, but tend to prefer less expensive offshore sources.	• Individuals or companies investing in the country can now repatriate the total amount of invested capital, dividends and fee from technology transfers and royalty contracts.	• A new exchange rate system now enables importers to obtain hard currency directly from commercial banks instead of the central bank. The central bank charges a two percent commission on costs (pesos) in the free market. • The central bank and the commercial banks compete for foreign exchange (U.S. dollars tourism, remittances for Dominicans living abroad and free trade zone (FTZ) expenditures). • The central bank has the monopoly in collecting U.S. dollars coming from non-FTZ exports. • The exchange rates from the central bank and commercial banks have been competitive since the new free foreign exchange systems has been in effect. The result has been the availability of hard currency to pay for imports, and to remit profits.
19. Ireland	• There is no discrimination between Irish and foreign firms. In some instances, development authorities and banks are able to facilitate loan packages to foreign firms with favorable credit terms.	• There are no restrictions on the conversion or repatriation of investment capital, earnings, interest or royalties	• Ireland enjoys full current and capital account liberalization. • Foreign exchange is easily obtainable at market rates. The Euro is now Ireland's national currency
20. Mauritius	• There is no discrimination between foreign and local firms with regard to access to credit.	• There is no legal parallel market in Mauritius for investment remittances	• There is no legal obstacle to obtaining foreign exchange for any business transaction or transferring funds associated with an investment. The exchange rate is market-determined, but the market is dominated by a small number of institutions. • Local banks sometimes experience foreign exchange shortages (due to seasonal export receipts) • There is convertibility on both capital and current accounts. • Settlement can be done in foreign currency, and foreign currency accounts can be opened in Mauritius.

5. Section II. Best Practices in Investment Instruments

This section addresses the *Best Practices in Investment Instruments*. It explores the investment policy framework that CARICOM countries may wish to adopt to enhance their development prospects by looking at how different regional groupings have harmonized their investment policy. This section covers the Asia-Pacific Economic Cooperation (APEC) Non-Binding Investment Principles adopted in Jakarta in November 1994, the Framework Agreement on the Association of Southeast Asian Nations (ASEAN) Investment Area (AIA), the Common Market of the South (MERCOSUR), the European Union (EU), the North American Free Trade Agreement (NAFTA) and similar agreements, the Revised Treaty of Chaguaramas, and the draft Multilateral Agreement on Investment (MAI).[10] The section concludes with a number of questions and options for CARICOM countries to harmonize their investment regimes.

5.1. INVESTMENT POLICY FRAMEWORK

Traditional investment agreements set standards for the treatment and protection of investors and their investments. They also typically include an admission clause, which refers to the laws and regulations of the host-state for the admission of investments, and provide an effective dispute settlement mechanism between states, as well as between investors and the host state. These agreements, most of which are bilateral in nature, do not confer an automatic right of establishment to foreign investors and do not *per se* attract investment flows. Rather, they act as a complement to the economic determinants of these flows, and contribute to improving the investment climate of host states and reducing the risk of investing in foreign countries. Most bilateral investment treaties signed by CARICOM countries with countries other than the United States and Canada fall under this category.

More recently, a growing number of countries, particularly in the Americas, have negotiated agreements that go beyond this traditional approach. These instruments add a "market access" or "liberalization" component to the "protection" element of a traditional investment agreement. They include a right of establishment, i.e. the right to establish a new business or to acquire an existing one, subject to admissible, negotiated, exceptions or reservations. They also incorporate a list of reservations or country-specific exceptions from key treaty obligations with a view to preserving the right to maintain non-conforming measures (even in sectors subject to legally binding liberalization undertakings). These instruments can exert a positive influence on the investment regime of a country by locking in the liberalization achieved at the domestic level. Countries can potentially

[10] See Annex I for more detail on each of these regional groupings.

benefit from the signaling effects of binding the statutory and regulatory *status quo* in these agreements, as well as from the considerably heightened level of regulatory transparency afforded by attempts to comprehensively list investment restrictive measures. The bilateral investment treaties between Barbados and Canada, Grenada and the United States, Jamaica and the United States, Trinidad and Tobago and Canada, and the United States and Trinidad and Tobago have adopted this approach. Chapter III of the Revised Treaty of Chaguaramas on establishment, services, capital and movement of community nationals includes a market access component with a list of country-specific reservations but does not address *per se* protection elements.

Examples:

Protection

- European-style BITs
- MERCOSUR Protocols on Investment (signed in 1994, not in force)
- Andean Community (Decision 291 of 1991)
- Central America-Dominican Republic FTA (signed in 1999)
- Dominican Republic-CARICOM FTA

Liberalization

- WTO (TRIMs and GATS)
- Revised Treaty of Chaguaramas
- Protocol of Montevideo on Services (MERCOSUR) (1998, not in force)
- Andean Community (Decision 439 on services)

Protection and Liberalization

- EU (protection: transfers; liberalization: right of establishment)
- Central America (CACM) (2002)

- Free Trade Agreements (FTAs):
  - NAFTA (1994), Bolivia-Mexico (1995), Costa Rica-Mexico (1995),
  - Group of Three (1995),[11] Canada-Chile (1997), Mexico-Nicaragua (1998),
  - Chile-Mexico (1999), Mexico-Northern Triangle (2001),[12]
  - Central America-Panama (2002), Chile-USA (Draft, 2003)

- Barbados-Canada BIT (1997), Grenada-United States BIT (1989),
- Jamaica-United States BIT (1997), Trinidad and Tobago-Canada BIT (1996),
- Trinidad and Tobago-United States BIT (1996),
- Draft MAI (1998)

[11] Group of Three: Colombia, Mexico, and Venezuela.
[12] Northern Triangle: El Salvador, Guatemala, and Honduras.

For countries that adopt investment liberalization rules, this choice needs to be accompanied by a negotiating modality. In a “negative list” or “top-down” approach, countries can maintain (either temporarily or permanently) those measures that do not conform to one or more disciplines of the agreement by including them in a list of reservations. A “positive list” or “bottom-up” approach, in contrast, requires that countries list only those sectors that they wish to subject to the disciplines of the agreement.

Under a negative list, reservations or country-specific exceptions are exceptions that each Party to an Agreement takes with respect to a limited number of provisions in the same Agreement (such as national treatment, most-favored-nation (MFN) treatment, performance requirements, and senior management and boards of directors). Each reservation in the Agreement exempts specific existing non-conforming measures (any law, regulation, procedure, requirement or practice) of a Party from one or more of these obligations. Some reservations set out liberalization commitments. Some of these commitments take effect immediately at the entry into force of the Agreement, while others are phased-in over time. With a number of non-conforming measures, the fully phased-in liberalization commitments will eliminate the measure. In NAFTA and NAFTA-like agreements, if an existing non-conforming measure is made less non-conforming or eliminated, whether by unilateral action or because of a liberalization commitment, it cannot subsequently be amended by or replaced with a new measure that is more non-conforming (“ratcheting”). Also, in these agreements, as in the draft MAI, there is an Annex with a list of reservations for future measures under which a Party to the agreement may maintain existing non-conforming measures respecting the listed sectors and activities and may adopt new measures that are more non-conforming (i.e. more protectionist) with respect to a limited number of provisions (national treatment, MFN treatment, performance requirements, and senior management and boards of directors).

Examples:

Negative List:

- Revised Treaty of Chaguaramas
- Andean Community Decision 439 on Services
- Central America (CACM)

- Free Trade Agreements:
  - NAFTA, Bolivia-Mexico, Costa Rica-Mexico, Group of Three,
  - Canada-Chile, Mexico-Nicaragua, Chile-Mexico,
  - Mexico-Northern Triangle, Central America-Panama, Chile–USA

- Barbados-Canada BIT, Grenada-United States BIT, Jamaica-United States BIT,
- Trinidad and Tobago-Canada BIT, Trinidad and Tobago-United States BIT

- Draft MAI

Positive List:

- WTO GATS
- MERCOSUR Protocol of Montevideo on Services

Another question that warrants the attention of CARICOM countries is in regards the *coverage* of investment rules. In general, investment rules apply indistinctly across all areas of economic activity. Such "generic" rules cover the four core vectors of globalization - goods, services, ideas (IPRs) and people. A few instruments, however, are "product-specific" and cover investment either in goods/manufacturing *or* services. This is the case, for example, of investment disciplines in the World Trade Organization (WTO). During the Uruguay Round, GATT Contracting Parties limited the scope of investment discussions to the trade restrictive and distorting effects of a narrow range of performance requirements. The WTO Agreement on Trade-Related Investment Measures (TRIMs) features disciplines applicable to goods trade only, whereas the General Agreement on Trade in Services (GATS) covers investment-related matters in respect of two of the four so-called "modes" of supplying services subject to its disciplines: commercial presence (mode 3) and movement of natural persons (mode 4). A third approach to the coverage of investment rules consists of limiting the rules to a particular sector of the economy. This is the case for instance of the chapter on financial services in the North American Free Trade Agreement (NAFTA), which covers investment and cross-border trade in services for this sector only.

Bringing together these two fundamental questions facing negotiators yields a potentially useful conceptual framework for mapping approaches to investment rule-making in the context of the CARICOM region. Countries that adopt generic investment rules must decide whether the function of those rules should be circumscribed to protecting foreign investment, granting market access to investors of other Parties, or achieving both ends simultaneously. Countries that adopt product-specific rules face the same three choices listed above; the scope of the rules they agree upon, however, will be limited to goods or services, or to a specific sector of the economy such as financial services.

Examples

Goods: WTO TRIMs

Services: WTO GATS, Revised Treaty of Chaguaramas

Goods and Services

- EU, Central America (CACM)
- Free Trade Agreements:
- NAFTA, Bolivia-Mexico, Costa Rica-Mexico,
- Group of Three, Canada-Chile, Mexico-Nicaragua,
- Chile-Mexico, Mexico-Northern Triangle,
- Central America-Panama, Chile–USA

- Draft MAI
- Bilateral Investment Treaties

Sector-specific: Financial services in NAFTA and NAFTA-type agreements

5.1.1. Scope and Coverage

The scope of an investment agreement has three essential components. The "substantive scope" consists generally of the disciplines and the definition of key terms, such as investment and investor. The definition of the terms investment and investor are the key determinants of the substantive scope of an investment regime. These terms constitute the main parameters identifying who will benefit from the provisions of an investment instrument. Investment instruments do not cover all investments and all investors. In fact, they only apply to investors of another Party and investments made by investors of another Party in the territory of a Party, although, in some cases, the definition of investment applies to all investments in the territory of the Party with regard to the provisions on performance requirements. In the NAFTA, for example, the provision on scope indicates that the investment chapter applies to any measures adopted or maintained by a Party relating to:

a) Investors of another Party;
b) Investments of investors of another Party made in the territory of the Party, indicating that the chapter covers both investments that exist at the time of the entry into force of the Agreement and investments made or acquired subsequently; and
c) All investments of investors of any Party in the territory of another Party with respect to the article on Performance Requirements.

The provision on scope may also specify what is not covered by the investment regime. For example, in the second draft of the FTAA investment chapter made public in November 2002 some proposals exclude economic activities reserved by each Party, pursuant or not to its legislation in force. Other proposals mention that nothing in the chapter shall be construed to prevent a Party from providing a number of services (e.g. law enforcement, public education and health services, etc.). Some proposals exclude measures related to financial institutions or financial services.

The "territorial scope" refers to the territory of the Parties that falls under the agreement, including the application of the provisions at the sub-national level. In free trade agreements, this is generally dealt within an article that covers the whole agreement. The temporal scope informs on whether the agreement applies to investment made, and disputes that arose, prior to the entry into force of the agreement. In general, the agreement applies to all investments.

5.1.1.1. Substantial Scope: Definition of Investment

With the exception of the Revised Treaty of Chaguaramas, which does not define investment, and Decision 291 of the Andean Community, which covers only foreign direct investment (FDI), all investment agreements in the Americas have adopted a broad, open-ended, asset-based definition of the term investment. The draft Multilateral Agreement on Investment also follows the same approach. A broad definition is more encompassing than the traditional definition of foreign direct investment because it also includes portfolio investment and intangible assets such as intellectual property rights. Typically, modern definitions use phrases such as "every kind of asset," "any kind of asset," or "every kind of investment," accompanied by an illustrative but non-exhaustive list of examples.

The list commonly includes the following five components: a) movable and immovable property and any related property rights, such as mortgages, liens or pledges; b) shares, stock, bonds or debentures or any other form of participation in a company, business enterprise or joint venture; c) money, claims to money, claims to performance under contract having a financial value, and loans directly related to a specific investment; d) intellectual property rights; and e) rights conferred by law (e.g., concessions) or under contract.

The MERCOSUR Colonia and Buenos Aires Investment Protocols follow the trend adopted in most agreements. They embrace an open-ended, "asset-based" definition of *investment*, which includes FDI, portfolio investment, and intangible assets such as intellectual property rights (IPRs). Their definition is accompanied by a non-exhaustive list of examples. The EU investment regime also belongs to the same group of instruments. For example, Directive 88/361/EEC stipulating the full liberalization of capital movements between Community members contains a broad list of transactions that are to be considered as capital movements.[13]

While the objective of using such a comprehensive definition is to guarantee protection to as many forms of investment as possible, there has been an attempt —albeit neither in the MERCOSUR Protocols nor in the EU provisions— to avoid coverage of purely monetary or speculative flows not related to an investment. Thus, recent agreements include qualifications of their coverage. For example, a few agreements exclude from the definition of covered investment "real estate or other property, tangible or intangible, not acquired in the expectation or used for the purpose of economic benefit or other business purposes." This exception is built in the definition of investment in NAFTA, the Group of Three, and the Canada-Chile, Mexico-Nicaragua and Mexico-Northern Triangle FTAs. Their "asset-based" definition covers a broad list of assets that are expressly linked with the activities of an enterprise. It excludes, for example, those transactions that might occur in capital or money markets with no connection to a specific investment and claims to money that arise solely from commercial contracts.

The ASEAN definition of investment includes all direct investments other than portfolio investments and matters relating to investment covered by other ASEAN Agreements such as the ASEAN Framework Agreement on Services.

[13] See Council Directive 88/361/EEC of 24 June 1988.

5.1.1.2. Substantial Scope: Definition of Investor

The definition of the term “investor” is another key component of the scope of an investment agreement because, as mentioned above, such instruments do not cover all investments. In fact, they only apply to investments made by investors of another Party. Therefore, the definition of the term *investor*, which includes natural (i.e. individuals) and juridical (i.e. companies or other legal entities) persons, plays a major role in determining who enjoys the benefits of the agreement.

In most investment instruments, citizenship is the only criterion used to determine whether a natural person should be considered an “investor” under the agreement. In a few agreements, for example those signed by Canada, the definition is broadened to include permanent residents. This is also the case of the draft MAI. Residency is also sometimes used to exclude natural persons from coverage of the agreements. The Colonia Protocol and the Protocol of Montevideo on Services, both of MERCOSUR, also cover both nationals and permanent residents in their definition of natural persons, whereas the Buenos Aires Protocol only includes nationals, as most investment instruments do. Some instruments exclude nationals of a Party from their coverage when their investments are made in the territory of another Party in which they reside. MERCOSUR Investment Protocols include such limitation but relax this constraint if “it is proved that the resources for such investments are of external origin” (Article 1).

With respect to juridical persons, three different criteria have been commonly used to define the nationality of a company or legal entity: incorporation, seat, and control. Countries with common law tradition such as the United States, Canada and CARICOM use the place of incorporation of a company to determine its nationality. Other investment instruments such as NAFTA, the draft MAI, and the Canada-Chile FTA, for example, follow the same approach. Under NAFTA, to be an “investor of a Party” an enterprise (and a branch of an enterprise) must be constituted or organized under the law of a Party. There is no requirement that nationals of a NAFTA country control the enterprise. However, if the enterprise is controlled by investors of a non-Party, benefits can be denied if the enterprise has no substantial business activities in the territory of the Party under whose laws it is constituted. The denial of benefits clause also provides that the host-state may deny benefits of the agreement if it does not maintain diplomatic relations with the non-Party or if it adopts or maintain measures with respect to the non-Party that prohibit transactions with the enterprise. The incorporation criterion has also been used between countries with civil law traditions (Group of Three, and the FTAs signed by Mexico with Bolivia, Chile, Costa Rica, Nicaragua, and the Northern Triangle). But civil law countries have traditionally relied instead on the place where the management or seat of the company is located.

The Colonia and Buenos Aires Protocols, and the Protocol of Montevideo all have elected the place of incorporation and seat of a company. Additionally, the Colonia Protocol defines investor as “any juridical person constituted in the territory of the host country, and effectively controlled, directly or indirectly, by a natural or juridical person.” It is worth noting that it can be said that the combination of different criteria is used in those cases where governments are interested in restricting the benefits of the agreement to those legal entities that effectively have ties with the home country. On the contrary, when the objective is to broaden the scope of application, agreements provide for the possibility of applying different alternative criteria.

Although the term "investor" is not explicitly defined in the relevant provisions on intra-EU investment, Article 56 EC appears flexible enough to encompass both natural and juridical persons. Prior to the adoption of the Treaty of Maastricht (which entered into force in January 1994), the rules on capital movements used the residency criterion to determine whether a person should benefit from the freedom to move capital between the Community's member countries. Current Treaty language, in contrast, simply prohibits all restrictions on the movement of capital between member states, without specifying any criteria that would restrict the categories of beneficiaries of the fourth freedom.

The very broad scope of the Treaty's article on capital movements must be seen in conjunction with the narrower coverage of the provisions on freedom of establishment enshrined in Article 43 EC, which prohibits "restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State," as well as "restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State." Thus, Article 43 EC elects a nationality criterion to determine the category of natural persons that should benefit from the right of establishment. Regarding juridical persons, these are treated, for the purposes of the right of establishment, "in the same way as natural persons who are nationals of Member States" (Article 48 EC). Accordingly, juridical persons, in order to benefit from the right of establishment conferred by Article 43, "must be formed in accordance with the law of a Member State [and have] their registered office, central administration or principal place of business within the Community" (Article 48 EC).

ASEAN uses a very different criterion for both natural and juridical investors, who are defined as those who make an investment in another Member State, the effective ASEAN equity of which taken cumulatively with all other ASEAN equities fulfills at least the minimum percentage required to meet the national equity requirement and other equity requirements of domestic laws and published national policies, if any, of the host country in respect of that investment.

5.1.2. Minimum Standard of Treatment

The primary objective of this provision has traditionally been to provide a minimum standard of treatment, which is related to international law. A large number of investment instruments contain a fair and equitable treatment provision and often combine this concept with other principles of international law, such as level of full protection and security and non-discrimination. With respect to international law, the main issue is whether it is appropriate to expressly establish a link between fair and equitable treatment and other concepts with international law. On 31 July 2001, the NAFTA Free Trade Commission narrowed the scope of the NAFTA provision on minimum standard of treatment: "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."[14]

The MERCOSUR Investment Protocols – like most investment instruments, but unlike the EC Treaty or the Revised Treaty of Chaguaramas - include provisions on fair and equitable treatment, protection and security, and non-discrimination. Fair and equitable treatment is a general concept without a precise definition. It provides a basic standard unrelated to the host-state's domestic law and serves as an additional element in the interpretation of the provisions of an investment agreement. MERCOSUR Protocols do not include a reference to international law in their fair and equitable treatment provision, whereas before the "clarification" by Ministers in 2001 the NAFTA, in contrast, allowed for treatment to be accorded to investments and investors "in accordance with international law, including fair and equitable treatment and full protection and security" (Article 1105(1)). Now, the NAFTA refers to customary international law, which implies that a violation of another international agreement or another NAFTA chapter cannot be invoked by an investor of another Party as a breach of the NAFTA in a dispute with the host-state.

5.1.3. National Treatment and MFN Treatment

National treatment and MFN treatment require that each Party accords to the investments and/or investors of another Party treatment no less favorable than that it accords to its own investors and investments of those investors (national treatment) or investors of third Party and their investment (MFN treatment). As a relative standard, their function is to require non-discriminatory treatment, *de facto* and *de jure*.

Regional groupings have adopted two different approaches with respect to national treatment and MFN treatment. As mentioned above, several investment instruments include a market access component. This is the case, for example, of the NAFTA and NAFTA-like agreements, the draft MAI, the EU, the Revised Treaty of Chaguaramas, and the Andean Community Decision 439 on services. These instruments, which cover all phases of an investment, have been designed with the purpose of assuring the free entry of such investments -albeit with country-specific reservations (such as alien landholdings)- into the territory of the host country.

With respect to national treatment, the NAFTA and draft MAI provisions provide for a right of establishment with a list of reservations (country-specific exceptions) for each Party. The bilateral investment treaties between Barbados and Canada, Grenada and the

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[14] See NAFTA Free Trade Commission: Joint Statement, Building on a North American Partnership, Washington, DC, 31 July 2001.

United States, Jamaica and the United States, Trinidad and Tobago and Canada, and the United States and Trinidad and Tobago also follow the same approach, and so does the Revised Treaty of Chaguaramas for investment in services.

In the case of the EU, the right of establishment conferred on natural and juridical persons by Article 43 EC is one of the two pillars of the intra-EU investment regime: "Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to *set up* and manage undertakings […] under the conditions laid down for its own nationals by the law of the country where such establishment is effected." Moreover, as underlined by the European Court of Justice, "the rules regarding equality of treatment forbid not only overt discrimination by reason of nationality or, in the case of a company, its seat, but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result."[15] In the EU context, the national treatment principle embedded in the right of establishment of Article 43 EC also applies to the post-establishment phase of an investment since "freedom of establishment shall include the right to […] set up and *manage* undertakings […] under the conditions laid down for its own nationals by the law of the country where such establishment is effected."

Under the EC Treaty, EU member countries are allowed to introduce restrictions to the right of establishment. EC activities connected "with the exercise of official authority" are not subject to the provisions on the right of establishment. Similarly, EU countries could, on the grounds of public policy, public security or public health, adopt (discriminatory) measures restricting the freedom of establishment. In order to determine whether a restriction on the right of establishment is consistent with Article 43 EC, the European Court of Justice subjects the measure in question to four "tests." Accordingly, measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must be applied in a non-discriminatory manner; be justified by imperative requirements in the general interest; be suitable for securing the attainment of the objective which they pursue (proportionality test); and not go beyond what is necessary in order to attain it (necessity test).

The MERCOSUR Investment Protocols, in contrast, do not presuppose a right of establishment. In fact, the Colonia and Buenos Aires Protocols follow the approach adopted in the traditional bilateral investment treaty, and provide for national treatment at the post-establishment phase. In contrast, the Protocol of Montevideo on Trade in Services contains a national treatment provision, which provides for a right of establishment "à la carte" because it applies to the sectors, sub-sectors, activities and measures included in a country's list of specific commitments.

The APEC Non-Binding Investment Principles provide that member economies will accord, in like situations, national treatment to foreign investors, with exceptions as provided for in domestic laws, regulations and policies.

In the case of ASEAN, each member must open immediately all its industries for

[15] Case C-1/93 Halliburton [1994] ECRI-1137, paragraph 15.

investment by ASEAN investors; accord immediately to ASEAN investors and their investments, in respect of all industries and measures affecting investment including but not limited to the admission, establishment, acquisition, expansion, management, operation and disposition of investments, treatment no less favorable than that it accords to its own like investors and investments. Each Member State had to submit a Temporary Exclusion List and a Sensitive List, if any, within 6 months after the date of signing of this Agreement, of any industries or measures affecting investments (referred to in paragraph 1 above) with regard to which it is unable to open up or to accord national treatment to ASEAN investors. These lists form an annex to the Agreement. In the event that a Member State, for justifiable reasons, is unable to provide any list within the stipulated period, it may seek an extension from the AIA Council. The Temporary Exclusion List is reviewed every 2 years and shall be progressively phased out by 2010 by all Member States except the Socialist Republic of Vietnam, the Lao People's Democratic Republic and the Union of Myanmar. The Socialist Republic of Vietnam shall progressively phase out the Temporary Exclusion List by 2013 and the Lao People's Democratic Republic and the Union of Myanmar shall progressively phase out their Temporary Exclusion Lists by 2015. The Sensitive List had to be reviewed by 1 January 2003 and at such subsequent periodic intervals as may be decided by the AIA Council.

The MFN principle is another key component of an investment agreement. A few investment agreements incorporate an exception to the MFN treatment in the case of the privileges deriving from membership or association in a free trade agreement, customs union, common market or regional agreement. The FTAs concluded by Mexico with Bolivia, Costa Rica, Nicaragua and the Northern Triangle, as well as the FTAs signed by the Dominican Republic with Central America and CARICOM do include such provision. The Group of Three, and the CARICOM-Dominican Republic FTA also stipulate that the MFN treatment does not apply to preferences or privileges resulting from an international agreement relating wholly or mainly to taxation. The NAFTA and the free trade agreements concluded by Chile with Canada and Mexico, for example, have a general exception for taxation treaties that covers not only the investment chapter but the entire agreement.

In the case of MERCOSUR, the two Investment Protocols include an MFN provision, as well as exceptions to this principle for privileges deriving from membership in a regional integration agreement or from international taxation conventions. The Protocol of Montevideo does not allow the possibility to introduce exemptions to the MFN principle, in contrast to the GATS, which permits temporary exemptions—for a maximum of ten years, in principle, and subject to multilateral review—if listed in an annex at the time of the entry into force of the agreement or of accession to the WTO. The MERCOSUR Protocol of Montevideo incorporates a number of general exceptions to its obligations, including an exception to the MFN principle in the case of double taxation agreements.

In the case of ASEAN, each member must accord immediately and unconditionally to investors and investments of another member, treatment no less favourable than that it accords to investors and investments of any other member with respect to all measures affecting investment including but not limited to the admission, establishment, acquisition, expansion, management, operation and disposition of investments. In relation to investments failing within the scope of the Agreement, any preferential treatment granted under any existing or future agreements or arrangements to which a Member State is a party shall be extended on the MFN basis to all other members. Where a member is temporarily not ready to make concessions under the national treatment article, and another member has made concessions under the said Article, then the first mentioned member must waive its rights to such concessions. However, if a member who grants such concessions is willing to forego the waiver, then the first mentioned member can still enjoy these concessions. Having regard to the late entry into ASEAN of the Socialist Republic of Vietnam, the Lao People's Democratic Republic and the Union of Myanmar, this only applies to the Socialist Republic of Vietnam for a period of 3 years, and the Lao People's Democratic Republic and the Union of Myanmar for a period of 5 years from the date the Agreement comes into force.

5.1.4. Performance Requirements and Incentives

Performance requirements are used by countries to influence the behavior of investors. By imposing on investor conditions that are not based on the market, performance requirements may affect investment decisions and the movement of goods and services.

Two types of performance requirements have been identified: mandatory performance requirements and incentive-based performance requirements. Mandatory performance requirements are conditions or requirements that are imposed at the pre- and/or post-establishment phases, i.e. for the establishment and/or operation of an investment. Incentive-based performance requirements are conditions that an investor must meet to secure a government advantage (subsidy) or incentive. Some performance requirements, while banned under the first type of condition, may be allowed when they condition the conferral of an advantage or a subsidy. Some examples include requirements to locate production, provide a service, train or employ workers, construct or expand particular facilities or carry out research and development.

The Agreement on Trade-Related Investment Measures (TRIMs) of the World Trade Organisation (WTO) establishes an illustrative list of prohibited performance requirements which affect trade in goods, those contrary to the principle of national treatment (Article III of GATT 1994), such as local content and trade-balancing requirements, and those inconsistent with the general obligation of eliminating quantitative restrictions (Article XI of GATT 1994), such as trade and foreign exchange–balancing restrictions and domestic sales requirements. The TRIMs Agreement applies to both mandatory and incentive-based performance requirements. Member countries had ninety days from the date of entry into force of the WTO Agreement to report all inconsistent performance requirements to the Council for Trade in Goods. Developed countries had to eliminate these performance requirements within two years of the date of entry into force of the WTO agreement. Developing countries had a deadline of five years (January 1, 2000), and least-developed countries were given seven years. The Council for Trade in Goods may extend the transition period for developing and least-developed countries. A few developing countries, which had requested extension of their deadline, were granted such extension.

The NAFTA-type agreements prohibit *specific* performance requirements for both goods *and* services. For example, the NAFTA and the Chilean FTAs with Canada and Mexico require that performance requirements to achieve a particular level or percentage of local content, to purchase local goods and services, to impose trade or foreign exchange balancing requirements, to restrict domestic sales of goods or services, to export a given level or percentage of goods or services, to transfer technology, and to act as exclusive supplier of goods and services be prohibited as a condition of the establishment, acquisition, expansion, management, conduct, or operation of a covered investment. The first four requirements are also prohibited as a condition to receive an advantage (that is, a subsidy or an investment incentive). However, there is no such limitation with respect to requirements to locate production, provide a service, train or employ workers, construct or expand particular facilities or carry out research and development. Moreover, there are some exceptions to the performance requirement prohibition. For instance, NAFTA Article 1106 (6) provides that requirements to achieve given levels of domestic content or to purchase local goods and services are allowed, provided that they are not applied in an arbitrary or unjustifiable manner or do not constitute a disguised restriction, if these measures are necessary: to secure compliance with laws and regulations that are not inconsistent with the provisions of the agreement; to protect human, animal or plant life or health; or for the conservation of exhaustible natural resources. Finally, the prohibition on performance requirements does not apply to some of the above requirements with respect to export promotion and foreign aid programmes, procurement to a state enterprise, as well as the content of goods necessary to qualify for preferential tariffs or tariff quotas, in the case of an importing Party. The draft MAI adopted an approach similar to the NAFTA.

The scope of the provision on performance requirements in the MERCOSUR Colonia Protocol is narrower than the corresponding provision in the NAFTA. The Colonia Protocol underlines that “No Contracting Party shall establish performance requirements for the establishment, expansion or maintenance of investments which require or demand commitments to export goods, or specify certain goods or services to be acquired locally or impose any other similar requirement.”

The Andean Community establishes particular provisions for the performance of contracts for the license of technology, technical assistance, and technical services and for other technological contracts under the national laws of each member.

Whereas, the APEC Non-Binding Investment Principles call on member economies to minimize the use of performance requirements that distort or limit expansion of trade and investment, neither the EU nor the Buenos Aires Protocol discusses this issue. The same can be said of the Revised Treaty of Chaguaramas.

5.1.5. Key Personnel

The term key personnel in investment has generated many interpretations because it comprises two dimensions: freedom to hire and temporary entry. The *freedom to hire* dimension refers to the right granted to the investor to employ, in senior management positions, personnel within the host country without regard to the nationality or citizenship of the person concerned. Several investment agreements in the Americas (NAFTA and NAFTA-like agreements) as well as the draft MAI include provisions related to the investor and the personnel hired in senior management positions required for the establishment or operation of an investment. They state that a Party may not require that an enterprise of that Party appoint to senior management positions individuals of any particular nationality. These agreements also mention that a Party may require that a majority of the board of directors of an enterprise that is an investment under the agreement be of a particular nationality, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

The *temporary entry* of key personnel refers to the right granted to the investor to enter the host country or to bring key personnel, essential to a specific operation of an investment (temporary entry). Key personnel is subject to immigration laws and laws and regulations relating to the entry, stay, and work of natural persons. This dimension of key personnel can be directly related to the fourth mode of supply of a service referred to in Article I of the General Agreement on Trade in Services (GATS), establishing: "...For the purposes of this Agreement, trade in services is defined as the supply of a service:

... d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member".[16]

Whereas most free trade agreements in the Americas address the two dimensions of key personnel, the MERCOSUR Investment Protocols are silent on those issues. In contrast, and as noted earlier, one of the fundamental freedoms established by the EC Treaty concerns the movement of workers, which according to Article 39 EC entails the "abolition of any discrimination based on nationality between workers of the Member

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[16] The GATS has an Annex on movement of natural persons supplying services under the Agreement, which reads as follows:

"1.- This Annex applies to measures affecting natural persons who are service suppliers of a Member, and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply service.

2.- The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.

3.- In accordance with Parts III and IV of the Agreement, Members may negotiate specific commitments applying to the movement of all categories of natural persons supplying services under the Agreement. Natural persons covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment.

4.- The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment. (The sole fact of requiring a visa for natural persons of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment)."

States as regards employment, remuneration, and other conditions of work and employment." The EC Treaty, moreover, assigns a role to the European Council and the Commission to attain the goal of freedom of establishment by, *inter alia*, "effecting the progressive abolition of restrictions on freedom of establishment in every branch of activity under consideration […] as regards the conditions governing the entry of personnel belonging to the main establishment into managerial and supervisory posts in […] agencies, branches or subsidiaries [in the territory of a Member State]" (Article 44f EC).[17]

This issue is also important in the CARICOM regime. In fact, the most significant aspect of the Revised Treaty of Chaguaramas is the provision for the free movement of university graduates, other professionals, and skilled persons and occupations. No other regional agreement includes such a wide-ranging policy on the free movement of nationals among countries of their region. It is worth noting though that in November 2002, the four MERCOSUR members, as well as their associate members, Bolivia and Chile, approved a plan that will allow their 250 million people to live and work in any other member country and be granted the same rights as the citizens of those nations.

The APEC Non-Binding Investment Principles state that member economies will permit the temporary entry and sojourn of key foreign technical and managerial personnel for the purpose of engaging in activities connected with foreign investment, subject to relevant laws and regulations.

5.1.6. Transfers

It is common practice in investment agreements to have a provision covering the free transfers of funds related to investments of investors of another Party. In fact, the provision usually states that all payments relating to an investment of an investor of another Party can be transferred in a freely convertible currency or freely usable currency (as defined by the International Monetary Fund) at the market rate of exchange prevailing on the date of transfer. Such provision usually includes an open-ended list of the types of payments that are covered such as:

- Profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, returns in kind and other amounts derived from the investment;
- Proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;
- Payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement;
- Payments made pursuant the article on expropriation, and
- Payments arising out an investment dispute.

[17]The freedom to hire is the right of the investor to employ personnel legally within the host country without regard to the nationality or citizenship of the person concerned, whereas the temporary entry dimension of key personnel is the right of the investor to enter the host country himself or bring into the host country key personnel essential to a specific operation of an investment.

Some agreements allow for limitations or exceptions. For example, restrictions to the free transfer of investment-related funds would be allowed in the case of the equitable and non-discriminatory application of the host-state's legislation in the following areas:

- Bankruptcy, insolvency or the protection of the rights of creditors;
- Issuing, trading or dealing in securities;
- Criminal or penal offenses;
- Reports of transfers of currency or other monetary instruments; and
- Ensuring the satisfaction of awards, warrants, or court orders in judicial or administrative proceedings.

Some agreements (e.g. NAFTA and NAFTA-like agreements) allow for limitations to transfers in the case of balance-of-payment problems in the chapter on general exceptions, which means that this exception applies to the whole agreement and not just to the investment chapter. ASEAN also contemplates an exception for serious balance of payments difficulties.

The MERCOSUR Investment Protocols guarantee the free *transfers* of funds relating to the operation of an investment and include a non-exhaustive list of types of payments for which the transfer of funds is to be guaranteed. The APEC Non-Binding Investment Principles state that member economies will further liberalize towards the goal of the free and prompt transfer of funds related to foreign investment, such as profits, dividends, royalties, loan payments and liquidations, in free convertible currency.

Article 56 (paragraph 2) of the EC Treaty prohibits all restrictions on payments between member states. The prohibition is quite broad and not limited to payments concerning movements of capital. Some scholars have argued that the prohibition goes beyond the payments related to capital movements to also include movements of goods and services, a view that appears consistent with the broad EU objectives of economic and monetary union. Moreover, Article 58 EC permits member states "to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security." Such measures, however, shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments. As in the case of Article 43EC, the European Court of Justice subjects these measures to four "tests."

5.1.7. Compensation for Losses

Investment agreements do not, in principle, require a state to pay compensation in a situation where an investor of another Party suffers losses in the host country due to war or other armed conflict, civil disturbances, state of emergency or similar events. Most agreements, however, provide for national treatment and MFN treatment in respect to any measure a Party adopts or maintains related to those losses. This issue is either covered in a specific provision on compensation for losses or by the national treatment and MFN provisions. Very few agreements (US BITs) require a country to pay compensation in two specific situations: the first is where the damage results from the requisitioning of property by the host state's forces or authorities; the second is where the damage results from the destruction of property by the host state's forces or authorities where the destruction was not caused in combat or required by the necessity of the situation.

5.1.8. Expropriation

Investment agreements include a provision that prohibits a Party from directly or indirectly nationalizing or expropriating an investment of an investor of another Party except when done for a public purpose, on a non-discriminatory basis, in accordance with due process of law, and on payment of compensation. To be legal under this provision, an expropriation must be conducted under *all* these specific requirements. For example, an expropriation that is not for a public purpose or which is discriminatory, even if it is compensated, is illegal under international law. NAFTA and NAFTA-like agreements, as well as the draft MAI, most bilateral investment treaties and the MERCOSUR Investment Protocols prohibit the expropriation of investments except when these conditions are met. Most of these agreements use the Hull formula according to which compensation should be "prompt, adequate, and effective." The APEC Non-Binding Investment Principles state that member economies will not expropriate foreign investments or take measures that have a similar effect, except for a public purpose and on a non-discriminatory basis, in accordance with the laws of each economy and principles of international law and against the prompt payment of adequate and effective compensation.

Customary international law distinguishes between a state action, which constitutes an expropriation and requires compensation, and a state action which is a regulation and does not entail a compensation. In an international context, a direct expropriation occurs when the host state takes property owned by a foreign investor located in the host state, when there is deprivation of wealth attributable to the state. Although there is no agreed definition for indirect expropriation, it generally refers to actions, omissions, or measures attributable to a government that are the equivalent of a direct expropriation.

Under customary international law, a state is not responsible for loss of property or other economic disadvantage resulting from *bona fide* general taxation, regulation, forfeiture from crime, or other action of the kind. The state has the power to take actions, in the public interest, without having to pay compensation, even if the interests of individual property owners may be adversely affected. As all governments impose measures that may restrict the right of owners to use and dispose of their property (e.g. zoning, licensing, etc.), governmental measures or actions that cross the line from non-compensable regulation to compensable expropriation are not the rule, they are the exception. In fact, there is very little international jurisprudence dealing with this issue.

5.1.9. Dispute Settlement

Investment agreements include provisions for the settlement of disputes. Generally, disputes between Parties fall under the general dispute settlement mechanism included in these agreements. Such mechanism is based on consultation and, failing resolution through consultation, panel review. In the Andean Group, state-to-state disputes are referred to the Andean Court of Justice. The MERCOSUR Colonia Protocol provides for disputes between states concerning its interpretation or application to be resolved through the disputes settlement procedures established in the Brasilia Protocol of December 17, 1991. When disputes involve a third state, the Buenos Aires Protocol refers them to *ad hoc* arbitration. The two MERCOSUR Protocols on Investment, like most investment agreements, feature separate provisions for the settlement of disputes between investors and host states. The Protocol of Montevideo refers to MERCOSUR's dispute settlement mechanisms, whereas the Framework Agreement on the ASEAN Investment Area refers to the Protocol on Dispute Settlement Mechanism for ASEAN.

Investment agreements also include an investor-state dispute settlement mechanism whereby an investor of a Party is able to seek redress against another Party. In most investment agreements, the investor may choose between the local courts and international arbitration. In some agreements, this choice is final, in order to avoid simultaneous procedures and contradictory decisions.

The objective of an investor-state dispute settlement mechanism is to depoliticize investment disputes and put them into the sphere of international arbitration. It allows the investor to submit a claim that the host country has breached an obligation under the investment agreement and the investor has incurred a loss or damage as a result of the breach. The arbitral tribunal has the authority to award compensation to the injured investor but *cannot* request the host government to change its laws or regulations.

A disputing investor may submit a claim to arbitration under some specific rules of arbitration, for example the ICSID Convention, the Additional Facility Rules of ICSID, or the UNCITRAL Arbitration Rules. Awards are not subject to appeal but annulment of awards is possible in certain instances under ICSID. Under the Additional Facility Rules of ICSID and the UNCITRAL Arbitration Rules, a Party may request correction of clerical, arithmetic or similar errors.

The EC Treaty does not contain provisions for the settlement of disputes that are specific to investment. Nonetheless, under the EU legal system, a member state may bring an action to the European Court of Justice against another member for failure to fulfill an obligation under Community law. Moreover, as the institution tasked with ensuring that Community law is uniformly interpreted and effectively applied across member states, the Court has jurisdiction to give preliminary rulings on questions arising in national courts as to the interpretation or validity of Community law. Thus, while individuals cannot bring a case against a member state to the European Court of Justice,[18] they may request that a

[18] Natural or legal persons may bring actions that seek the annulment of a legal measure which is of direct

national court dealing with a particular dispute that involves Community law seek a preliminary ruling.

The APEC Non-Binding Investment Principles mention that member economies accept that disputes arising in connection with a foreign investment will be settled promptly through consultations and negotiations between the parties to the dispute or, failing this, through procedures for arbitration in accordance with members' international commitments or through other arbitration procedures acceptable to both Parties.

5.1.10. Investment and Environment

The NAFTA and NAFTA-like agreements, as well as the draft MAI, and the APEC Non-Binding Investment Principles address this issue. NAFTA underlines that nothing in the Investment Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

The draft MAI follows the same approach as NAFTA, whereas the APEC Non-Binding Investment Principles only state that member economies will not relax, safety, and environmental regulations as an incentive to encourage foreign investment.

5.1.11. Investment and Labor

The Draft MAI includes similar language to the above text on environment for labor issues. No other agreement includes provision on labor and investment in an investment instrument.

5.2. HARMONISATION OF INVESTMENT POLICY: THE EXPERIENCE OF APEC, ASEAN, THE EU, NAFTA AND MERCOSUR

Although no regional grouping covered in this study has fully harmonized its investment policy, members of these groupings have generally opted for common framework and common rules, as opposed to common laws and regulations. In most cases, each member country still maintains its own independent laws and policies, its legal system, and its sovereign right to control and regulate internal activities. The following section informs on

and individual concern to them directly to the Court, but only in the context of the Court's jurisdiction to review the legality of the acts of Community institutions, as specified in Article 230.

how the experience of these regional groupings may be relevant for CARICOM countries.

5.2.1. APEC

It is worth noting that the APEC Non-Binding Investment Principles adopted in Jakarta in November 1994 have not led to any harmonisation in terms of the investment policies among the 21 APEC member economies. What APEC has been able to accomplish, however, is to encourage transparency. Its member economies have agreed to provide information on their investment regime. Each member economy has prepared a guidebook, which explains in great detail its own investment regime.

As a non-binding agreement, APEC is no model for CARICOM countries. A binding agreement is necessary to provide legal security to investors and contribute to foster an increase in foreign investment. However, some APEC principles, should they be binding, could serve as a model for a CARICOM Investment Code. For example, the national treatment principle states that with exceptions as provided for in domestic laws, regulations and policies, APEC member economies will accord to foreign investors in relation to the establishment, expansion, operation and protection of their investments, treatment no less favorable than that accorded in like situations to domestic investors. The Revised Treaty of Chaguaramas does include a right of establishment but remains silent on the post-establishment phase of an investment.

5.2.2. ASEAN

ASEAN, on the other hand, took a different approach to increase its attractiveness for ASEAN and non-ASEAN investors and provides a model that could be replicated by CARICOM countries. The Framework Agreement on ASEAN Investment Area (AIA) adopted in 1998 and amended in 2001 aims to make ASEAN a competitive, conducive and liberal investment area through the following measures:

- Implementing coordinated ASEAN investment cooperation and facilitation programs;
- Implementing a coordinated promotion program and investment awareness activities;
- Immediate opening up of all industries for investment, with some exceptions as specified in the Temporary Exclusion List (TEL) and the Sensitive List (SL), to ASEAN investors by 2010 and to all investors by 2020;
- Granting immediate national treatment, with some exceptions as specified in the Temporary Exclusion List (TEL) and the Sensitive List (SL), to ASEAN investors by 2010 and to all investors by 2020;
- Actively involving the private sector in the AIA development process;
- Promoting freer flows of capital, skilled labor, professional expertise and technology amongst the member countries;
- Providing transparency in investment policies, rules, procedures and administrative processes;
- Providing a more streamlined and simplified investment process; and
- Eliminating investment barriers and liberalizing investment rules and policies in the

sectors covered by the Agreement.

The AIA has important implications for investment strategies and production activities in the region. For instance, the AIA encourages investors to think increasingly in regional terms and to adopt a regional investment strategy and network of operations. It provides greater scope for division of labor and industrial activities across the region, creating opportunities for greater industrial efficiency and cost competitiveness. In addition, current and potential investors benefit from the AIA arrangements in the following ways:

- Greater investment access to industries and economic sectors as a result of the opening up of industries under the AIA arrangements, if investors qualify as ASEAN investors;
- National treatment, if investors qualify as ASEAN investors;
- Greater transparency, information and awareness of investment opportunities in the region;
- More liberal and competitive investment regimes; and
- Lower transaction costs for business operations across the region.

The privileges offered by the AIA in investment market access and the granting of national treatment take immediate effect for ASEAN investors, with the exception of those sectors in the list of exclusions.

There are three categories of exclusions for which these privileges will not be accorded immediately: (a) Temporary Exclusion List (TEL) contains industries and investment measures that are temporarily closed to investment and not granted national treatment, but will be phased out within specified timeframes; (b) Sensitive List (SL) covers industries and investment measures that are not subject to phasing out, but will be reviewed by the AIA Council in 2003 and thereafter at subsequent intervals; and (c) General Exception List consists of industries and investment measures that cannot be opened up for investment or granted national treatment because of reasons of national security, public morals, public health or environmental protection.

Brunei Darussalam, Indonesia, Malaysia, Myanmar, the Philippines, Singapore and Thailand had until 1 January 2003 to phase out their TEL for the manufacturing sector. The newer members of ASEAN, Cambodia, Laos and Vietnam have until 1 January 2010.
A ministerial-level ASEAN Investment Area Council has been established to oversee the implementation of the Framework Agreement. The Council is assisted by the ASEAN Coordinating Committee on Investment. Three approaches will form the main pillars for establishing the ASEAN Investment Area:

- The Cooperation and Facilitation Program enhances ASEAN's competitiveness and provide investors with an efficient and low-transaction cost investment environment. It includes activities aiming at facilitating investment flows, human-resource development and the upgrading of skills of ASEAN investment agencies.
- The Promotion and Awareness Program promotes ASEAN as a single investment destination. It aims to give investors a better understanding and awareness of the

region's investment opportunities. This program includes regular high-level outward ASEAN Joint Investment Promotion Missions, the creation of investment websites and databases, and the publications of timely and useful investment information.

- The Liberalization Program opens up investment regimes throughout the region by eliminating investment barriers, liberalizing investment rules and policies, and granting national treatment.

As ASEAN progresses towards more integration, liberalization has slowed down with the arrival of new members such as Laos, Myanmar, and Cambodia. All of this has convinced the city-state of Singapore to become very aggressive over the past few years in signing free trade agreements, which include rules on investment, with partners such as New Zealand, Japan, the European Free Trade Association, Australia, and more recently the United States. It is also negotiating with Canada, Mexico, the Republic of Korea, and India.

5.2.3. European Union

Except for the right of establishment and the freedom of capital, each individual EU state retains the right to negotiate investment agreements. In fact, it is worth noting that when the European Union negotiate a free trade agreement with Mexico and with Chile, the rules on investment were negotiated separately by member states (bilateral investment treaties), with the exception of the provisions on right of establishment and transfers of payments.

Should CARICOM countries wish to adopt the EU model, this would mean that they would not negotiate an Investment Code since each individual CARICOM economy/country would remain free to sign investment agreements with other CARICOM members or with non-members. Chapter Three of the Revised Treaty of Chaguaramas, which covers establishment, services, capital, and movement of community nationals, would be the only CARICOM agreement addressing investment-related issues.

5.2.4. NAFTA

The NAFTA does not impose any type of harmonization of domestic investment policy among its three Parties. Therefore, under NAFTA, each Party retains the right to maintain its own laws and regulations relating to investment *as long as* they do not violate the rules of the investment chapter. NAFTA Parties were allowed to take reservations with respect to national treatment, MFN treatment, performance requirements, and senior management and boards of directors at the entry into force of the agreement. They were also allowed to take reservations for future measures. Mexico was allowed to list activities reserved to the State, and a fourth NAFTA Annex deals with exceptions for MFN treatment with respect to international agreements.

While Chapter Three of the Revised Treaty of Chaguaramas includes some market access components such as the right of establishment, it does not address protection elements. In order for the CARICOM regime to cover both market access and protection, it would be necessary to complement what is in Chapter Three of the Revised Treaty of Chaguaramas with provisions on expropriation, transfer, and minimum standard of treatment, among others, and also to devise an investor-state dispute settlement mechanism.

5.2.5. MERCOSUR

As MERCOSUR has not yet ratified its two investment protocols signed in 1994, it is fair to say that there is not as such a common investment policy among MERCOSUR members. It is also fair to underline that MERCOSUR is not a model that CARICOM countries should wish to follow. The MERCOSUR Protocols on investment do not include a market access component. They are strictly contemplating the post-establishment phase of an investment. The Protocol of Montevideo in MERCOSUR does have a market access component because it includes commercial presence. However, unlike CARICOM a positive list has been used by MERCOSUR countries and, more importantly, the 1998 Protocol has yet to be ratified.

6. Section III. Questions and Options for CARICOM

The harmonization of CARICOM's investment regime remains a key challenge for the region. Although other policy instruments will need to be implemented to ensure that countries of the Caribbean reap the full benefits of their efforts to attract foreign investment, the signaling effects of a negotiated binding investment instrument providing legal security to international investors would undoubtedly help position the region and improve its business environment. But countries of the Caribbean must reflect on what approach and which option would best meet their needs and priorities in this respect. The following Menu of Options raises a number of questions and establishes a few scenarios.

6.1. A BINDING OR NON-BINDING AGREEMENT

The first question to be addressed is whether a future CARICOM Investment Agreement would be binding on Parties. As mentioned above, a binding agreement would provide legal security to investors and contribute to foster an increase in foreign investment. It would also represent an important step toward creating a single integrated market. A large unified CARICOM investment space would provide the inducement for an investor to locate production within the market rather than serving it by exports. A new CARICOM Investment Space would be particularly attractive to market-seeking investors in services sectors where a market of sufficient size is not the primary condition, as opposed to goods, to warrant the investor's location decision. The effectiveness of a binding Investment Agreement would depend on the willingness of Member States to follow through with implementation. Although the signaling effects of an investment agreement, which would be limited to intra-CARICOM investment would nonetheless be significant, CARICOM countries need to ensure that they do not discriminate against investments and investors of Third Party.

6.2. SCOPE AND COVERAGE OF THE AGREEMENT

In general, investment agreements do not apply to all investments and investors, but rather to measures adopted or maintained by a Party relating to investors of another Party and investments of investors of another Party. In the case of a CARICOM Investment Agreement, what would be the key objectives of this Agreement? Would it cover investment in goods *and* services, taking into account what is already covered under Chapter 3 of the Revised Treaty of Chaguaramas and also the growing tendency of firms to produce and sell goods, services or ideas on an integrated basis?

CARICOM countries have also to decide on the general scope of the agreement. The substantive scope consists of the disciplines and the definitions of issues such as investment and investor. The temporal scope informs on whether the agreement applies to all investments of investors of another Party made before or after the entry into force of the agreement and whether it follows the same approach in terms of the disputes that arose before the agreement came into effect, whereas the territorial scope focuses on the territory of the Parties that fall under the agreement.

6.2.1. Definitions of Investment and Investor

The definitions of investment and investor are the key elements of an investment agreement because they constitute the main parameters identifying to whom the provisions of the investment chapter will apply and who will benefit from these provisions.

With respect to the definition of investment, CARICOM countries have to decide:

- Whether they would favor a broad asset-based definition of investment (encompassing all forms of investment including portfolio and intangible assets such as intellectual property) which would include new forms of an investment which could be developed in the future or whether the definition of investment should only focus on FDI;
- Whether the definition should be broad-based but linked to the activities of an enterprise as in NAFTA and include an exhaustive list of assets;
- Whether the definition should specifically refer to the characteristics of an investment such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk, as under the recently concluded US-Chile Free Trade Agreement;
- Whether the definition should clarify what does not constitute an investment.

In fact, although the objective of adopting a comprehensive definition is to afford protection to as many forms of investment as possible, there has been an attempt in a few recent agreements—albeit neither in the MERCOSUR Protocols nor in the EU provisions— to avoid coverage of purely monetary or speculative flows. The NAFTA, for example, adopted an “asset-based” definition encompassing a broad list of assets that are expressly linked with the activities of an enterprise, and excludes, among others, those transactions that might occur in capital or money markets with no connection to a specific investment and claims to money that arise solely from commercial contracts.

The definition of the term investor is another key component of the scope of an investment agreement. The definition of the term investor, which includes natural (i.e. individuals) and juridical (i.e. companies) persons, plays a major role in determining who enjoys the benefits of the agreement.

CARICOM countries should therefore decide:

- Whether the concept of natural person should be broadened to include not only nationals but also permanent residents;
- How to define an investor who is a dual national; and
- Whether the concept of juridical person should be based on incorporation as it is in

most agreements, which means that an enterprise organized under the laws of a CARICOM member would be defined as an investor but need not to be controlled by nationals of that country. The benefits of a CARICOM Investment Agreement would not apply to investors of non-CARICOM countries but may apply indirectly to them through their CARICOM subsidiaries.

6.2.2. National Treatment and MFN Treatment

The case for open markets is as compelling for investment as it is for trade. For much of the period up until the mid-1980s, investment could essentially be understood as substituting for trade. High tariffs would encourage firms to invest in a country and serve the national market. Such a relationship has today largely given way to complimentarity between trade and investment – market access and market presence - in an environment characterized by significant worldwide liberalization of trade and investment regimes. Simply put, internationally active firms today have more business models to choose from in deciding how best to access and serve foreign markets. They can much more readily choose the optimal means - trade, foreign direct investment (FDI), licensing - to maximize their access to resources, intermediate inputs and clients and, in the process, increase their competitiveness. This is true for goods and especially for services.

Modern investment agreement require non-discriminatory treatment in *all* phases of an investment, i.e. with respect to the establishment, acquisition, expansion, management, conduct, operation, sale, or other disposition of investments. This means that CARICOM investors would encounter the same treatment throughout the region, subject to country-specific exceptions with respect to a number of measures. In fact, what is essential to highlight here is that each CARICOM country would take reservations/country-specific exceptions with respect to a limited number of provisions in the Agreement (such as national treatment, most-favored-nation (MFN) treatment, performance requirements, and senior management and boards of directors). Each reservation in the Agreement exempts specific existing non-conforming measures (any law, regulation, procedure, requirement or practice) of a Party from one or more of these obligations. Some reservations could "consolidate" the status quo, while others would set out liberalization commitments. Some of these commitments would take effect immediately at the entry into force of the Agreement, while others would be phased-in over time. CARICOM countries would also need to decide whether a unilateral action to liberalize a measure would imply that this measure cannot be amended or replaced with a new measure that is more non-conforming. This concept is known as "ratcheting."

Traditional European-style investment agreements do not include a market access component. Their provision on admission of investment refers to the laws and regulations of the host country and does not provide for as great of level of certainty as the previous option because a country can change its laws and regulations and close any economic sector to foreign investment at any point in time. This is, for example, the case of MERCOSUR.

6.2.3. Flexibility for Disadvantaged Countries, Regions, and Sectors

The key question under the “market access” approach is whether it is flexible enough to take into account the special circumstances of disadvantaged countries, regions and sectors. The answer to this question is affirmative. CARICOM countries would be able to have a list of reservations for future measures under which a Party to the agreement would be allowed to maintain existing non-conforming measures respecting the listed sectors and activities and, most importantly, would be allowed to adopt new measures that are more non-conforming (i.e. more protectionist) with respect to a limited number of provisions such as national treatment, MFN treatment, performance requirements, and senior management and boards of directors.

6.2.4. Performance Requirements and Incentives

In most modern investment agreements the provision on performance requirements apply to *all investments,* which means that under a CARICOM Investment Agreement, such provision would also apply to investors of non-CARICOM countries, in contrast to all the other provisions. But should a CARICOM Investment Agreement cover performance requirements and incentives? Should specific mandatory performance requirements (conditions or requirements that are imposed for the establishment and/or operation of an investment) be banned? And should specific incentive-based performance requirements (conditions that an investor must meet to secure a government advantage (subsidy) or incentive) be also banned? Some performance requirements, while banned under the first type of condition, could be allowed when they condition the conferral of an advantage or a subsidy. Some examples include requirements to locate production, provide a service, train or employ workers, construct or expand particular facilities or carry out research and development. Such provision would allow each CARICOM member to maintain a different investment incentive regime. It is worth noting that no regional grouping has fully addressed the issue of investment incentives and agree to harmonize its regime yet.

The main issue is to determine what would be the objective of a provision on performance requirements and what type of activities it would/could cover: establishment, acquisition, expansion, administration, management, conduct, operation, sale or other disposition of an investment, i.e. all phases of an investment?

The scope of the provision on performance requirements in the MERCOSUR Colonia Protocol is narrower than the corresponding provision in the NAFTA. The Colonia Protocol underlines that “No Contracting Party shall establish performance requirements for the establishment, expansion or maintenance of investments which require or demand commitments to export goods, or specify certain goods or services to be acquired locally or impose any other similar requirement,” whereas the NAFTA prohibits the imposition of performance requirements to achieve a given level or percentage of domestic content; to purchase local goods and services; to impose trade- or foreign exchange-balancing requirements; to restrict domestic sales of goods or services; to export a given level or percentage of goods and services; to transfer technology; and to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market. The first four requirements are prohibited as a condition for receiving an advantage (for instance in the form of an investment incentive). The NAFTA also allows for reservations to be lodged against its provisions on performance requirements.

6.2.4.1. Flexibility for Disadvantaged Countries, Regions, and Sectors

As noted under national treatment and MFN treatment, CARICOM members could take country-exceptions, including taking into account the special circumstances of disadvantaged countries, regions and sector. They would then be able to maintain or adopt future measures that would violate the provision on performance requirements.

6.2.4.2. Senior Management and Boards of Directors

Modern investment agreements grant to investors covered under those agreements the right to employ, in senior management positions, personnel within the host country without regard to the nationality or citizenship of the person concerned. However, in some cases, resident or nationality requirements are permitted for the majority of boards of directors.

6.2.4.3. Transfers

Generally, investment agreements guarantee the free transfers of funds relating to the operation of an investment and include a non-exhaustive list of types of payments for which the transfer of funds is to be guaranteed. In addition, the provision state that all payments relating to an investment of an investor of another Party can be transferred in a freely convertible currency or freely usable currency (as defined by the International Monetary Fund) at the market rate of exchange prevailing on the date of transfer.

What would be the limitations or exceptions permitted under this provision? Would the restrictions to the free transfer of investment-related funds be allowed in the case of the equitable and non-discriminatory application of the host State’s legislation in the following areas:

- Bankruptcy, insolvency or the protection of the rights of creditors;
- Issuing, trading or dealing in securities;
- Criminal or penal offenses;
- Reports of transfers of currency or other monetary instruments; and
- Ensuring the satisfaction of awards, warrants, or court orders in judicial or administrative proceedings.

Would exceptions be also allowed in the case of balance-of-payment problems, as it is under several trade and investment agreements?

6.4.5. Minimum Standard of Treatment

A CARICOM Agreement on Investment could also include a provision on minimum standard of treatment related to customary international law. In fact, Fair and Equitable Treatment is a standard of treatment different from MFN treatment and national treatment, which are relative standards of treatment, because they involve a comparison between the treatment accorded to investors and the investments of investors of one Party with investors and investments of investors of another Party, or those of a Third State.

The definition of the concept of fair and equitable treatment is open to discussion in international forums. Nevertheless, it is clear that the primary objective is to provide a minimum standard of treatment, which is related to Customary International Law. A large number of investment instruments contain a fair and equitable treatment provision and often combine this concept with other principles of International Law, such as level of protection and security and non-discrimination.

6.4.6. Expropriation

An important concern of foreign investors is to ensure that their interests are protected in the event that the host country expropriates their investment. Agreements on Investment include a provision that prohibits a Party from directly or indirectly nationalizing or expropriating an investment of an investor of another Party except when done for a public purpose, on a non-discriminatory basis, in accordance with due process of law, and on payment of prompt, adequate and effective compensation.

Would a provision on expropriation identify factors to determine the nature of an indirect expropriation, as in the recently concluded US-Chile Free Trade Agreement, where such determination must be case and fact specific, and must take into account a list of factors such as: a) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; b) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and c) the character of the government action? Would it be useful for CARICOM members to recall, as Parties do in the US-Chile FTA, that “except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations"?

6.4.7. Compensation for Losses

Investment agreements do not, in principle, require a state to pay compensation in a situation where an investor of another Party suffers losses in the host country due to war or other armed conflict, civil disturbances, state of emergency or similar events. Most agreements, however, provide for national treatment and MFN treatment in respect to any measure a Party adopts or maintains related to those losses. Such provision would allow CARICOM member states to specify that they could discriminate in favor of national investors in the case of natural disasters such as hurricanes.

6.4.8. Dispute Settlement

Would a CARICOM Agreement on Investment include an investor-state dispute settlement mechanism whereby an investor of a CARICOM member country would be able to seek redress against another CARICOM country? Should the investor be given the choice between the local courts and international arbitration, and should this choice be final, as it is in some agreements in order to avoid simultaneous procedures and contradictory decisions?

A CARICOM Agreement on Investment could include an investor-state dispute settlement mechanism whereby an investor of a CARICOM member country would be able to seek redress against another CARICOM country. The investor should be given the choice between the local courts and international arbitration, and this choice should be final. Unlike NAFTA, an appellate body should be established and, in order to prevent frivolous claims, the mechanism should provide that such frivolous claims be punished by requiring the investor losing the case to pay the fees of the government.

6.4.9. Investment, Environment, and Labor Issues

A CARICOM Investment Agreement could underline that nothing in the Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with the Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns. The Parties could also recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. Should a CARICOM Agreement on Investment also add that if a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement? Similar language could be added relating to the labor issue.

ANNEX I

APEC

APEC now counts 21 member economies. It was established in 1989 in response to the growing interdependence among Asia-Pacific economies. Its goal is to advance Asia-Pacific economic dynamism and sense of community. The 12 founding members (Australia, Brunei Darussalam, Canada, Indonesia, Japan, Republic of Korea, Malaysia, New Zealand, the Republic of the Philippines, Singapore, Thailand and the United States) welcomed as new members the People's Republic of China, Hong Kong (its designation has been changed to Hong Kong, China since 1 July 1997) and Chinese Taipei in 1991, Mexico and Papua New Guinea in 1993, Chile in 1994, and Peru, Russia and Vietnam effective in 1998. APEC also includes three observers: the Association of Southeast Asian Nations (ASEAN) Secretariat, the Pacific Economic Cooperation Council (PECC) and the Pacific Islands Forum Secretariat (PIF).

ASEAN

The Association of Southeast Asian Nations or ASEAN was established on 8 August 1967 in Bangkok by Indonesia, Malaysia, Philippines, Singapore, and Thailand. Brunei Darussalam joined on 8 January 1984, Vietnam on 28 July 1995, Laos and Myanmar on 23 July 1997, and Cambodia on 30 April 1999. The ASEAN Declaration states that the aims and purposes of the Association are: (i) to accelerate the economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of Southeast Asian nations, and (ii) to promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries in the region and adherence to the principles of the United Nations Charter.

The ASEAN Free Trade Area (AFTA) was signed in 1992. It is essentially a traditional free trade area covering trade in goods but does also includes rules in a few other areas such as investment. The Framework Agreement on ASEAN Investment Area (AIA) was adopted in 1998 and amended in 2001.

CARICOM

The Caribbean Community (CARICOM) is integrated by 15 states and territories, 14 of which are independent and one of which, Montserrat, is an Overseas Territory of the United Kingdom.[19] Its most recent member, Haiti, joined CARICOM in 2002. The

[19] **Caribbean Community Member States (by year of accession):** Barbados (1973), Guyana (1973),

Community has three associate members—Anguilla, the British Virgin Islands, and the Turks and Caicos Islands, while the Cayman Islands and Bermuda are in the process of negotiating similar membership.

Established by the Treaty of Chaguaramas on 4 July 1973, the Caribbean Community grew out of the Caribbean Free Trade Association (CARIFTA) created in 1968. In its current form, CARICOM brings together a geographic space of 463,084 squared kilometers, with a population of 13,425,635. The functions and objectives of the Community, as stipulated by the Treaty, revolve around three main pillars of the integration movement:

- *Economic integration of the Member States*, through the establishment of a common market regime involving the free movement of goods, services, capital, and people;
- *Functional cooperation* in areas of common interest to Member States, such as health, education, the environment, science and technology, culture, and meteorology; and
- *Coordination of the foreign policies of Member States*, particularly vis-à-vis the Community's major trade partners.

In 1989, CARICOM members agreed to pursue a yet more ambitious goal, the establishment of a CARICOM single market and economy (CSME). The Annex to the 1973 Treaty of Chaguaramas specified five areas of activities for the Common Market Arrangements: Trade Liberalisation; the Common External Tariff (CET); the Common Protective Policy (CPP); Factor Mobility; and Coordination of Economic Policies and Production Integration. In 2001, a number of Heads of Government signed a *Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market Economy*. The revised Treaty has nine protocols that aim to facilitate the adoption of the CSME, providing for new institutions and procedures; the complete removal of remaining barriers to the free movement of goods, services, skilled persons, and capital; and the coordination and harmonisation of key aspects of economic policy.

Enjoined by the Treaty of Chaguaramas to present a common front to the external world, CARICOM members have been successful in crafting the required mechanism to present a common position in economic affairs and have strengthened themselves to participate in the major global negotiations. Economic relations have been developed and expanded with the major powers of the region, the United States, Canada, and the European Union. In addition, CARICOM has intensified its relations with Latin American countries, signing trade agreements with Venezuela, Colombia, the Dominican Republic and, most recently, concluding a free trade agreement with Costa Rica. At the same time, the Community has made extensive preparations to meet the challenges involved in the negotiations of the Doha Development Agenda at the World Trade Organisation (WTO) and in the Free Trade Area of the Americas (FTAA).

The Revised Treaty of Chaguaramas governs the treatment of services in CARICOM. It

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Jamaica (1973), Trinidad and Tobago (1973), Antigua and Barbuda (1974), Belize (1974), Dominica (1974), Grenada (1974), Montserrat (1974), St. Kitts-Nevis-Anguilla (1974), St. Lucia (1974), St. Vincent and the Grenadines (1974), The Bahamas (1983), Suriname (1995), Haiti (2002).

covers establishment, services and capital. The Protocol represents the most single most important advance in the movement toward the creation of the CARICOM Single Market and Economy through the conferment of the right of establishment, the right to provide services, and the right to move capital by any CARICOM national in the community. It prohibits the introduction of new restrictions on the provision of services, and strengthens such disciplines when restrictions are imposed. Subject to country exceptions, it requires the removal of existing restrictions on the free movement of services, the right of establishment, the right to move capital, and the free movement of labour.

DRAFT MULTILATERAL AGREEMENT ON INVESTMENT (MAI)

The United States successfully convinced its partners at the Organisation for Economic Cooperation and Development (OECD) to start negotiating, in 1995, a multilateral agreement on investment, which would be a free-standing international treaty open to non-member countries, with high standards of liberalisation, investment protection and effective dispute settlement procedures. The 1997 deadline to complete the negotiations was extended to the 1998 Ministerial Meeting held in Paris on 27-28 April.

The MAI negotiations ended in failure in the Fall of 1998, after the French government had announced that it was pulling out of these negotiations. The reasons for this failure lie, for some analysts, in the numerous issues, which remained to be resolved (exceptions, culture, the coverage of sub-national levels of government, extra-territorial measures, labor and environment, and definitions) when the talks broke down. Others highlight that a coalition of non-governmental organizations (NGOs) had campaigned against the agreement and successfully used the Internet trying to convince everyone that the MAI was a bad deal only benefiting multilateral corporations. Finally, others, closer to the negotiations, have suggested that the MAI failed because the agreement did not generate the benefits necessary to motivate the body politic and the business sector “to bite the bullet” and push for the conclusion of the negotiations.

In the United States, the Administration had no political appetite to fight for the MAI in early 1998, after having been unable to convince Congress to renew the fast-track negotiating authority in November 1997. Former U.S. Trade Representative Charlene Barshefsky told reporters on 13 February 1998 that the agreement “was simply not good enough” and that the United States “did not envision signing on to it” at the OECD Ministerial meeting in April 1998. The business sector in most OECD countries was also not very enthusiastic because the MAI would not have eliminated the very few investment barriers currently in place in these countries. Members were prepared at best to bind existing liberalization. Another element played against the agreement. The MAI was a single-issue negotiation, which meant that all the trade-offs needed to be made within the context of the investment provisions. In the Americas, the United States, Canada, and Mexico participated from 1995 to 1998 in the MAI negotiations, whereas Argentina, Brazil, and Chile took part in these negotiations as observers starting in 1997.

EUROPEAN UNION (EU)

The process of European integration was launched on 9 May 1950 when France officially proposed to create the first concrete foundation of a European federation. Six countries (Belgium, Germany, France, Italy, Luxembourg and the Netherlands) joined from the very beginning. The Treaty of Rome, which came into effect on 1 January 1958, was based on the principle of four freedoms: the free movement of goods, of persons, of services and of capital.

Today, after a few waves of accessions (1973: Denmark, Ireland and the United Kingdom; 1981: Greece; 1986: Spain and Portugal; 1995: Austria, Finland and Sweden) the EU has 15 Member States and agreed to the formal admission of 10 additional members (Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia) at the Athens Summit held on 16 April 2003.

The Treaty establishing the European Community (EC) does not incorporate comprehensive investment disciplines. Rather, the intra-EU investment regime is enshrined in a few key provisions, the most important of which are Articles 43 and 56 encompassing the right of establishment and the freedom of capital, respectively. These complement the freedoms to sell goods and services freely within the Single Market and for EU nationals to seek Community-wide employment opportunities in the context of a common labor market.

In 1988, the adoption—against the backdrop of the Single European Act—of Directive 88/361/EEC stipulating the full liberalization of capital movements between Community members, placed the free movement of capital on a par with the free movement of goods, services and persons.

MERCOSUR

The presidents of Argentina, Brazil, Paraguay, and Uruguay signed the Treaty of Asunción on 26 March 1991, with the objective of establishing the Common Market of the South (MERCOSUR). The treaty called for the free circulation of goods, services, and factors of production among member countries by 1 January 1995, through the elimination of tariffs and nontariff barriers, the adoption of a common external tariff and a common trade policy, the coordination of macroeconomic and sectoral policies, and the harmonisation of the members’ legislation in relevant areas.

MERCOSUR member states have adopted two different approaches to investment rule-making. Under the first approach, rules focus primarily on matters of investment protection, and cover both goods and services. The Colonia Protocol promotes and protects the investments of an investor of another MERCOSUR country into the territory of a member state, whereas the Buenos Aires Protocol covers investments from non-members. A second approach aims at liberalizing investment regimes, but does so for services only. The Protocol of Montevideo on Trade in Services, which applies to the market access (or liberalisation) dimension of investment rule-making, calls for the progressive liberalisation, through annual rounds of negotiations among member countries, of all restrictions affecting services trade and investment in MERCOSUR within ten years of the entry force of the Protocol. It bears recalling that these Protocols are not yet in force, although specific commitments within the context of the Protocol of Montevideo have already been negotiated and approved by MERCOSUR's Common Market Council.[20]

NAFTA

Continental integration has been achieved in several phases in North America. Until 1989 corporate strategies, government policies, and sectoral agreements had been the main instruments enabling producers to rationalize their operations and become more efficient. The 1980s marked a turning point in the relationship among the three countries. First, Canada announced in 1985 that it would seek freer trade with the United States. The Canada-U.S. Free Trade Agreement was signed on 2 January 1988, and entered into force on 1 January 1989. The agreement removed trade barriers in goods between the two countries and reduced several impediments to trade in services and to investment.

Mexico undertook a series of ambitious economic reforms in the mid-1980s. On the trade front, Mexico joined the General Agreement on Tariffs and Trade (GATT) in 1986, lowering its maximum tariffs to 20 percent and eliminating import licenses on all but 20 percent of imports. In 1989 Mexico signed a framework agreement with the United States mandating a series of sectoral trade negotiations. A year later Mexico approached the United States about negotiating a free trade agreement. Canada also announced that it would join the talks. The NAFTA negotiations began in Toronto on 12 June 1991, and ended at the Watergate Hotel in Washington, D.C., on 12 August 1992. Two side agreements, one on labour cooperation and one on environmental cooperation, were negotiated in 1993 and implemented in parallel to NAFTA. They were designed to facilitate greater cooperation between the NAFTA countries and to promote the effective enforcement of each country's laws and regulations.

The NAFTA chapter on investment covers both goods and services and includes a protection element and a market access component. Services in NAFTA are dealt with in several chapters, namely chapter 11 on investment, chapter 12 on cross-border services, chapter 13 on telecommunications, chapter 14 on financial services, and chapter 16 on temporary entry for business persons. NAFTA innovates in that it requires parties to liberalize all their discriminatory measures in the area of cross-border services, financial services (which covers cross-border trade and investment in financial services), and investment (which covers both goods and services), except those that are specifically listed in the annexes to the agreement.

[20] Protocol of Colonia for the Promotion and Reciprocal Protection of Investments in MERCOSUR, January 17, 1994; MERCOSUR/CMC/Dec No. 11/93. MERCOSUR's Protocol for the Promotion and Protection of Investment of Third States (Buenos Aires Protocol), August 5, 1994; MERCOSUR/CMC/Dec. No. 11/94. Protocol of Montevideo on Trade in Services in MERCOSUR, December 15, 1997; MERCOSUR/CMC/DEC Nº 13/97. On the negotiation of specific commitments in the context of the Protocol of Montevideo, see MERCOSUR/CMC/ DEC Nº 1/00 (June 29, 2000).

[i] FDI: Foreign Direct Investment
[ii] PSP: Private Sector Participation
[iii] FTZ: Free trade Zones
[iv] EU: European Union
[v] BITs: Bilateral Investment Treaties
U.K.: United Kingdom