



**TAKING STOCK OF IIA REFORM**  
**March 16, 2016**  
**A View from the Caribbean Community (CARICOM)**

**Background**

The Member States of the Caribbean Community (CARICOM) have very little collective experience negotiating International Investment Agreements (IIAs). While several Member States have concluded Bilateral Investment Treaties (BITs) with Third States, CARICOM as a bloc is yet to conclude a comprehensive IIA. The closest the Region came to achieving this was in the Economic Partnership Agreement (EPA) between the Caribbean Forum of African, Caribbean and Pacific States (CARIFORUM) and the European Union (EU), for which negotiations were completed in 2007. Under the EPA, commitments on investment focused on the liberalization of commercial presence with no provisions for the protection of investors and their investments, or for investor-state dispute settlement. More recently, CARICOM was engaged in negotiations with Canada which would have resulted in a comprehensive Chapter on Investments. However, these negotiations were suspended in 2015.

**The Draft CARICOM Template for Investment Chapters in External Trade Agreements**

In recognition of the limited experience of CARICOM countries in negotiating collectively IIAs, the CARICOM Secretariat has started work on developing a template for the Region's investment agreements with extra-regional partners. At the core of our Template is finding a balanced outcome that promotes investments which support sustainable development.

**Lessons Learned**

Outlined below are some of the issues which have commanded the attention of CARICOM Member States in recent negotiations and which would also need to be addressed in future IIAs:

- i. Investor-State Dispute Settlement (ISDS) has not been a red line issue for CARICOM countries in the past. However, the potentially far-reaching consequences of its inclusion have given rise to concerns among several Member States. While individual BITs, state contracts as well as CARICOM's trade agreements with Cuba and Costa Rica have provided recourse to ISDS, given the extraordinary nature of ISDS, we have given consideration to placing limits on the access of investors to ISDS and providing detailed and specific ISDS procedures.
- ii. A major concern for Member States in recent negotiations was how to best safeguard their policy sensitivities, whether through broad sectoral carve-outs or the scheduling of appropriate reservations.



- iii. We also recognize that the Financial Services Sector is “special” due to its systemic importance. Therefore, our approach has been one which contemplates different rules for investments in Financial Services.
- iv. There have also been challenges in securing agreement with our trading partners to certain provisions that seek to achieve overall balance in IIAs, such as investor obligations. Essentially, some trading partners are hesitant to incorporate obligations in this area.

### **Areas for Future Policy Guidance**

There is a need for more substantive debate and reflection on a number of issues. These include:

- v. The treatment of portfolio equity investment – recognizing that portfolio investment may account for a sizeable share of investment flows, do we exclude such investments? Do we exclude certain forms of portfolio investment below a particular threshold? Do we provide full coverage for portfolio investment subject to the right of the state to invoke balance of payments restrictions?
- vi. The treatment of state debt – do we maintain a carve-out for state debt? If state debt is covered, do we place limits on the ability of the investor to initiate ISDS proceedings?
- vii. We also need to determine how best to treat with short term debt, that is, debt with an original maturity of less than three years. Do we exclude short term debt from the definition of investment?
- viii. On the issue of performance requirements, we also need to assess the extent of preparedness to undertake obligations beyond those in the World Trade Organization (WTO) Agreement on Trade Related Investment Measures (TRIMS).

At the CARICOM level, we recognize the important role played by UNCTAD as a multilateral support platform for issues related to IIA reform. We also take note of UNCTAD’s Investment Policy Framework and Roadmap for IIA reform that have been guiding countries, including those in CARICOM, since 2012 to negotiate or amend treaties to make them more development oriented and more balanced. Therefore, CARICOM would welcome collaboration with UNCTAD in the following areas:

- ix. An assessment of the substantive content of the BITs concluded by CARICOM countries with a view to identifying trends and drawing comparisons to new treaty practice. This assessment would be shared with our Member countries.



- x. UNCTAD could provide a peer review of and commentary on the Draft CARICOM Investment Template.
- xi. Finally, UNCTAD could also collaborate with CARICOM in assessing the prospects of the introduction of investment disciplines at the multilateral level.

### **Issues for WIF 2016**

One of the fundamental issues that should receive attention at the World Investment Forum (WIF) 2016 relates to dispute settlement in light of the tension that currently exists with respect to those who prefer investment disputes to reside within national legal frameworks and those who have a preference for ISDS. There are shortcomings in both approaches and as such, broader discussions should take place at the level of the WIF.