



CARIFORUM EPA and beyond: Recommendations for Negotiations on Services and Trade related Issues

The CARIFORUM-EU EPA and Interim Agreement between Other-ACP Regions and the EU: Investment Provisions and Commitments
– Working Paper –

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Executive Summary

Part I of this study highlights key investment provisions in the recently concluded CARIFORUM-EU Economic Partnership Agreement (EPA) and the effect of these provisions on EU investment into the CARIFORUM region. These are compared with the outcomes of other regional Caribbean investment treaties and with investment treaties negotiated with individual EU Member States. Part II looks briefly at the investment provisions of four interim EPAs concluded between the EU and other African Caribbean Pacific regions.

Findings can be summarized as follows:

- Limited EU competence in the area of investment means the EPA addresses only direct investment through establishment of a commercial presence and does not include investment protection provisions;
- The investment chapter (Chapter 2 Commercial Presence) includes provisions covering commercial presence in services sectors, but sectoral coverage and reservations for services and non-services sectors are not included in the same CARIFORUM schedule;
- However, the EU approach differs and commitments in both services and non-services are included together in the same schedule. The EU uses a mixed positive and negative list approach;
- Sensitive sectors are carved out of the scope of the Commercial Presence Chapter altogether;
- EU investors are accorded market access and national treatment in certain sectors, subject to exceptions within those sectors;
- Market access and national treatment commitments reportedly do not require signatory CARIFORUM states to amend existing legislation and regulations;
- Most favoured nation treatment imposes negligible requirements on the current and future regulation of EU investment in CARIFORUM states, and does not require according EU investors the same treatment as CARIFORUM and CARICOM investors;
- Liberalisation comes from binding existing investment rules in specified sectors, except where future regulatory flexibility is explicitly preserved (in 32 cases);
- Regional investment treaties such as the Revised Treaty of Chaguaramas and the CARICOM Investment Code, and the CARICOM FTAs with the Dominican Republic and Costa Rica primarily address investment protection and, except for the FTA with Costa Rica are not yet fully implemented;
- BITs concluded between individual CARIFORUM states and EU Member States do not impose liberalisation requirements. They indirectly liberalise investment by giving investors greater certainty through investment protection commitments such as post establishment national treatment;
- The CARIFORUM-EU Commercial Presence Chapter does not introduce any new institutions or procedures;

- The importance of CARIFORUM regional integration is recognized in the Commercial Presence Chapter and investment provisions are unlikely to disrupt regional integration and result in EU investment crowding out intra-regional flows;
- Work done to prepare the CARIFORUM schedule of commitments and reservations should aid the same process still to be undertaken in other regional treaties;
- The four interim EPAs involving African regions examined here require concluding investment negotiations either by 31 December 2008 or 31 July 2009;
- No targets or requirements for a final EPA outcome on investment liberalisation are established in these interim agreements, nor in the Cotonou Agreement.

Introduction

Part I of this study analyses the investment provisions of the CARIFORUM-EU Economic Partnership Agreement (EPA). The text was initialed in December 2007 and signature is due to take place in June 2008. It is yet to be determined when the Agreement will enter into force. Part II looks at the treatment of investment issues in four interim EPAs concluded by the EU with: the East African Community, the Eastern and Southern African States, the Southern African Development Community, and Ghana.¹

Investment provisions in the CARIFORUM-EU EPA are examined in the context of the negotiating constraint the EU faces under its organisational structure with the division of 'competence' between Member States and the representative organ. FDI is not yet within the scope of the EC's – the EU's executive branch - Common Commercial Policy, despite the inclusion of other trade-related issues such as intellectual property.² The EC currently has non-exclusive competency over investment. This constraint means the EC applies a trade construct to the negotiation of investment issues. Attempts to overcome this in the draft European Constitution were partly successful, though the Constitution was never adopted.³ The Reform Treaty (Treaty of Lisbon), signed in late 2007 but not yet ratified, brings FDI under the EU's Common Commercial Policy, but then adds that legal competencies over FDI are unaffected. This has created confusion and leaves open the question of who holds competency to negotiate international investment agreements (IIAs) – the EC or Member States.⁴

Currently, EU Member States negotiate their own bilateral investment treaties (BITs). The EC participated in WTO investment discussions with the approval of all Member Countries until the Singapore issues were sidelined after the 2003 Cancun Conference. And economic integration agreements such as EPAs remain limited to including investment provisions concerning liberalisation and market access. The important issue of investment protection is regarded as outside the EC's competence and so remains the domain of Member States' BITs. Also, it leaves the EU open to only negotiate on a limited type of investment: commercial presence. Member States negotiate BITs to cover both FDI and other forms of investment and assets. Another consequence is that EU Member States still have to approve the final version of investment provisions included in the EPA.

¹ Ghana and Cote d'Ivoire are members of the West African region. Both concluded individual interim agreements with the EU in the absence of a consensus position for a region-wide interim agreement.

² D. Vis-Dunbar, 'European treaty may revive debate over power to conclude investment agreements', *Investment Treaty News* (IISD), 31 October 2007.

³ See proposed Article III-217.

⁴ Vis-Dunbar, *supra*, footnote 2.

1 The CARIFORUM-EU EPA

1.1 Explanation and analysis of investment provisions

1.1.1 How development friendly are the EPA's investment provisions?

Title II Chapters 1 (General Provisions) and 2 (Commercial Presence) contain provisions on investment that form the basis of Part I of this study. Title II Chapter 2 covers certain types of investment in services sectors and non-services sectors. Investments covered by Title II are referred to as "commercial presence".⁵ For ease of reference, the terms investment and commercial presence are used interchangeably here in connection with Title II of the EPA.

In assessing the outcome of investment negotiations in the CARIFORUM-EU EPA, this report examines, *inter alia*, how the provisions aid development. Development friendliness is a concept that requires some elaboration. Investment treaties seek to achieve one or more of the following objectives: investment promotion, protection, and liberalisation. All three objectives have pro-development implications. It is also the case that in pursuing these objectives, investment provisions may prove less effective in meeting development goals. That is, they may not adequately balance the interests of host governments and their right to regulate for development with the interests of foreign investors. A host government's commitments under investment treaties may sometimes conflict with its pursuit of more direct development goals.

Most IIAs (BITs and investment provisions in economic integration agreements) only address development issues indirectly by granting investment protection and liberalising investment rules. Relatively few investment treaties contain provisions that directly promote investment, though most make some reference to promotion and have the indirect objective of promoting investment.

The EPA's coverage of investment centres on the core 'treatment' elements of national treatment (NT) and most favoured nation (MFN) treatment,⁶ and a key liberalising provision, market access.⁷

The EPA makes limited use of investment protection provisions; Title III includes a guarantee that host governments will not restrict the free movement of capital relating to investments made under Title II (including the commercial presence chapter).⁸ The EPA does not seek to guarantee investors protection against expropriation of their investments without fair compensation, a guarantee commonly used in IIAs (see below in relation to CARICOM FTAs). Nor does it include dispute settlement and the means for investors to take claims for breach of treaty to international arbitration.⁹

Investment *promotion* is commonly the focus of development policy. Whilst promotion is an important, but indirect, outcome of the provisions in Chapters 1 and 2, it is covered directly in

⁵ Article 4.

⁶ Articles 7 and 9 respectively.

⁷ Article 6.

⁸ Title III Current Payments and Capital Movements, Article 2 Capital Movements.

⁹ Article 5, footnote 7.

Chapter 7, Article 60. Recommendations for future negotiations (discussed at 1.1.2 below) include options for more effective investment promotion in investment treaties.

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¹⁰ Article 4.

¹¹ Articles 7 and 9 respectively.

¹² Article 6.

¹³ Title III Current Payments and Capital Movements, Article 2 Capital Movements.

¹⁴ Article 5, footnote 7.

CARIFORUM's approach to investment negotiations

CARIFORUM countries are heavily dependent on inward investment flows to sustain their economies. Investment promotion has been pursued through a number of bilateral investments treaties between various CARIFORUM states and third states, including member states of the European Union. Tourism oriented investment accounts for the major portion of investment flows into the CARIFORUM region thereby giving rise to the need to seek different types of investment flows compatible with the broad based development strategies of CARIFORUM states.

Approach to the investment negotiations:

CARIFORUM sought a comprehensive investment agreement with the EC in the EPA for a number of reasons including:

- (i) the need to achieve greater predictability and transparency in investment flows into the region and greater security for investors and their investments (investor protection);
- (ii) the need to establish rules supportive of more favourable market access rights; and
- (iii) the need to achieve a broad based investment regime conducive to the technological development and social transformation (for example, greater employment) of CARIFORUM States.

Negotiating challenges and strategies:

CARIFORUM's principal negotiating objective was to secure, as far as possible, a comprehensive investment framework establishing rules for both market access and investment protection. Ideally CARIFORUM States hoped to use an EPA framework as a "one stop shop" in its investment relationship with the Member States of the European Union. On commencing negotiations, it quickly became evident that the EU's ongoing limited competency on investment would prove an obstacle to achieving this.

In light of the need to scale back its ambition on the scope of the investment chapter, CARIFORUM's negotiating strategy centered around securing agreement on rules that would facilitate greater investment flows and best lead to a pro-development outcome. The notion of a pro-development outcome has two dimensions:

- (i) the establishment of rules that would be conducive to investment flows in those areas of greatest economic importance to CARIFORUM states; and
- (ii) the reservation of the most sensitive areas of investment activity so as to ensure the maintenance of an effective policy space for CARIFORUM Governments conducive to national development. Accordingly, CARIFORUM has excluded sensitive areas such as the provision of public services and the provision of utilities from EPA investment liberalization.

Source: Edited extracts from A. Cunningham, 'The CARIFORUM States and the Economic Partnership Negotiations: A glance at negotiating strategies and negotiating outcomes', GTZ paper.

Commitments for the signatory CARIFORUM states on treatment and market access must strike a balance to maximize development needs. The EPA addresses development concerns by placing limitations on the extent of liberalisation and protection offered to EU

investors. It does this through narrowing the wording of provisions in Titles II and III, and the use of reservations, exceptions, transitional arrangements, and consultation mechanisms established under the Agreement.¹⁵ By limiting the treaty's coverage of investment to commercial presence, an important narrowing is assured. The constitution, acquisition or maintenance of a business, professional establishment or branch for the purpose of economic activity¹⁶ is a much more limited concept than commonly used asset-based definitions of investment that cover portfolio investments and a range of other assets such as intellectual property. Consequently, the EPA's investment provisions only apply to certain types of investment. This was driven by the EU's lack of competence to negotiate on all types of investment. Given CARIFORUM was a demandeur on many investment issues (see box) they might have preferred a broader definition that would have meant national treatment and MFN applied to more types of foreign investment. Other ACP regions should bare this in mind in their negotiations with the EU.

Scheduling commitments and setting out reservations allows development needs to be addressed. The phasing in of commitments for less developed economies is a development friendly technique the EPA uses for The Bahamas and Haiti.¹⁷ And non-conforming measures existing at the time of signature but not set out in the CARIFORUM Party's schedule may be added to the schedule within two years of the date of entry into force of the EPA. This leniency is of considerable benefit to developing countries and allows them to gradually adjust to the treaty commitments. A commitment to further negotiations and future liberalisation is another development friendly way of reducing the immediate impact of treaty commitments.¹⁸

The EPA is proactive in seeking to balance public and private interests. UNCTAD has noted that "(a)n alternative approach to balancing private and public interests, which to date has not been prominently explored in [investment treaties], would be to establish investor responsibilities directly... rather than only leaving the host country with the right to impose them through its domestic laws."¹⁹ Article 11 (Behaviour of Investors) goes some way to achieving this by requiring Parties to legislate to prevent things such as corruption in investment processes. However, Article 11 stops short of imposing a direct requirement on investors.

1.1.2 Recommendations for other regional EPA negotiations

In the current negotiating environment where the EU is limited in what it can negotiate on, the approach taken by CARIFORUM-EU negotiators can be commended for other ACP regions. It includes core international investment principles – NT, MFN treatment and market access²⁰ - defined and limited to address needs in a region that includes economies at different stages of development. A narrow definition of investment required by the EU will also be required in their negotiations with other ACP regions.

¹⁵ The latter is covered in Part V Institutional Provisions.

¹⁶ Article 4.

¹⁷ Article 3 bis.

¹⁸ Article 3.

¹⁹ UNCTAD IIA Monitor No. 2 (2007).

²⁰ Market access is frequently only applied to trade in services, rather than all foreign direct investment flows.

Coverage of the pre-establishment phase combined with an annex containing a schedule of commitments is to be commended for other ACP negotiations as a means of defining the extent of commitments. The positive list approach used in the CARIFORUM-EU EPA is arguably more appropriate for developing countries since it allows for a “bottoms-up” approach to protection and liberalisation with selection of sectors and sub-sectors to be subject to investment provisions. The GATS-style schedule adopted by signatory CARIFORUM states requires making commitments on MFN, NT or market access in a particular sector. A country thereby agrees to adhere to the principles defined by the agreement, subject to limitations listed in the schedule. “When making a commitment a government therefore binds the specified level of market access and national treatment and undertakes not to impose any new measures that would restrict entry into the market or the operation of the [commercial presence]. Specific commitments thus have an effect similar to a tariff binding — they are a guarantee to economic operators in other countries that the conditions of entry and operation in the market will not be changed to their disadvantage.”²¹

However, the implications are unclear where the *full* GATS approach to scheduling is not used. Capacity constraints were no doubt complicit in preventing CARIFORUM negotiators from providing greater detail of non-conforming measures and guaranteeing all non-conforming measures were included in the schedule. Details of relevant legislation ensure greater transparency and certainty in binding the specified level of access. For example, it is uncertain whether Grenada can increase fees for non-nationals without breaching its market access commitment:

Fishing: Grenada: The Legislation prescribes differential fees for non-nationals to obtain a license to engage in fishing activities.

If other ACP regions elect to use a positive list, it is recommended that more information is included in the schedule explaining exactly how the schedule will operate. A substantial capacity building initiative is recommended to assist with the preparation of EPA schedules in other regions. It is also worth noting that the use of reservations that retain the right to adopt or maintain measures in the future is a significant tool for retaining flexibility where this is perceived as necessary for development. The CARIFORUM schedule uses this extensively (see section 1.2).

If feasible in light of the EU’s competence to negotiate on investment, it is recommended several additional principles be considered for the remaining ACP negotiations: the prohibition of expropriation without just compensation, and the guarantees of fair and equitable treatment and full protection and security. These are well-established investment principles that do not obstruct development objectives but are central tenets of investment protection and amongst the basic investment guarantees. Signatory CARIFORUM states have agreed to these provisions in other IIAs (see sections 1.2 and 1.4) and numerous African countries already have some experience with these issues, though clearly require technical assistance in these areas. However, care should be taken to use legal formulations

²¹ ‘Guide to reading the GATS schedules of specific commitments and the list of article II (MFN) exemptions’, World Trade Organization, <http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm>

that have emerged in recent years to address concerns about a broad reading of indirect expropriation and fair and equitable treatment.²²

It is further recommended that if the EU receives an expanded negotiating mandate and additional investment principles are included in the remaining ACP EPAs, then negotiators consider including alternative dispute resolution methods such as mediation and conciliation. International investment arbitration is extensively used in IIAs but its benefits (strengthening the rule of law and providing greater certainty for investors) are sometimes outweighed by disadvantages for developing countries. For example, arbitration can be costly and may damage host government relations with the investor concerned.

A number of other issues less commonly addressed in investment agreements and which set a more proactive development agenda should also be considered to ensure remaining ACP negotiations are development friendly and enhance regional integration. These include provisions: requiring transparency and the exchange of investment-related information; fostering linkages between foreign investors and domestic companies; promoting capacity building and technical assistance; encouraging the transfer of technology; and requiring joint investment promotion activities.²³ Some of these issues are covered in the CARIFORUM-EU EPA, but not in the detail required to set a proactive development agenda (admittedly, this is always a negotiated outcome). Cooperation is covered in Chapter 7 of Title II, but there is little detail on how Parties can cooperate on investment promotion:

*Establishing mechanisms for promoting investment and joint ventures between service suppliers of the EC Party and of the Signatory CARIFORUM States, and enhancing the capacities of investment promotion agencies in Signatory CARIFORUM States.*²⁴

In conclusion, there are potential additional advantages from making greater use of investment promotion provisions and explicitly linking these to a country or region's strategic investment policies. Promotion provisions are most effective where they commit a contracting party to take positive steps to encourage investment. These can be harnessed to target specific sectors.²⁵ It is also necessary to consider what impact on investment flows investment treaty provisions have. It seems from the literature that investment provisions are likely to play a greater role in the development of some countries than in others.²⁶ A full assessment of the impact on other ACP regions is beyond the scope of this study.

²² On fair and equitable treatment see T. J. Westcott, 'Recent Practice on Fair and Equitable Treatment', the Journal of World Investment and Trade, Volume 8, Number 3, June 2007.

²³ UNCTAD IIA Monitor No. 2 (2007), p. 7.

²⁴ Article 60, paragraph 2(f).

²⁵ UNCTAD, *supra*, footnote 18.

²⁶ See for example Neumayer E and Spess L, 'Do bilateral investment treaties increase foreign direct investment to developing countries?' (May 2005), available online at: [http://eprints.lse.ac.uk/627/01/World_Dev_\(BITs\).pdf](http://eprints.lse.ac.uk/627/01/World_Dev_(BITs).pdf) ; Tobin J and Rose-Ackerman S, 'Bilateral investment treaties: do they stimulate foreign direct investment?' (June 2006), available online at: (www.upf.es/dret/civil/clef/sra.pdf). A different conclusion was reached in Gallagher K and Birch M, 'Do investment agreements attract investment? Evidence from Latin America', The Journal of World Investment and Trade, Volume 7, (December 2006), pp. 961–973.

1.2 CARIFORUM commitments on investment: a comparison between the EPA outcome and other intra-regional investment treaties

1.2.1 Commitments on investment in the CARIFORUM-EU EPA

As mentioned above, the three main commitments on investment set out in Chapter 2 are market access, NT and MFN treatment. Market access is a trade concept whose links with international investment law are usually limited to trade in services through commercial presence (so-called mode 3). It plays a larger role in the EPA due to the EU's limited competence to negotiate on investment. Commitments in Chapter 2 relate to commercial presence, a subset of foreign direct investment.

The EPA also includes a commitment in Article 11 for states to regulate the behaviour of investors to prevent corruption, ensure investors act in accordance with ILO core labour standards and do not circumvent international environmental and labour obligations, and liaise with local communities on natural resource projects.

1.2.1.1 Liberalisation of investment in signatory CARIFORUM states

Article 6 Market Access, guarantees commercial presences and investors from the EU access no less favourable than that set out in the CARIFORUM Party's schedule of commitments on investment (commercial presence).

Market access is assured in Article 6.2 by introducing limitations to the types of measures CARIFORUM states can use to regulate commercial presences and investors. Liberalisation of existing regulatory regimes is achieved by requiring all signatory CARIFORUM states to – where applicable - remove measures currently in place, and commit not to introduce measures in the future, that operate as:

- (a) limitations on the number of commercial presences whether in the form of numerical quotas, monopolies, exclusive rights or other commercial presence requirements such as economic needs tests;*
- (b) limitations on the total value of transactions or assets in the form of numerical quotas or the requirement of an economic needs test;*
- (c) limitations on the total number of operations or on the total quantity of output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test.*
- (d) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment; and*
- (e) measures which restrict or require specific types of establishment (subsidiary, branch, representative office) or joint ventures through which an investor of the other Party may perform an economic activity.*

However, these limitations do not apply to all sectors and laws. Scope is reduced in two ways: first, Article 5 sets out a list of sensitive sectors that are carved out from the scope of

Chapter 2, and second, Article 6.2 liberalisation is confined to selected sectors set out by signatory CARIFORUM states in its schedule and excludes laws and regulations (measures) specified therein. The relevant schedule is Annex 4.V List of Commitments on Investment (Commercial Presence) in Economic Activities other than Services Sectors.²⁷ Commercial presence in services sectors (mode 3) falls within the scope of Chapter 2, but unusually, sectoral coverage and non-conforming measures are set out in the separate services schedule.

Signatory CARIFORUM states have adopted a GATS-style schedule for investment in non-services sectors. The schedule sets out those sectors, including all sub-sectors, for which the market access and NT commitments apply. The sectors include: agriculture, hunting and forestry; fishing; mining and quarrying; manufacturing; production, transmission and distribution of electricity, gas, steam and hot water. Critically, the schedule also sets out reservations for measures that do not conform to the Article 6.2 market access liberalisation commitment or the Article 7 national treatment commitment.²⁸

Reservations are also made for sub-sectors or activities where there is currently no limitation on foreign investment, but where a CARIFORUM state seeks flexibility for possible future regulation of foreign investment in a manner inconsistent with its market access and national treatment obligations.²⁹ These reservations are usually formulated in the signatory CARIFORUM state's schedule as "[Country X] reserves the right to adopt or maintain any measures relating to...". The schedule contains 29 reservations taken out by individual signatory states for adopting possible future measures and three further reservations taken out by all 13 CARIFORUM states for adopting possible future measures.

1.2.1.2 Liberalisation through binding existing foreign investment regimes

The EPA contains no indication of what measures currently in place in CARIFORUM states are to be removed for CARIFORUM states to comply with this liberalisation. The Caribbean Regional Negotiation Machinery (CRNM) has indicated there will be very little need for legislative change to give effect to these commitments.³⁰ Some states may amend laws or regulations in their fishing sector to comply with Article 6.2. No details of these changes are discernable from the EPA or its schedules. Liberalisation will therefore principally be achieved through the 'binding' of existing regulatory practice and the resulting limitations placed on future 'tightening' of the regulation of commercial presences. That is, parties to the EPA commit to maintaining the current level of openness and procedural ease for the establishment of commercial presences. As noted above, binding of the existing regulatory landscape is limited by open reservations taken out by some CARIFORUM states.

²⁷ This revised version was provided by CRNM on 28 March 2008.

²⁸ Note that the schedule does not mention that non-conforming measures listed are reservations against the provisions on market access or national treatment. However, Article 8 (List of Commitments) states: "and, by means of reservations, the market access and national treatment limitations applicable to commercial presences and investors of the other Party in those sectors are set out in lists of commitments..."

²⁹ For example, "Forestry and Logging: DMA, VCT: The State reserves the right to adopt or maintain measures on investment in this sector."

³⁰ Email to the author from CRNM, 4 April 2008.

1.2.1.3 Scope

Chapter 2 applies to both the pre and post-establishment phases of investment. The chapter therefore commits parties to provide NT or MFN treatment to the setting up a commercial presence, including everything from the approval processes through to the operations phase of a commercial presence. Article 1 defines commercial presence to include the “constitution” and “acquisition” of a juridical person.

1.2.1.4 Transparency

Transparency is also critical to notions of liberalisation and is often cited as a liberalising effect of IIAs. The transparent articulation of exceptions to treaty commitments on investment, including referencing the particular measures (law or regulation), allows investors to make more informed decisions and thereby amounts to a more liberal and open investment environment. The signatory CARIFORUM states’ schedule provides limited transparency because little information is provided on non-conforming measures. No doubt negotiators were wary of this and had in mind that transparency would be improved considerably as part of the mechanism for ongoing discussions and future negotiations established under Article 13 (Review).

1.2.1.5 Most favoured nation treatment

CARIFORUM states need not automatically pass on the same treatment to EU investors that they provide to foreign investors from small developing and least developed countries. MFN treatment is offered to EU investors under Article 9.1 with exceptions to its application set out in paragraphs that follow. In principle, EU investors and their commercial presences are guaranteed:

treatment no less favourable than the most favourable [Signatory CARIFORUM states] may accord to like commercial presences and investors of any major trading economy with whom they conclude an economic integration agreement after the signature of this Agreement.

Three exceptions to MFN treatment are worthy of note. First, the MFN obligation only requires that CARIFORUM states provide EU investors treatment no less favourable than they provide to investors from a "major trading economy" under an economic integration agreement. “Major trading economy” is defined to include “any industrialised country, or any country accounting for a share of world merchandise exports above one percent”. The reciprocal EU commitment for CARIFORUM investors is greater and requires providing treatment no less favourable than that accorded to investors or commercial presences in the EU of *any third country*.³¹

Second, Article 9.2 further limits the application of the MFN rule by exempting any treatment of commercial presences within the CARICOM Single Market and Economy and the internal market created by the CARICOM-Dominican Republic FTA.³² Whereas the “major trading economy” limitation applies for treatment by signatory CARIFORUM states to their trading

³¹ Set out in the preceding paragraph of Article 9.1

³² This type of exception to MFN is known as the Regional Economic Integration Organisation (REIO) exception.

partners, this means CARIFORUM states need not treat EU investors as favourably as investors from other CARIFORUM states.

A third limitation set out in Article 9.5 covers the negotiation of future free trade agreements (FTAs). Where a signatory CARIFORUM state enters an FTA with a third party including more favourable treatment accorded to such third party, the signatory CARIFORUM states and the EU will enter into consultations to decide whether the signatory CARIFORUM state can deny the EU the more favourable treatment.

To summarise, the three cases where MFN treatment need not be extended to EU investors provides CARIFORUM states with considerable flexibility in formulating investment policy. In fact, it reduces the MFN commitment to almost zero.

1.2.1.6 Other commitments on investment

As mentioned above, Title II contains no investment protection provisions. However, Title III does include a guarantee of the right to freely transfer funds relating to an investment:

Article 2 Capital movements

1. *With regard to transactions on the capital account of balance of payments, the Signatory CARIFORUM States and the EC Party undertake to impose no restrictions on the free movement of capital relating to direct investments made in accordance with the laws of the host country and investments established in accordance with the provisions of Title II of this Agreement, and the liquidation and repatriation of these capitals and of any profit stemming therefrom.*
2. *The Parties shall consult each other with a view to facilitating the movement of capital between them in order to promote the objectives of this Agreement.*

Note that the right to free transfers is also subject to a balance of payments exception in Part VI, Article 8.³³

Investment promotion commitments are also not addressed in the Commercial Presence chapter, but are part of Title II Chapter 7:

Article 60 Cooperation

...2. Subject to the provisions of Article 7 of this Agreement, the Parties agree to cooperate, including by providing support for technical assistance, training and capacity building in, inter alia, the following areas:

...

f. Establishing mechanisms for promoting investment and joint ventures between service suppliers of the EC Party and of the Signatory CARIFORUM States, and

³³ "...Where any Signatory CARIFORUM States or the EC Party is in serious balance of payments and external financial difficulties, or under threat thereof, it may adopt or maintain restrictive measures with regard to trade in goods, services and establishment. [...]" (Part VI, Article 8.1)

enhancing the capacities of investment promotion agencies in Signatory CARIFORUM States.

This is a very general undertaking containing no explicit obligations.

In conclusion, commitments faced by signatory CARIFORUM states require no change in current policy (with the possible, unconfirmed, exception of the fishing industry in several countries). First, market access and NT obligations are reportedly in line with the existing treatment of EU investors. Second, what liberalisation there is comes from binding existing laws, noting that many activities within these sectors are unbound. And third, MFN treatment imposes negligible requirements on the current and future regulation of EU-sourced commercial presences.

1.2.2 Commitments relating to treatment of investors from other CARIFORUM states

This section examines the treatment of intra-CARIFORUM foreign investment flows through an analysis of treaty commitments in three key regional instruments: the Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy, the CARICOM - Dominican Republic Free Trade Agreement, and the CARICOM - Costa Rica Free Trade Agreement.³⁴

1.2.2.1 Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy (2001)

The Revised Treaty, though not yet fully implemented, includes provisions dealing with investment and the establishment of investments in several places. The main effect of these provisions is to prohibit Member States imposing new restrictions on the ability of investors from other Member States to establish and operate economic enterprises:

Article 32 Prohibition of New Restrictions on the Right of Establishment

1. *The Member States shall not introduce in their territories any new restrictions relating to the right of establishment of nationals of other Member States save as otherwise provided in this Treaty.*
2. *The Member States shall notify CO TED of existing restrictions on the right of establishment in respect of nationals of other Member States.*
3. *The right of establishment within the meaning of this Chapter shall include the right to:*
 - (a) *engage in any non-wage-earning activities of a commercial, industrial, agricultural, professional or artisanal nature;*

³⁴ The CARIFORUM grouping comprises 15 countries. The Caribbean Community (CARICOM) originally established in 1973, is made up of 14 countries. The Dominican Republic is a member of CARIFORUM but not CARICOM, Montserrat is a member of CARICOM but not CARIFORUM, and Haiti is a member of CARIFORUM but not CARICOM.

(b) create and manage economic enterprises referred to in paragraph 5(b) of this Article.

...

It also proposes the removal of existing restrictions on the right of establishment:

Article 33 Removal of Restrictions on the Right of Establishment

1. *Subject to the provisions of Article 221 and Article 222, the Member States shall remove restrictions on the right of establishment of nationals of a Member State in the territory of another Member State.*
2. *The removal of restrictions on the right of establishment mentioned in paragraph 1 of this Article shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of a Member State in the territory of another Member State.*
3. *Subject to the approval of the Conference, COTED, in consultation with COHSOD and COFAP, shall, within one year from the entry into force of this Treaty, establish a programme providing for the removal of restrictions on the right of establishment of nationals of a Member State in the territory of another Member State.*

...

There is a similar prohibition and process of removal of restrictions on the movement of capital payments.³⁵ Investment issues particular to disadvantaged countries in the CARICOM community are addressed in Articles 147 and 149 of the Revised Treaty.³⁶

These commitments in the Revised Treaty will be brought into effect through development under the Revised Treaty of a CARICOM community investment policy:

ARTICLE 68 Community Investment Policy

COTED in collaboration with COFAP and COHSOD shall establish a Community Investment Policy which shall include sound national macro-economic policies, a harmonised system of investment incentives, stable industrial relations, appropriate financial institutions and arrangements, supportive legal and social infrastructure and modernisation of the role of public authorities.

The policy is to be implemented through the CARICOM Investment Code (CIC). This is still under negotiation.³⁷ The original proposal had been for a CARICOM Agreement on Investment to govern intra-regional investment relations, with an Investment Code used to

³⁵ Article 39 Prohibition of New Restrictions on Movement of Capital and Current Transactions, and Article 40 Removal of Restrictions on Movement of Capital and Current Transactions.

³⁶ Article 147 Promotion of Investment, and Article 149 Article 149 Measures Relating to the Right of Establishment.

³⁷ Advice from CRNM (email dated 4 April, 2008). See also 'Overview of the Investment Regime in the Dominican Republic', VA Consulting for CRNM (May 2006), p. 28.

address third country investment. The CIC is now being negotiated as the sole agreement governing both intra and extra-regional investments in the CARICOM Single Market.³⁸

A draft CIC text (dated August 2007) is being used as the basis of ongoing consultations, however schedules containing reservations have not yet been prepared.³⁹ The final coverage of the Code and the extent to which it may liberalise, protect and promote investment flows between CARICOM member states remains to be seen, however the draft text includes a comprehensive set of core investment protection provisions: national treatment, most favoured nation treatment, fair and equitable treatment, performance requirements, appointment of senior management and board of directors, transfer of funds, expropriation and compensation, compensation for losses (from war and civil unrest), sectoral reservations, general exceptions, and transparency. It also proposes a number of provisions addressing national and regional investment promotion, the exchange of information between CARICOM member states and a mechanism for resolving disputes between investors and a member state. Full implementation of the CARICOM Revised Treaty through introduction of the CIC would result in an investment framework for Caribbean countries much broader and more comprehensive than envisaged by the EU EPA. Central to this conclusion is the adoption in the draft CIC of a broad asset-based definition of investment. Finally, as indicated in discussion of the CARIFORUM-EU EPA's MFN provision, the treatment of intra-CARICOM investment would not automatically be extended to EU investors.

1.2.2.2 CARICOM-Dominican Republic Free Trade Agreement (signed 22 August 1998)

The CARICOM-DR FTA entered into force on 1 December 2001 for Barbados, Jamaica, and Trinidad and Tobago, 5 February 2002 for the Dominican Republic, 6 October 2004 for Guyana, and August 2005 for Surinam. Other CARICOM members have not completed implementation of the FTA.⁴⁰ The free trade area established by Article I paragraph 1(i) is therefore presumed not to apply in its entirety. That is, the FTA provisions relating to investment would not apply to all CARICOM countries. The other complicating fact is that to date, non-conforming measures negotiations for investment have not taken place, so there are no reservations schedules in place.⁴¹ Similarly there are not yet schedules with services market access commitments. With only the disciplines in place in the investment and services chapters, the FTA is not properly implemented and it seems safe to conclude, investors are not accorded the protections set out in the provisions.⁴²

Notwithstanding questions regarding its operability, the FTA's investment provisions differ in scope and objectives to the CARIFORUM-EU EPA. The FTA doesn't pursue liberalisation through a market access provision. Its focus is investment protection implemented by way of a side agreement in Annex III on the reciprocal promotion and protection of investment (in

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ <<http://www.sice.oas.org>>

⁴¹ CRNM, *supra*, footnote 31.

⁴² If the disciplines were assumed to apply to all investors and investments, existing non-conforming measures would be in breach of the treaty.

effect, a BIT concluded for a group of countries).⁴³ These provisions stipulate the admission of investments in accordance with each country's laws.⁴⁴ The agreement includes: NT, MFN treatment with an exception for regional economic integration agreements, fair and equitable treatment, transparency, compensation for losses, expropriation, and free transfers. These rights for investors and investment flows between CARICOM countries are far more extensive than rights accorded EU investors under the EPA.

Trade in services covering mode 3 is included in a separate Annex II agreement. There, Article XII (Market Access) refers to an attachment setting out commitments, but these have not yet been implemented.⁴⁵

1.2.2.3 CARICOM – Costa Rica FTA (signed 9 March 2004)

The FTA entered into force between Costa Rica and Trinidad and Tobago on 15 November 2005, Costa Rica and Guyana on 30 April 2006, and Costa Rica and Barbados on 1 August 2006. Again, it is important to recognize that obligations regarding the treatment of investors and their investments in this treaty only apply between these ratifying parties, so the treaty does not govern investment flows between Costa Rica and all CARICOM countries.

Chapter X of the treaty contains investment provisions similar to those in the Dominican Republic FTA. Leaving aside the incomplete implementation of the CAIRCOM-DR FTA, the Costa Rican FTA extends greater protection to investors and their investments. Both FTAs differ in scope and in objectives to the EPA commercial presence chapter. The FTA with Costa Rica includes: coverage of post establishment investment, fair and equitable treatment, and full protection and security, NT, MFN, expropriation and compensation, compensation for losses arising from war and civil disturbance, and free transfers. Unlike the other treaties examined in this study, the FTA with Costa Rica also provides investors additional protection through the option to access international arbitration to settle disputes with host governments.

These rights and protections are available for investors from either Party who have made investments in accordance with the legislation of the host government (i.e. post establishment). The structure and nature of the commitments in this agreement are established in part through the definition of *investor* and *investment*. The two FTAs analysed and the CIC contain broadly similar definitions of an investor covering natural persons and legal persons constituted under the laws of a treaty party that carry on business in that country. The CARICOM–Costa Rica FTA adopts a similar broad definition of investment to that used in the Dominican Republic FTA and the CIC. Investment includes “any kind of asset, defined in accordance with the laws of the host country, which the investor of one Party invests in the territory of the other Party in accordance with the latter's laws and regulations”. It then sets out an open list of examples. This approach is in contrast to the

⁴³ “Article VII- Investment: The Parties agree to promote and facilitate investments within the Free Trade Area through the provisions contained in the Agreement on Reciprocal Promotion and Protection of Investments that appears as Annex III.”

⁴⁴ Article II states that further negotiations on admission and promotion are to take place after entry into force. These haven't taken place yet.

⁴⁵ In the protocol implementing the FTA, Article V indicated market access negotiations for services were to commence in 2000 and were to conclude by the indicative date of 30 June 2001.

more restricted “commercial presence” definition adopted in the CARIFORUM – EU EPA to comply with the EU’s limited competence in the field of investment.

As a consequence of these definitions in the CARICOM-Costa Rica FTA, the NT and MFN apply to a larger range of investors and types of investment. The NT and MFN disciplines are also more extensive and offer greater protection to investors because they contain fewer direct exceptions or limitations to their application. Finally, because the FTA with Costa Rica covers only post establishment investments, the chapter doesn’t include schedules of commitments determining the scope of NT, MFN or market access, nor is there any framework for including these at a later stage. NT and MFN require treating a given foreign investor the same as nationals and other foreign investors once their investment is made. The absence of schedules also means CARICOM has not bound its regulatory framework and is not prevented from introducing “less liberal” laws. By comparison, the EPA does not require signatory CARIFORUM states to offer EU investors the same protections as they offer Costa Rican investors, and whilst the CARIFORUM schedule binds its regulatory framework in a number of sectors, it has been shown that they have retained considerable flexibility to introduce new laws in many of the covered sub-sectors.

1.2.3 Conclusion

Full implementation of the CARICOM Revised Treaty through introduction of the CIC would result in a broader and more comprehensive investment framework for Caribbean countries than has been introduced through the CARIFORUM-EU EPA. These intra-CARICOM rules would include the gradual removal by home countries of restrictions on the right of establishment for intra-regional investors, and would also offer them a full complement of investment protection guarantees. The EPA with the EU does not remove restrictions on the right of establishment, nor does its scope include investment protection provisions. EU investors are provided with a guarantee of the current level of openness in those sectors specified in the schedule (except in the 32 cases where sectors are listed but future regulatory flexibility is preserved). This does not make it easier for the EU to invest, but it does offer greater certainty about the applicable laws in specified sectors.

CARICOM host countries that are also members of the CARIFORUM grouping would not be required to extend to EU investors the same treatment they provide investors from CARICOM home countries if and when the CARICOM rules are finalized. The MFN treatment provision in the EPA is quite limited. It does not require CARIFORUM states to automatically pass on the same treatment to EU investors that these states offer to foreign investors from small developing and least developed countries.

The CARICOM-Dominican Republic FTA and the CARICOM-Costa Rica FTA do not address the right of establishment, though it was flagged as an issue for future negotiation in the Dominican Republic agreement. The EPA’s binding of certain existing laws on establishment for EU investors therefore represents something not currently available to parties of these FTAs. But this only locks in current practice in certain sectors for the treatment of EU investors. It is unlikely existing regulations would be changed and made more restrictive for investors from the region. On the other hand, both FTAs includes investment protection provisions for investors within the two FTA areas. If the FTAs are fully implemented this will provide regional investors protection through a number of international investment principles

(eg. fair and equitable treatment, protection against expropriation, compensation for losses, free transfers, etc.) not offered in the EU EPA.

1.3 CARIFORUM states' commitments to EU member states in bilateral investment treaties

This section examines investment commitments made by individual CARIFORUM states to individual EU Member States. There are no economic integration agreements between individual CARIFORUM states and the EC or individual EU Member States, however a considerable number of BITs have been negotiated and are operational. Five BITs are examined here representing a diversity of CARIFORUM countries and levels of development.

BITs differ from the EPA in their objectives, scope and coverage. BITs are almost universally treaties that cover only the post establishment phase of investment.⁴⁶ They confer rights to investors regarding treatment by host governments of a wide range of types of investment after they have been established in the host country. In contrast, the EPA commercial presence chapter includes amongst its core provisions a commitment to market access for a narrow set of investments in accordance with conditions set out in the EPA's provisions and schedules. CARIFORUM states have not offered investors from EU Member States preferential or liberalised access in these BITs. BITs nevertheless confer on investors rights under international law and therefore generate a greater degree of confidence in the host country environment once an investment is established. A host government that offers a binding treaty commitment consistent with its domestic law is generally recognized as having agreed to more liberal treatment of the foreign investor.

1.3.1 Barbados – Germany BIT

The Barbados-Germany BIT, in force since 1 May 2002, is quite different in its objectives and coverage to the CARICOM-EU EPA. The BIT seeks to ensure greater protection of investments rather than liberalising entry of investment into Barbados. It applies a broad and open-ended definition of investment: "every kind of asset" including moveable and immoveable property, shares, claims to money, intellectual property rights and business concessions. Investments between the parties are to be admitted in accordance with domestic laws, but once an investment is established the host government provides investors and their investments with NT and MFN treatment, except where more favourable treatment to third parties is extended through membership of a customs union, common market or free trade area.

Parties also guarantee they will accord investors and their investments fair and equitable treatment, full protection and security, compensation for losses arising from war or civil unrest, and will not expropriate an investment directly or indirectly without prompt, adequate and effective compensation. These are well-established principles in international investment law, though their meaning and the treatment demanded of host governments to meet these standards is dependent on the treaty wording and individual facts. These issues are the

⁴⁶ The model BITs of several countries, most notably Canada and the United States, have been revised in recent years to include the pre-establishment phase and incorporate schedules.

subject of considerable international arbitration. The EU was restricted from including these issues in negotiating the CARIFORUM-EU EPA.

The BIT also guarantees investors the right to freely transfer payments in connection with an investment. This right is offered in the EPA (see question 1, above), though the BIT wording offers investors greater protection by requiring that transfers are allowed "without delay" and by establishing which official exchange is to be applied.⁴⁷

The BIT is in force for an initial period of ten years and continues thereafter unless terminated by either party with twelve months' notice. Investment made prior to the treaty's termination are subject to the treaty provisions for a further twenty years after the BIT is terminated.⁴⁸

1.3.2 Belize – Netherlands

The Agreement on Encouragement and Reciprocal Protection of Investments between Belize and the Netherlands entered into force on 1 October 2004. Like other BITs considered here, it contains no market access commitments but aims to protect and (indirectly) promote a broad range of investments once they have been established in the host country. The treaty adopts a standard asset-based definition of investment and defines investors as including legal persons not constituted under the law of a party, but controlled directly or indirectly by a national or legal person of a party. Belize and the Netherlands agreed to the same treatment provisions included in the Barbados-Germany agreement. Article 3 (5) seemingly ensures that any CARIFORUM-EU EPA provision, that offers investors more favourable treatment would prevail over the BIT:

If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain a regulation, whether general or specific, entitling investments by nationals of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such regulation shall, to the extent that it is more favourable, prevail over the present Agreement.

This should be interpreted to include the EPA concluded by the EU and CARIFORUM body as containing international law obligations "between the Contracting Parties".

The Belize-Netherlands BIT applies for 15 years, and thereafter is extended for periods of ten years. It can be terminated with six months notice prior to the conclusion of a ten-year period.⁴⁹

1.3.3 Dominican Republic - Spain

The Agreement on the Reciprocal Protection and Promotion of Investments between the Dominican Republic and Spain entered into force 7 October 1996. It operated for an initial period of five years and since then has been automatically renewed every two years. Parties can terminate with six months notice before the date of expiry, though the substantive

⁴⁷ Articles 5 and 7.

⁴⁸ Article 13.

⁴⁹ Article 14.

provisions would continue to apply to investments made before termination for a period of five years.⁵⁰

The treaty's provisions and scope are very similar to those described above. Still, there are slight differences between these BITs that affect the scope. For example, 'investor' is defined to include natural persons with nationality of one of the parties and legal persons organised under the law of a contracting party and with a registered address in the territory of the same contracting party.⁵¹ The Belize-Netherlands BIT, on the other hand, also applies to legal persons not constituted under the laws of a contracting party but controlled directly or indirectly by nationals or legal persons of a contracting party.⁵² And in the Barbados-Germany BIT, Germany does not require companies claiming to be investors in Germany to have legal personality.⁵³

1.3.4 Haiti - United Kingdom

An Agreement for the Promotion and Protection of Investments entered into force between the UK and Haiti on 27 March 1995, ten years after it was negotiated. The BIT operated for an initial period of ten years and thereafter continues in force until either of the parties gives 12 months notice of termination. The provisions continue to apply to investments made whilst the treaty was in force for a further ten years.

This BIT contains better protection in relation to compensating investors for losses arising from war, armed conflict or civil unrest. It includes a requirement for restitution or compensation where the loss results from requisitioning of property by forces or authorities, or destruction of property not caused by in combat and not "required by the necessity of the situation".⁵⁴ It also sets out in more detail the requirements for compensation in the event of justifiable expropriation. It must reflect the:

*market value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge, and shall include interest at a normal commercial rate until the date of payment, shall be made without delay, effectively realizable and be freely transferable.*⁵⁵

1.3.5 Jamaica - Germany

The Treaty Concerning the Reciprocal Encouragement and Protection of Investments between Jamaica and Germany entered into force on 29 May 1996. The BIT operates for 15 years and will terminate then if either party provides 12 months notice. The treaty will otherwise continue indefinitely and can be terminated at any time with 12 months notice. The scope and application of the treaty is consistent with those addressed above.

⁵⁰ Article 12.

⁵¹ There is no requirement that the company undertake economic activity as was required, for example, under the CARICOM-Costa Rica FTA.

⁵² Article 1.

⁵³ Article 1.

⁵⁴ Article 4.

⁵⁵ Article 5.

1.3.6 Conclusion

Individual CARIFORUM states and individual EU member countries have negotiated numerous BITs, however these are quite different in scope and objectives when compared to the EPA's Chapter 2 on Commercial Presence: BITs seek to protect and promote investors and their investments once they have been made, whilst the EPA provisions are designed to liberalise the process of establishing an investment. It should be noted (see Box) that CARIFORUM countries had hoped to negotiate a comprehensive investment chapter with the EU that would supercede BITs concluded by individual countries of the two regions. The EU's limited competence on investment was an obstacle to achieving this. Notwithstanding, BITs can coexist with the EPA and offer greater certainty for investors.

1.4 New institutions, regulations and administrative procedures concerning investment

This section assesses whether new institutions, regulations or administrative procedures are required to implement the Commercial Presence Chapter. This is to be distinguished from the issue of whether signatory CARIFORUM states need to introduce or amend domestic legislation to conform to their treaty commitments (this was addressed to the extent possible with available information in section 1.1).

The Commercial Presence Chapter contains no requirements for new institutions or procedures; however, the General Provisions Chapter (Chapter 1) requires several further steps and future action. The first is the preparation of the schedules for The Bahamas and Haiti. Article 3 bis requires incorporation of these schedules no later than six months after signature of the EPA. Interestingly, these commitments are to be compatible with relevant requirements under the GATS. It's unclear what GATS requirements would dictate these countries' schedules for non-services sectors.

The second requirement is the Article 3 obligation to undertake "future liberalisation". This commits parties to commencing further negotiations on investment no later than five years from the date of entry into force of the EPA with the aim of adding to the overall commitments of issues covered in Title II. Note that on a strict reading, this would not require additional commitments under the Commercial Presence Chapter, if additional commitments were made in, say the chapter on Cross Border Supply of Services. Although the requirement for future negotiations is not an ongoing burden or administrative procedure, it will require future action by signatory CARIFORUM states. If the EU's competence issues relating to investment negotiations are resolved by this time and the EU can address international investment more fully, recommencing negotiations under Article 3 could be a large undertaking for Caribbean countries. This could well impose further costs on CARIFORUM countries. At the same time, indications are the CARIFORUM region would welcome the inclusion of investment protection provisions in the EPA. These two issues – incorporating schedules for disadvantaged countries, and committing to future negotiations – are likely to be important issues in other ACP region negotiations. They confer future obligations, but are important development features of EPAs that allow gradual adjustment.

At the broader, treaty-wide level, Part V of the EPA establishes four institutional bodies that will supervise implementation, facilitate dialogue and cooperation between the parties, and assist stakeholders to participate in the implementation process.⁵⁶ These bodies play a key role in implementing the treaty's development dimension and in implementing and monitoring the Commercial Presence Chapter. They are: the Joint CARIFORUM-EC Council, the CARIFORUM-EC Trade and Development Committee, the CARIFORUM-EC Parliamentary Committee, and the CARIFORUM-EC Consultative Committee. There is no expected ongoing function in relation to investment carried out by the treaty's institutional bodies.

1.5 Impact of the CARIFORUM-EU EPA on regional integration for investment

This section considers whether the EPA's investment commitments will impact the broader integration process underway in CARIFORUM states. This integration process is driven by the Revised Treaty (see section 1.2.2.1). The integration process and consequences for the regulation of foreign investment between Caribbean states were discussed in section 1.2. Formulation of a Community investment policy, the CARICOM Investment Code, is well advanced, but preparing schedules of commitments and reservations is still an undecided issue.⁵⁷ Implementing the CARIFORUM-EU Commercial Presence Chapter will be introduced into this policy environment.

Title II and CARIFORUM's commercial presence schedule specifically acknowledge regional integration. First, Article 1 states Title II's objectives as:

[...] reaffirming [the Parties] commitments under the WTO Agreement and with a view to facilitate the regional integration and sustainable development of the Signatory CARIFORUM States and their smooth and gradual integration in the world economy [...]

Second, Article 3 ter Regional CARIFORUM Integration draws attention to the progressive removal of, *inter alia*, investment barriers as a means of achieving greater regional integration, but confers no obligations on parties:

1. The Parties recognize that economic integration among CARIFORUM States, through the progressive removal of remaining barriers and the provision of appropriate regulatory frameworks for trade in services and investment will contribute to the deepening of their regional integration process and the realization of the objectives of this Agreement.
2. The Parties further recognize that the principles set in Chapter V of this Title to support the progressive liberalisation of investment and trade in services between the Parties provide a useful framework for the further liberalisation of investment and trade in services between CARIFORUM States in the context of their regional integration.

Here, paragraph 2 reinforces the regional integration process. It refers to Title II Chapter V which sets out core elements of a regulatory framework required for the progressive

⁵⁶ See the CRNM Fact-Fiction series : <http://www.crn.org/epa_fact_fiction3.htm>

⁵⁷ CRNM, *supra*, footnote 31.

liberalisation of investment. For example, a system committed to the principles of transparency, procedural fairness, and the right of review of administrative decisions.⁵⁸ However, Title II, Chapter V of the EPA does not create obligations for the regional integration of CARIFORUM states. Rather, it says only that parties recognize the role of transparency, procedural fairness, and the right of review.

And third, the CARIFORUM schedule on commercial presence also clearly separates the EPA undertakings from "the rights and obligations of the signatory CARIFORUM states arising from obligations under the Revised Treaty of Chaguaramas..., or the CARICOM-Dominican Republic Free Trade Agreement."⁵⁹

It can be concluded from these references and the effect of the EPA investment provisions discussed in earlier sections, that the investment provisions are unlikely to disrupt regional integration and may provide additional momentum to the process. The EPA does not of itself make it easier for EU investors to enter Caribbean markets, thereby minimizing the most direct impact of increased capital flows crowding out intra-regional flows. Moreover, the investment provisions do not provide preferential access to EU investors over regional investors. The market access and NT commitments provide greater certainty that investment laws in signatory CARIFORUM states will remain consistent in certain sectors. This reduces the chance that investors will be adversely affected by changes to the law.

A positive effect of the Commercial Presence Chapter on regional integration is derived from preparation of the EPA commercial presence schedule. This experience improves the capacity of government officials in the region responsible for identifying sectors to be covered by investment provisions and documenting exceptions to market access and NT. Whilst this improved capacity and expertise should not be overstated - the task is likely to have been the work of a small number of officials - it nevertheless should make preparation of the CIC schedules easier, despite the draft CIC's additional inclusion of investment protection provisions.

Finally, it is possible the EPA will be implemented before the CIC is concluded and before the CARICOM-Dominican Republic FTA is fully operational.⁶⁰ Those CARIFORUM host countries that have committed to binding their laws in certain sectors for EU investors under the EPA may not be required to extend this commitment through an MFN obligation to investors claiming no less favourable treatment under these other agreements. The MFN provision in the CIC is not finalized and does not yet apply. The CARICOM-Dominican Republic FTA has only entered into force in some countries and though there is an MFN provision, the MFN obligation contains an exemption for treatment offered to investors under an existing or future trade agreement.⁶¹ Further study could be undertaken to ascertain whether investors from the Caribbean region already benefit from a binding commitment such as that accorded EU investors in certain sectors bound by CARIFORUM in its schedule.

⁵⁸ Title II, Articles 25 and 26. Other provisions in Chapter V relate primarily to services sectors.

⁵⁹ Paragraph 4, Annex 4.V

⁶⁰ See section 1.2.2.2, above.

⁶¹ Annex III, Article III.3, CARICOM-Dominican Republic FTA.

2 Interim ACP-EU EPAs Normal.

2.1 Coverage of investment in the interim EPA agreements and timelines for completion of negotiations

Part II of the study builds on analysis of investment in the CARIFORUM-EU EPA with a view to developing an understanding of the task ahead for other ACP regions and their policy options on investment. Questions 1 and 2 establish the current position and set out details of how investment is addressed in four interim EPA agreements. In each interim agreement, conclusion of investment negotiations is integrated into a final single outcome and will be part of a comprehensive EPA.

Limitations the EC has on negotiating on investment because of the uncertainty of where competence on this issue rests is equally relevant in analysis of interim EPAs and the ongoing negotiating process in other ACP regions. The possibility that this uncertainty over competency may be resolved whilst ACP EPA negotiations continue presents a particular challenge for these regions. As mentioned in the introduction, for the meantime, it seems the prospective ratification of the Lisbon Treaty will not resolve this issue.

2.1.1 East African Community

The Agreement Establishing a Framework for an Economic Partnership between the East African Community Partner States and the European Community and Its Member States (the EAC-EU framework EPA) was concluded on 27 November 2007. The final EAC-EU EPA is to be concluded by 31 July 2009.⁶²

There is no commitment in the framework agreement for an EPA to contain a chapter on commercial presence, however there is a requirement set out in Article 37, the Rendez-vous Clause, that Parties build on "progress made in the negotiation of a comprehensive EPA text". This provision, which comprises Chapter V of the Agreement, sets out areas where the parties will continue negotiations and includes trade in services and investment and private sector development.⁶³ The Agreement also includes several other references to investment. The preamble notes the importance of increased investment flows:

Cognizant that substantial investment are required to uplift the standards of living of the EAC Partner States.

And Article 2 notes as an objectives of an EAC-EU EPA:

Establishing and implementing an effective, predictable and transparent regional regulatory framework for trade and investment in the EAC Partner States, thus supporting the conditions

for increasing investment, and private sector initiative

[and to]

⁶² Article 3.2

⁶³ Article 37 d) and e)ii.

reinforce, broaden and deepen cooperation in all areas relevant to trade and investment.

Article 52 makes the only reference in the Agreement to investment promotion and cooperation:

[...] the Parties shall endeavour to facilitate co-operation in all areas covered by this Agreement as well as facilitate trade and goods and services, promote investments and encourage transport and communication links [...]

Originally part of the Eastern and Southern Africa grouping that had been negotiating with the EU since 2004, the EAC decided in October 2007 to conclude its own separate EAC agreement. The decision reflects the fact that the EAC has operated as a Customs Union since 1 January 2005.

The EAC has more than 18 months from concluding its interim agreement in which to complete negotiations. Some reports suggest negotiations on the comprehensive EPA are only just beginning.⁶⁴ It is unclear whether resumption of discussions signals the start of negotiations on substantive investment provisions, or whether talks were held earlier before the EAC broke away from the ESA-EU negotiations. The ESA-EU EPA joint roadmap established in February 2004 set out an indicative timetable for three phases of negotiations: setting of priorities (March-August 2004), substantive negotiations (September 2004-December 2005), and continuation and finalization of negotiations (January 2006-December 2007). Irrespective of this, the EAC-EU framework EPA commits parties to the abovementioned timetable of 31 July 2009.

If there has been no discussion yet of substantive provisions, July 2009 could pose a challenging target for EAC states. It will be particularly important to leave sufficient time to negotiate and develop the schedules. This is true for negotiations in all ACP regions.

2.1.2 Eastern and Southern African States

The Interim Agreement Establishing a Framework for an Economic Partnership Agreement between Eastern and Southern African States and the European Community and its Member States (the interim ESA-EU EPA) includes references to investment issues in several chapters. Chapter IV, Title II Private Sector Development, commits parties to a number of investment promotion goals in Article 40:

[...] a) Create an environment for sustainable and equitable economic development of ESA through investment, including Foreign Direct Investment (green field or portfolio), technology transfer, capacity building and institutional support from the EC Party;

⁶⁴ "The target date for conclusion of comprehensive negotiations is July 2009 with talks tentatively set to begin in March 2008." Trade Negotiation Insights, Volume 7. Number 2 / March 2008, p. 6, 'The EAC interim agreement: an overview' <http://www.acp-eu-trade.org/library/files/TNI_EN_7-2.pdf>

b) Provide deeper cooperation with institutions and intermediary organizations dealing with investment promotion in the EC Party, including the CDE and ESA through, inter alia, business dialogue, cooperation and partnership;

c) Support through appropriate instruments, the promotion and encouragement of investment in the ESA region including establishing a framework for funding and assistance to support economic development programmes in ESA;

d) Strengthen and build the capacity of private development institutions such as investment promotion agencies, chambers of commerce, associations and indigenous development organisations in individual ESA States and the region as a whole so as to enable the emergence of dynamic and vibrant private sector; and

e) Develop a legal interim framework that promotes investment by both Parties, with a view to promoting and protecting investment and work towards harmonised and simplified procedures and administrative practices.

Note that the EU was not restricted in setting out investment promotion objectives relating to a broader concept of investment that includes portfolio investment.

Investment negotiations are covered in Chapter V Areas of Future Negotiation. The same Rendez-vous clause as used in the EAC interim agreement commits parties to concluding a "full and comprehensive" EPA covering trade in services (assumed to include investment in services sectors), and investment and private sector development.⁶⁵ The interim Agreement also looks to promote investment in a number of areas of private sector development: micro-enterprises and SMEs, mining and minerals, and energy.

An ESA-EU EPA must be concluded by 31 December 2008.⁶⁶ If the ESA negotiations have not yet started discussing the substantive content of an investment chapter, concluding discussions in time will be difficult. With talks having started in 2004, there should be a good basis for moving ahead with treaty text. Model text along the lines used in the CARIFORUM-EU EPA can usefully be used as the basis of discussions. Given the limited number of investment issues to be included in the EPA (i.e. no investment protection provisions other than a commitment to free transfers, and a narrow establishment-based definition of commercial presence), most time should be spent on market access and preparing ESA schedules. Based on the CARIFORUM outcome, indications are that binding existing investment regulations and identifying sub-sectors where future regulatory flexibility is to be preserved will be the main task for Eastern and Southern African countries.

2.1.3 Southern African Development Community

The Interim Economic Partnership Agreement between the SADC EPA States and the European Community and its Member States (the interim SADC-EU EPA) was initialed on 23 November, 2007. Article 1 includes amongst the objectives of the EPA "(s)upporting the conditions for increasing investment and private sector initiative...". The agreement

⁶⁵ Article 53.

⁶⁶ Article 3.2 states: The Parties undertake to complete negotiations with a view to concluding a comprehensive EPA, no later than 31 December 2008, including on subject matter listed in paragraphs b) and c) according to the Agree Joint Road Map adopted by the Parties on 7 February 2004.

establishes a timetable for future negotiations on investment, but only for a subset of countries within the SADC grouping. Title IV, Article 67 Second Stage of Negotiations states:

The Parties agree to continue negotiations in 2008 to extend the scope of the present Agreement. For the purpose of this Title, the SADC EPA States will be constituted of Botswana, Lesotho, Mozambique and Swaziland. The remaining SADC EPA States may join the process of negotiation on a similar basis. To this end, they will notify in writing the EC Party and the other SADC EPA States.

Article 67 also commits the Parties to negotiating an Investment Chapter no later than 31 December 2008.⁶⁷ It stipulates that negotiations take into account relevant provisions of the SADC Protocol on Finance and Investment⁶⁸ and that the EU provide adequate technical assistance to facilitate negotiations and implementation of the Investment Chapter.⁶⁹

2.1.4 Ghana

The West African region did not reach agreement on concluding an interim EPA with the EU. However, Ghana and the Ivory Coast concluded individual agreements. Here we examine the Agreement Establishing a Stepping Stone Economic Partnership Agreement between Ghana and the EC and its Member States (the interim Ghana-EU EPA).

Article 44 in Title IV (Services, Investment and Trade Related Rules) requires that Parties cooperate to conclude a "global Economic Partnership Agreement between the whole West African Region and the EC" including investment and trade in services. Parties are required to take all necessary measures to endeavour to conclude an EPA between West African countries and the EC and its Member States before the end of 2008. This creates a very limited obligation since other countries in the West African Region are not party to the interim agreement and are therefore not bound to take "all necessary measures" to finalise the EPA. Article 44 does not entertain the possibility of concluding a Ghana-EU EPA.

Article 74 (Outermost regions of the European Community) paragraph 1 refers to investment promotion:

[...] the Parties shall endeavour to facilitate co-operation in all areas covered by this Agreement as well as facilitate trade and goods and services, promote investments and encourage transport and communication links between the outermost regions and Ghana.

The West Africa - EU joint roadmap was adopted in March 2004. In the first phase of negotiations, from 2004 until October 2006, one of the five negotiating technical groups looked at services and investment. In October 2006, the West African region decided to proceed to the second phase of negotiations focusing on the text of the agreement.⁷⁰ According to the report of the meeting of chief negotiators in February 2007, it was agreed to begin the next phase of negotiations immediately, namely drafting the EPA legal text and negotiating market access offers. It is unclear what progress on drafting investment

⁶⁷ Article 67 II.a)

⁶⁸ Details of the SADC Protocol were not identified during research for this study.

⁶⁹ Article 67 II.b)

⁷⁰ <http://77ec.europa.eu/trade/issues/bilateral/regions/acp/regneg_en.htm>

provisions was made during 2007. Negotiations on investment and the entire EPA will not be concluded in 2008 if the West African grouping is unable to quickly come together and support the principles outlined in the interim agreements of Ghana and the Ivory Coast.

2.2 Extent of liberalisation

The four interim EPAs analysed contain no requirements regarding the nature or extent of investment liberalisation commitments to be included in final EPAs. For example, the interim EAC-EU EPA only requires that parties conclude a comprehensive agreement and continue negotiations on investment and private sector development in pursuit of this aim.⁷¹ And the interim ESA-EU EPA requires negotiating a full and comprehensive agreement including investment that builds on the Cotonou Agreement and takes account of progress made in EPA negotiations to date.⁷²

The Cotonou Agreement, the founding treaty governing the trade and investment relationship between the EU and ACP regions, also contains no guidance on the nature or level of investment liberalisation to be undertaken. Rather, it focuses on the two other objectives of investment treaties: investment protection (Article 78)⁷³ and investment promotion (Article 75).⁷⁴ These objectives are commonly addressed through BITs negotiated by EU Member States, so it is curious that these issues are taken up under the competence of the European Community.⁷⁵ Articles 75 and 78 both include a caveat that taking action to promote and protect investment must be “within the scope of their respective competencies”. We are left to assume negotiators of the Cotonou Agreement hoped the EU might have resolved the question of investment competency sooner. Instead, the CARIFORUM-EU text is light on protection and promotion provisions, but takes up the issue of investment liberalisation, not directly mentioned in the Cotonou Agreement in the context of non-services sectors. As it has eventuated, further liberalisation of CARIFORUM investment laws through the EPA is moderate and is primarily achieved by binding the existing investment framework, rather than amending and lowering CARIFORUM states’ domestic investment laws.

⁷¹ Article 37, Agreement Establishing a Framework for an Economic Partnership Agreement between the EAC and EU.

⁷² Article 53, Interim Agreement Establishing a Framework for an Economic Partnership Agreement between the ESA and EU.

⁷³ Article 78 Investment Protection: 1. The ACP States and the Community and its Member States, within the scope of their respective competencies, affirm the need to promote and protect either Party’s investments on their respective territories, and in this context affirm the importance of concluding, in their mutual interest, investment promotion and protection agreements which could also provide the basis for insurance and guarantee schemes.

2. In order to encourage European investment in development projects of special importance to, and promoted by the ACP States, the Community and the Member States, on the one hand and the ACP States on the other, may also conclude agreements relating to specific projects of mutual interest where the Community and European enterprises contribute towards their financing.

3. The Parties also agree to introduce, within the economic partnership agreements, and while respecting the respective competencies of the Community and its Member States, general principles on protection and promotion of investments, which will endorse the best results agreed in the competent international fora or bilaterally.

⁷⁴ Article 75 Investment promotion: The ACP States, the Community and its Member States, within the scope of their respective competencies, recognising the importance of private investment in the promotion of their development cooperation and acknowledging the need to take steps to promote such investment, shall: [...] (b) take measures and actions which help to create and maintain a predictable and secure investment climate as well as enter into negotiations on agreements which will improve such climate; [...]

⁷⁵ On implementation of Article 78 and investment protection provisions, see also Annex II Chapter V Investment Protection Agreements, Article 15.

Finally, the Cotonou Agreement's provisions on services include mode 3 commercial presence, and Article 41.4 does identify liberalisation of services as a goal for the EPAs:

The Parties further agree on the objective of extending under the economic partnership agreements, and after they have acquired some experience in applying the Most Favoured Nation (MFN) treatment under GATS, their partnership to encompass the liberalisation of services in accordance with the provisions of GATS and particularly those relating to the participation of developing countries in liberalisation agreements.

Two markers to this requirement are set out: that such action need only be taken after Parties have acquired some experience in applying MFN treatment under GATS, and that liberalisation is to be in accordance with those GATS provisions relating to developing country services liberalisation. This wording provides negotiators in the ACP regions with significant flexibility in determining the level of liberalisation of investment in services they agree to.

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