



# **Overview of the Investment Regime in the Dominican Republic:**

**Implications for the CARIFORUM-EU Economic  
Partnership Agreement (EPA) Negotiations**

**Prepared by Vilma I. Arbaje**

**for the Caribbean Regional Negotiating Machinery (CRNM)**

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# Table of Contents

|   |            |
|---|------------|
| <b>I. ACKNOWLEDGMENTS</b> .....   | <b>iii</b> |
| <b>II. INTRODUCTION</b> .....   | <b>iv</b>  |
| <b>1. BACKGROUND</b> .....  | <b>1</b>   |
| <b>1.1 THE DOMINICAN REPUBLIC AND THE NEGOTIATIONS OF THE EPA</b> .....   | <b>1</b>   |
| <b>1.2 RATIONALE OF THE TECHNICAL BRIEF</b> .....   | <b>2</b>   |
| <b>2. FOREIGN DIRECT INVESTMENT IN THE DOMINICAN REPUBLIC</b> .....   | <b>3</b>   |
| <b>3. ANALYTICAL OVERVIEW OF THE INVESTMENT REGIME IN THE DOMINICAN REPUBLIC (DR)</b> .....   | <b>5</b>   |
| <b>4. DOMESTIC LEGAL AND ADMINISTRATIVE INSTRUMENTS GOVERNING INVESTMENT IN THE DR</b> .....  | <b>8</b>   |
| <b>4.1 BACKGROUND</b> .....   | <b>8</b>   |
| <b>4.2 LEGAL INSTRUMENTS GOVERNING FOREIGN INVESTMENT</b> .....   | <b>9</b>   |
| <b>4.3 ADMINISTRATIVE INSTRUMENTS</b> .....   | <b>9</b>   |
| <b>4.4 OTHER LAWS AND INCENTIVES FOR FOREIGN INVESTMENT</b> .....   | <b>9</b>   |
| <b>5. MATRIX OF THE PROCEDURES INVOLVED IN CARRYING OUT AN INVESTMENT IN THE DR</b> .....   | <b>12</b>  |
| <b>6. DOMINICAN REPUBLIC’S TRADE AGREEMENTS – BITS AND FTAS -</b> .....   | <b>23</b>  |
| <b>6.1 BILATERAL AGREEMENTS</b> .....   | <b>23</b>  |
| <b>6.1.1 List of Bilateral Agreements</b> .....   | <b>24</b>  |
| <b>6.2 FREE TRADE AGREEMENTS</b> .....  | <b>26</b>  |
| <b>6.2.1 List of Free Trade Agreements that Include a Chapter on Investments</b> .....  | <b>27</b>  |
| <b>7. APPROACH OF THE DR LEGISLATION VS. THE CARICOM INVESTMENT CODE</b> .....  | <b>28</b>  |
| <b>8. ANALYSIS OF THE INVESTMENT PROVISIONS IN CARICOM-DR FTA, DR –CAFTA, AND CARICOM’S INVESTMENT CODE</b> .....   | <b>32</b>  |
| <b>9. INTERESTS OF THE DR REGARDING INVESTMENT IN THE EPA AND RECOMMENDATIONS FOR A COMMON APPROACH BY CARICOM AND DR ON INVESTMENT IN THE EPA NEGOTIATIONS</b> ..... | <b>41</b>  |
| <b>10. ACRONYMS</b> .....   | <b>44</b>  |
| <b>11. BIBLIOGRAPHY</b> .....   | <b>46</b>  |
| <b>12. ANNEXES</b> .....  | <b>48</b>  |



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We hope that the present document will constitute a strong Caribbean building-block in the negotiation of an Economic Partnership Association (EPA), and will especially contribute to the strengthening of the Cariforum trade block, as an instrument for the development of our countries and our region.

*Vilma Arbaje*

## II. Introduction

**VA Consulting** was contracted by the Caribbean Regional Negotiating Machinery (CRNM) to carry out a comprehensive analysis of the Dominican Republic's investment regime within the framework of an EPA.

The Economic Partnership Agreement (EPA) pursues a greater convergence of regional integration between the Dominican Republic and CARICOM. In this matter, the investment area is one of the subjects where there is need for greater convergence. Therefore, the objective of this study is to provide the CRNM with a clear understanding of the investment regime in the DR.

The method applied to implement this project was, in the first place, to use as primary sources of information, the identification, compilation and analysis of investment legislation currently in force in the Dominican Republic, as well as of the trade agreements that include investment chapters, such as the Free Trade Agreement between the Dominican Republic, Central America and the United States (known as DR-CAFTA). Likewise, an analysis was made of the draft legal frameworks that CARICOM has developed to regulate intraregional investment within the CARICOM Single Market and Economy, as well as its extra-regional relations, both with its free trade agreement partners and with third countries.

In the second place, interviews were held with the stakeholders that are essential at the current stage of preparation of the study, as well as with those who played a major role in the DR-CAFTA negotiations. In this regard, interviews were made with the Office for the Promotion of Exports and Foreign Investment in the Dominican Republic (CEI-RD), the agency in charge of registering investment, and with the former negotiator of the Investment Chapter for the Free Trade Agreement between the Dominican Republic and the United States (DR-CAFTA).

The most relevant results indicate that, in general, Dominican legislation on foreign investment (Law 16-95) and the commitments made within the framework of DR-CAFTA are more liberal than the draft Investment Code of CARICOM (CIC).

The procedures involved in the registration of foreign investment, remittance of profits, repatriation of capital and transfer of technology are regulated by the Office for the Promotion of Exports and Foreign Investment in the Dominican Republic (CEI-RD).

Also, the Dominican Republic has signed bilateral investment agreements with numerous countries, including Member States of the European Union. The recently signed Free Trade Agreement between the Dominican Republic, Central America and the United States goes further than national legislation, and contains commitments that exceed those made with the WTO or through bilateral investment agreements.

# 1. Background

## 1.1 The Dominican Republic and the Negotiation of the EPA

The Dominican Republic signed the Lomé IV Convention in 1989 which, as of 1990, opened up a whole new era of foreign relations for the country. Decades of isolation and absence on the international scene had kept the Dominican Republic marginalized from the integration processes in the Hemisphere and separated from its natural allies - the Caribbean Community (CARICOM) and Central America.

Through its accession to the Lomé IV Convention, the country entered into a process of recognition and negotiation with its new allies and partners, i.e. the independent English-speaking Caribbean countries that had also signed the Convention, as well as Haiti and Suriname. Between 1990 and 1992, intensive technical and political negotiations took place among the Caribbean Community (CARICOM), the European Commission and the Dominican Republic, in order to create a negotiating space between the Caribbean ACP<sup>1</sup> countries and the Technical Unit that manages the projects to be implemented within the framework of the Caribbean Regional Indicative Program (CRIP). This led to the creation of CARIFORUM as a consultation mechanism of the region to implement the programs financed by the CRIP.

The Caribbean Regional Negotiating Machinery (CRNM) was created in April 1997 by the Caribbean Community (CARICOM) Governments to develop, coordinate and execute an overall negotiating strategy for various external trade negotiations in which the Region was involved.

A few years later, the Dominican Republic decided to join the RNM, aware that this was the most important channel to negotiate the convention that would succeed Lomé IV, a process that culminated in the signature of the Cotonou Agreement in the year 2000.

The Cotonou Agreement envisages the negotiation of an Economic Partnership Agreement that would come into force in January 2008. These EPAs are free-trade agreements focused on cooperation, investment, and the sustainable development of ACP countries.

In this process, the Dominican Republic negotiates through the CRNM. The ACP and the Commission of the European Union agreed on a negotiation calendar in four phases. Recently, in September 2005, the third stage of the EPA negotiations was launched in Saint Lucia. This phase takes thirteen months, from September 2005 to December 2006, and aims at consolidating the discussions and establishing common ground for the EPA. The final stage will extend from January to December 2007, and the entry into force would be in January 2008.

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<sup>1</sup> ACP: Africa, Caribbean and Pacific.

## **1.2 Rationale for the Technical Brief**

CARICOM Member States and the Dominican Republic (DR) have agreed to negotiate jointly as CARIFORUM with the European Union (EU) towards an Economic Partnership Agreement (EPA). One key element of the regional integration phase of the EPA negotiations is closer integration between CARICOM and the DR. Indeed, for practical purposes, it is important that the two Parties settle divergences among their various trade and investment regimes before they engage in a process that will result in concessions to the European Union. This is particularly in light of the fact that the bilateral trade agreement between CARICOM and the DR has an unsettled agenda.

One of the areas in which there is need for greater convergence is investment rules and provisions in the two regions. While CARICOM is implementing its Single Market, the DR has signed FTAs with other countries, in particular, the CAFTA with the United States that contains very liberal investment provisions. CARICOM's approach to investment appears to be more conservative. In order to better prepare CARIFORUM negotiators to interface with the EU, it is important for them to understand clearly the investment regime of the DR. This is also important in order to advance the integration phase of the EPA discussions.

It is proposed that a technical brief be prepared to provide background to the Caribbean Regional Negotiating Machinery and national officials. It will cover the following tasks:

- Provide an analytical overview of the current investment regime in the Dominican Republic (DR) based on the relevant legislation, regulations and administrative procedures. In so doing, outline the basic objective and approach to foreign investment by the DR.
- Identify and catalogue all the domestic legal and administrative instruments governing investment in the DR
- Provide a step by step matrix of the procedures involved in making an investment in the DR – approval process, etc.
- Provide a list of all the trade or other agreements to which the DR is party that contain investment provisions (bilateral investment treaties as well as FTAs)
- Compare the approach of the DR to investment in its national legislation and trade or investment agreements to that of CARICOM in the Draft CARICOM Agreement on Investment and the CARICOM Investment Code for third-country investors that are currently being discussed.
- Provide an analysis of how the investment provisions of the CARICOM-DR Free Trade Agreement compares with the investment provisions in the recently concluded US-DR free trade agreement (CAFTA).
- In the context of bilateral negotiations on investment issues between the EU and CARIFORUM, assess how the investment rules in the CARICOM-DR FTA will interface with the rules in the evolving CARICOM investment regime.
- Briefly outline the interests of the DR regarding investment issues in the negotiation of an EPA with the European Union.
- Make any other relevant observations or recommendations regarding common approaches by CARICOM and the DR towards investment in EPA negotiations.

## 2. Foreign Direct Investment in the Dominican Republic

Foreign Direct Investment (FDI), undoubtedly promotes the development of small economies and contributes to the adoption of new technologies and forms of production, through the transfer of technology and knowledge. However, this implies that the countries have clear and efficient legal and regulatory frameworks that guarantee and protect investment.

In 1995, as part of the reform process that the Dominican Republic embarked upon during the Nineties, a new law on foreign investment was promulgated – Law 16-95 – which opened up the investment regime in the country. One of the modifications introduced was equal treatment for foreign and national investors, i.e. national<sup>2</sup> treatment and free market access for foreign investors. Likewise, this Law establishes free convertibility of national currency, without need for prior authorization by the corresponding authorities, as well as the right to freely repatriate profits and the totality of invested capital.

**Table No. 1**  
**Foreign Direct Investment as Percentage of GDP 1990-2004**  
**(in US\$ million)**

| Year | FDI as Percentage of GDP |
|------|--------------------------|
| 1990 | 2.40%                    |
| 1991 | 1.94%                    |
| 1992 | 2.02%                    |
| 1993 | 1.95%                    |
| 1994 | 1.93%                    |
| 1995 | 3.45%                    |
| 1996 | 0.72%                    |
| 1997 | 2.79%                    |
| 1998 | 4.41%                    |
| 1999 | 7.69%                    |
| 2000 | 4.81%                    |
| 2001 | 4.98%                    |
| 2002 | 4.22%                    |
| 2003 | 3.69%                    |
| 2004 | 3.46%                    |

Source: ECLAC

This allowed for sustained growth of FDI in the Dominican Republic: 3.46% of the Gross Domestic Product in 2004. In 1999, it had reached 7.69%, the highest percentage since 1990, thanks to considerable investment in the privatized electricity sector.

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<sup>2</sup> The exceptions to the National Treatment principle established in the Law are the investments in the fields of national security, public health, toxic waste management, and those which have an impact on the environment.



Between 1993 and 2002, the three sectors that attracted the most foreign investment were electricity (US\$1,957.1 million), tourism (US\$1,727.3 million), and communications (US\$1,658.7 million).

**Table No. 2**  
**Direct Foreign Investment Flow per Sector 1993 – 2004 (in US\$ million)**

| Sectors      | Tourism       | Commercial    | Communications | Electricity   | Financial    | Free Zones   | Other        | Foreign Investment |
|--------------|---------------|---------------|----------------|---------------|--------------|--------------|--------------|--------------------|
| 1993         | 73.1          | 16.6          | 93.1           | -             | 6.5          | -            | -            | 189.3              |
| 1994         | 42.5          | 33.9          | 123.7          | -             | 6.7          | -            | -            | 206.8              |
| 1995         | 111.2         | 140.8         | 149.3          | -             | 13.0         | -            | -            | 414.3              |
| 1996         | 61.2          | 59.8          | (36.2)         | 7.5           | 4.2          | -            | -            | 96.5               |
| 1997         | 114.2         | 216.5         | 32.8           | 42.9          | 14.2         | -            | -            | 420.6              |
| 1998         | 312.2         | 177.4         | 117.1          | 33.4          | 29.5         | -            | 30.2         | 699.8              |
| 1999         | 296.9         | 182.6         | 98             | 631.4         | 40.9         | 40.5         | 47.5         | 1337.8             |
| 2000         | 73.7          | 153.7         | 272.2          | 281.9         | 45.3         | 42.5         | 83.7         | 953.0              |
| 2001         | 136.8         | 166.6         | 223.3          | 401.9         | 15.1         | 72.6         | 62.8         | 1079.1             |
| 2002         | 196.1         | 218.2         | 223.1          | 205.1         | 24.9         | 44.9         | 48.8         | 961.1              |
| 2003         | 259.8         | 143.4         | 177.3          | 174.8         | 82.2         | 82.5         | 85.3         | 1005.3             |
| 2004         | 50.0          | 51.9          | 185.0          | 178.2         | 61.6         | 14.5         | 108.5        | 649.7              |
| <b>Total</b> | <b>1727.7</b> | <b>1561.4</b> | <b>1658.7</b>  | <b>1957.1</b> | <b>344.1</b> | <b>297.5</b> | <b>466.8</b> | <b>8013.3</b>      |

Source: Central Bank of the Dominican Republic

FDI in the Dominican Republic mainly originates in the United States and a few Member States of the European Union. During the period 2002 to 2004, the countries with most investment in the Dominican Republic were the United States and Spain.

**Table No. 3**  
**Origin of Direct Foreign Investment (in US\$ million)**

| Country of Origin | 2000         | 2001          | 2002         | 2003          | 2004         | Total         |
|-------------------|--------------|---------------|--------------|---------------|--------------|---------------|
| Canada            | 133.2        | 10.2          | 18.4         | 69.8          | 10.9         | <b>242.5</b>  |
| Chile             | 21.6         | 0.3           | -            | 3.8           | 103.9        | <b>129.6</b>  |
| France            | 97.5         | 60.6          | 109.6        | 66            | 35.0         | <b>368.7</b>  |
| Grand Cayman      | 37.0         |               | 13.7         | -             | -            | <b>50.7</b>   |
| Italy             | 15.5         | 0.7           | 5.0          | 17.5          | 34.6         | <b>73.3</b>   |
| Netherlands       | 36.0         | 245.2         | 119.4        | -             | -            | <b>400.6</b>  |
| Spain             | 190.1        | 174.9         | 25.7         | 140.2         | 2.4          | <b>533.3</b>  |
| Switzerland       | 14.0         | 2.0           | 4            | -             | -            | <b>20.0</b>   |
| United Kingdom    | 17.4         | 2.0           | 0.2          | -             | -            | <b>19.6</b>   |
| USA               | 201.6        | 433.5         | 434.2        | 433.1         | 301.1        | <b>1775.7</b> |
| Other             | 189.0        | 149.7         | 258.7        | 274.9         | 161.8        | <b>1034.1</b> |
| <b>Total</b>      | <b>952.9</b> | <b>1079.1</b> | <b>961.1</b> | <b>1005.3</b> | <b>649.7</b> | <b>4648.1</b> |

Source: Central Bank and CEI-RD

### 3. Analytical Overview of the Investment Regime in the Dominican Republic (DR)

Since 1990, a series of reforms have been made in order to obtain a legal framework that would boost business and economic growth in the country. The process that prompted these reforms, which included foreign investment, started with new judicial provisions in the following sectors: foreign sector, with the modernization of tariffs (90); development of free zones (90); labor matters (92); changes of the fiscal system (93); openness to foreign investment (95); privatizations (97); and telecommunications (98).<sup>3</sup> The purpose and the focus of the Dominican government were to encourage local and foreign private investment. This group of laws targeted the opening up and liberalization of the markets, in order to respond to internal requirements and the new norms in international trade relations.

The main framework for investment in the Dominican Republic is Law No. 16-95 of October 24, 1995 on Foreign Investment, and Rules of Application No. 214-04. The objective of this judicial framework is to promote and develop foreign investments in the country, as well as to establish a regulatory model that guarantees and protects the investors. By promulgating this law, the Dominican government wishes to stimulate the arrival of foreign capital and to support the strengthening of productive activities, especially in the exporting sector.

One of the most important elements of this law is the principle of National Treatment to local and foreign investors, which guarantees that investors from any country shall receive a treatment not less favorable than other foreign investors and their investments and investments made by Dominican citizens.<sup>4</sup> Likewise, it should be noted that MFN treatment is guaranteed, which creates an open framework for investments in the Dominican Republic and leaves little room for negotiation processes.

In the legislation of the Dominican Republic, Article 16 of the Civil Code and Articles 166 and 167 of the Code of Civil Procedure establish an exception to the principle of National Treatment, according to which a “Judicatum Solvi” bond may be demanded from any foreigner or foreigner residing in the Dominican Republic who sues a Dominican citizen. This provision is of a private nature and, consequently, a judge may not impose it as a matter of law. This measure is required to cover the expenses and damages that might be caused after the procedure has been launched.

Law No. 16-95, in its Article 1 Paragraph a), defines direct foreign investment as “contributions from abroad, property of foreign individuals or legal entities, or of national individuals residing abroad, to the capital of a company that operates in the country.” Other terms defined in the law are direct re-investment, new foreign

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<sup>3</sup> ECLAC (2001). Economic and Social Growth in the Last 20 years in the DR and Prospects for the 21st Century.

<sup>4</sup> There are exceptions to the principle of equal treatment in special laws. For instance, Law No. 126-71 on Insurance requires a proportion of 51% of Dominican capital to be an insurance agent in the country.

investment, foreign investor, national investor, the Central Bank and the Export and Investment Center of the Dominican Republic (CEI-RD).

Another aspect of the law is that it does not limit the forms of investment, and indicates that it recognizes contributions in convertible currency; contributions in kind, such as industrial plants, new and retooled machinery and equipment, spare parts and pieces, raw materials, intermediary products, and finished products, as well as intangible technological and financial instruments that can be categorized as such by the Monetary Board.<sup>5</sup> In this regard, Dominican law establishes the concept of asset-based investment, whose main interest is to guarantee a high level of protection for said investment once it has been made.

An investment is materialized not only by the initial contribution to the same, but also through re-investment of profits in the same activity that has generated dividends. This same legal framework regulates, as described in Article 3 of the aforementioned law: a) investment in the capital of a new or existing company, including the establishment of branches; b) real estate investment in the country; and c) investments aimed at the acquisition of financial assets. Once the new investments and re-investments are registered, they receive equal treatment as direct foreign investment.

However, this provision has certain restrictions for investment in operations with toxic, hazardous or radioactive waste; activities that have a negative impact on public health and the environment, and the production of materials and equipment related to national security. Also, there exists an additional requirement for investment that could affect the ecosystem. The proponents of this kind of investments must present a project with provisions and measures showing that any possible ecological damage is not permanent, and that proper measures would be taken to recover the impacted area.

The Registration of Investments, in conformity with Regulation No. 214-04 shall be made with the Export and Investment Center of the Dominican Republic (CEI-RD)<sup>6</sup>, an institution that was created by Law 98-03 of June 17, 2003. However, it should be noted that this registration is not mandatory and that there is no current legislation that constrains its execution, which means that the investors registers the investment voluntarily. Also, the laws that exist for certain sectors are the ones that define competition and quality in the development of productive activities. This is the reason why FDI statistics in the Dominican Republic only refer to registered investment. This constitutes an improvement, as it eliminates the formality of prior obtaining of a permit. Indeed, registration is supposed to make the procedure easier for the investor, and not more complicated. Moreover, for statistical purposes, it is important that investors register their investment.

After the modification of the legislative framework that regulates investment in the Dominican Republic and of all the norms in the different sectors, such as the Laws on Tourism, on Telecommunications, Energy, Duty Free Zones, the Monetary and Financial Code, and others, this regulation has become secondary. It remains as a

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<sup>5</sup> The contributions or inputs to an operation of restructuring of Dominican external debt are not considered under this description.

<sup>6</sup> See Office for the Promotion of Foreign Investment and Exports in the Dominican Republic [www.cei-rd.gov.do](http://www.cei-rd.gov.do)

general framework, but has not been particularly relevant for the development of investment in recent years.

All the procedures and the different requirements for registration of investment in the Dominican Republic shall be outlined in Chapter 5 of the present document. Concerning the authority of CEI-RD, Article 2 of the Rules of Application No. 214-04 establishes the following, among others:

- To provide information, and to receive and analyze the requests for registration of direct foreign investment, foreign re-investment, new foreign investment, and license contracts for technology transfer.
- To receive information on the operation of export or free zones, with a view to granting registration of the corresponding foreign investment.<sup>7</sup>
- To issue certificates of registration of foreign investment or transfer of technology.
- To verify the value of profits remitted abroad, as well as of payments derived from the transfer of technology and the repatriation of capital.
- To inform the National Congress, through the Executive Power, of everything related to the flow of foreign investment in the country.
- To provide the Central Bank with all information regarding registered companies for statistical purposes.<sup>8</sup>

Law 16-95 establishes for foreign investors the freedom to remit abroad all dividends declared during the fiscal year, up to the total amount of net current profits for the period, in freely convertible currency and without need for prior authorization. Investors may, also, repatriate the invested capital gains.<sup>9</sup> At present it is no longer necessary or obligatory to register with CEI-RD or with the Central Bank for these purposes.

This freedom is also granted for Technical Service Contracts where fees are established for transfer of technology, and for contracts for the local manufacturing of foreign brands that include royalties. Nevertheless, these contracts, amounts and payment procedures shall be previously approved by CEI-RD.

Article 10 of the Law establishes that investors may directly represent their products manufactured abroad or in the Dominican Republic. In this regard, local and foreign investors shall receive equal treatment and their representation shall be regulated by Law No. 173 of 1966 on the Protection of Import Agents of Merchandise and Products.

The definition of “company” is derived from Regulation No. 214-04, as “an economic unit, of one sole owner, in general partnership, in limited partnership, or a stock company”.

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<sup>7</sup> This information is from the National Council of Export Free Zones, which was created by Decree No. 507 of December 27, 1978.

<sup>8</sup> This provision is established in the Monetary and Financial Law No. 183-02 of November 21, 2002.

<sup>9</sup> Reevaluation surpluses recorded in the capital accounts of companies that have reevaluated their assets, shall not be considered as foreign investment.

## 4. Domestic Legal and Administrative Instruments Governing Investment in the DR

### 4.1 Background

The first law promoting investments was Law No. 861 of July 22, 1978 on Foreign Investment, promulgated during the administration of President Antonio Guzmán Fernández, and inspired by the provisions of Decision No. 24 adopted by the Cartagena Commission.<sup>10</sup>

But, in 1942, the Dominican Constitution had already been modified to allow the National Congress to grant concessions to investors, through tax exemption contracts, so as to authorize them to operate in certain areas of the economy<sup>11</sup>.

In the Sixties, a law was enacted to complement the existing law on foreign investment. Law No. 251 of May 11, 1964 and Regulation No. 1679 of 1964 regulate the International Transfer of Funds and are still in force.

In January and April 1972, two resolutions of the Monetary Board of the Central Bank, and in view of promoting investment, allowed certain corporations and individuals with operations in specific areas of the economy, to register their FDI with the Central Bank, as requirement for the conversion of Dominican Pesos into freely convertible currency, and to remit the profits abroad.

It was not until 1995 that the government of President Joaquín Balaguer issued Law No. 16-95 of November 20 on Foreign Investment. On August 28, 1996, President Leonel Fernández approved Regulation No. 380-96 to apply said law. Since then, the judicial framework has undergone several modifications. Decree No. 163-97 modified Articles 4, 7 and 9 of Regulation 380-96. Subsequently, Law No. 98-03 of June 18, 2003 was issued to create CEI-RD and to modify Articles 2, 4, 8, 9 and 12 of Law 16-95.

On March 11, 2004, the Rules of Application No. 214-04 for Registration of Foreign Investment were promulgated to repeal Regulation No. 380-96 and any other legal provision to the contrary.

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<sup>10</sup> Executive Summary of Pellerano and Herrera, March 2001.

<sup>11</sup> Article 110 of the Dominican Constitution: “No exemption shall be given, nor any exoneration, reduction or limitation of taxes, fiscal or municipal contributions or duties, to any private person, except by virtue of law. However, private persons may acquire, through concessions authorized by law, or by means of contracts approved by the National Congress, the irrevocable right to benefit, for the time stipulated in the concession or contract, and in compliance with the obligations that the former or the latter impose, from exemptions, exoneration, reductions or limitations of taxes, fiscal or municipal contributions or duties, for certain works or companies of public interest, or for certain works or companies for which it is convenient to attract the investment of new capital, with a view to stimulating the national economy, or for any other reason of social interest.”

## 4.2 Legal Instruments Governing Foreign Investment

- Law No. 16-95 of November 20, 1995 on Foreign Investment.
- Law 98-03 of June 18, 2003 creating the Export and Investment Center of the Dominican Republic (CEI-RD).

## 4.3 Administrative Instruments

- Rules of Application No. 214-04 of March 11, 2004 on Registration of Foreign Investment.
- *Residence for investors*: CEI-RD, together with the National Directorate of Migration, through Decree 950-01 of September 20, 2001, have implemented a program of residence permits that envisages accelerated residence procedures for persons linked to foreign investment in the Dominican Republic. This Decree also grants to these foreigners a permit of residence for a period of at least 45 days.<sup>12</sup>
- *Information for Investors*:
  - Availability of commercial name
  - Registration of commercial name
  - Availability of trademark
  - Issue of patent certificate
  - Gambling license
  - Telecommunications concession
  - Establishment of free zone industries
  - Establishment of special free zone
  - Environmental permit
  - Labor code profile
- It is important to indicate that the Export and Investment Center of the Dominican Republic (CEI-RD) maintains discretionary power to modify the requirements and documents to be presented by the investor in order to register.

## 4.4 Other Laws and Incentives for Foreign Investment

As part of the reforms launched to open up the economy and to attract investment towards specific priority sectors, special laws have been enacted that grant tax incentives for certain types of investment. The following is a list and brief summary of the laws and incentives for special sectors:

- *Law 8-90 of January 15, 1990 to Promote the Establishment of New Free Zones and the Growth of Existing Zones*. The companies that manufacture goods and services for export established as Free Zones (Law 8-90 of January 15, 1990 and Rules of Application No. 366-97 of August 29, 1997) benefit from a special regime

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<sup>12</sup> See Annex 13 regarding the Request Form for Residence of Investment.

of customs controls and tax incentives of up to 100% on several items. Some of these exemptions are: income tax payments, payment of taxes on the transfer of industrialized goods and services (ITBIS), payment of taxes on construction, on loan contracts, on registration and transfer of real estate; payment of taxes on the constitution of commercial firms or on the increase of their capital; import taxes, tariffs, customs duties, equipment for free zones, etc. The Free Zones are regulated by the National Council of Export Free Zones of the Dominican Republic (CNZFE). This institution has to ensure the growth and development of the free zone sector in the DR, and is also responsible for the definition of a general policy of promotion and development geared towards improvement of the business climate, in order to attract new investments from abroad. The procedure for registration of investment in a Free Zone is different from the one established in Law 16-95 and its Rules of Application.

- **Law 150-97 of July 7, 1997 establishing a Zero Tax on agricultural and livestock inputs, equipment and machinery.** This law is only applicable to companies established in the country to carry out agricultural and livestock projects, and grants a zero tax (0%) on agricultural and livestock inputs, equipment and machinery. The same establishes exemptions to the application of the Law on the Transfer of Industrialized Goods and Services (ITBIS), the exchange rate surcharge, and the dismantling of tariffs.
- **Law 153-98 of May 27, 1998, General Telecommunications Law.** This law promotes a modern and competitive regulatory framework, and aims at modernizing the legal instruments. It guarantees the right of users to choose their suppliers of telecommunications services at their best convenience. Also, it sets the basis for the regulation of the different services. On the other hand, the law ensures that the State exercises its role of regulation and control with the least possible intervention, and creates a Regulatory Body for telecommunications.
- **Law 20-00 of May 8, 2000 on Industrial Property.** Its purpose is to protect inventions, patents, trademarks, and the like. This law contributes to the transfer and dissemination of technology, and places the Dominican Republic in conformity with the Agreement on Intellectual Property – TRIPS – signed in Marrakech in 1994, when the World Trade Organization was founded.
- **Law 19-00 on the Securities Market, promulgated in April 2000.** Its objective is to promote and regulate the securities market of the Dominican Republic. This law creates a Regulatory Body, the Superintendent's Office for Securities, which is an autonomous institution whose responsibility is to promote, regulate and control the securities market. It also creates the National Securities Council, a Registry of Securities, and a Registry of Products, with the purpose of providing information to the public on securities, issuers and other actors in the securities market, which has to operate with efficiency and transparency, in order to contribute to the economic and social development of the country.
- **Law 64-00 of August 18, 2000 on the Environment and Natural Resources.** This law establishes the norms for conservation, protection, improvement and restoration of the environment and natural resources, so as to ensure sustainable use, as well as sanctions against those who violate the law. It also creates different entities such as



the Secretariat of State for the Environment and Natural Resources, the National Council for the Environment, the National System of Environmental Management, and the National System of Protected Areas.

- **Law 28-01 of February 1, 2001 creating a Special Border Development Zone.** The Special Border Development Zone covers the Provinces of Pedernales, Independencia, Elías Piña, Dajabón, Montecristi, Santiago Rodríguez and Bahoruco. This Zone will offer exoneration of all internal taxes during 20 years to all companies authorized by the Dominican laws to establish themselves in the Zone. Moreover, fifty per cent (50%) reduction is granted on the payment for freedom of transit and the use of ports and airports.
- **Law 158-01 of October 9, 2001 on the Promotion of Tourism Development.** This legal text grants benefits to poles of scarce development and to new poles in provinces and locations of great potential, through tax exemptions of up to one hundred percent (100%) on various items for a period of 10 years. Also, incentives are created for natural and legal persons domiciled in the country who establish businesses, and promote or invest capital in this kind of activity and in the tourism poles.
- **Law 183-02 of July 2002 – the Monetary and Financial Code.** This code was promulgated with the purpose of establishing a regulatory regime for the national monetary and financial system, in order to ensure optimum conditions of price stability, liquidity, solvency, and management of financial intermediation, and the effective operation of the system in a climate of competitiveness and free market.
- **Law 126-02 of August 14, 2002 on E-Commerce and Digital Documents and Signatures.** Regulates all commercial relations structured around the utilization of one or more digital documents or data messages, or any other similar medium. This law was created in conformity with international regulations.
- **Law 3-02 of January 18, 2002 on the Commercial Registry.** According to this law, the registration and recording of all documents established in the law and related to commercial activities of natural persons or commercial firms in the Dominican Republic shall be administered by the Chamber of Commerce and Production of the location where the commercial activity is conducted.
- **Law 1-02 of January 18, 2002 on Unfair Commercial Practices and Safeguard Measures.** Regulates the basic rules of behavior of the economic actors, in order to guarantee effective freedom of competition in the market, and prevent or avoid distortions created by unfair commercial practices, as well as to introduce temporary provisions to safeguard national production against the sudden increase of imports.



## 5. Matrix of the Procedures Involved in Carrying out an Investment in the DR

Law 16-95, the Rules of Application 214-04, and the internal resolutions of CEI-RD establish requirements for the registration of foreign investment, remittance of profits, repatriation of capital and transfer of technology. The following table presents the details of the different steps to be followed for each activity:<sup>13</sup>

| Activity                          | Responsible Institution | Procedure   | Remarks  |
|-----------------------------------|-------------------------|---|--|
| <b>Registration of Investment</b> | CEI-RD                  | 1) As soon as foreign investors or companies have made their investment, they shall deposit the following documents with CEI-RD: <ul style="list-style-type: none"> <li>- In the case of: i) <u>Natural persons</u>: name, address, telephone, fax, nationality of the foreign investor and of the person representing him/her, identification document (identity card or passport); ii) <u>Legal entity</u>: photocopy of National Taxpayer Registration (RNC) of the company receiving the investment, trade name, domicile, telephone and fax numbers.</li> <li>- Amount of investment in freely convertible currency.</li> <li>- Country of origin of investment.</li> <li>- Name and documents of constitution of the company</li> </ul> | <ul style="list-style-type: none"> <li>- Regarding contributions in kind, a sworn statement before Notary Public has to be presented, in which the foreign investor declares that the contributions were or will be used for purposes of the investment project to be registered, together with the description and cost of the contributions.</li> <li>- If there exists any previous certificate of registration, the original certificate shall be deposited for purposes of substitution.</li> </ul> |

<sup>13</sup> Registration of and information on companies operating in industrial free zones shall be dealt with directly by the National Council of Export Free Zones (CNZFE).

<sup>14</sup> Optional information for statistical purposes of CEI-RD.

<sup>15</sup> These powers are granted by Art. 17 Paragraph b) of Law No. 98-03 that creates CEI-RD.

| Activity | Responsible Institution | Procedure   | Remarks  |
|----------|-------------------------|---|--|
|          |                         | <p>receiving the investment (bylaws of the company).</p> <ul style="list-style-type: none"> <li>- Branch of economic activity of the company receiving the investment.</li> <li>- Number of jobs generated by the foreign investment project.<sup>14</sup></li> <li>- Proof of authorization to operate branches, through the establishment of the company's domicile in the location where the investment will be made.</li> <li>- Updated list of stockholders and of the Board of Directors.</li> <li>- Investment stock certificates.</li> <li>- Sworn statement before Notary Public to declare that foreign currency was used (total amount registered) for purposes of the investment project.</li> </ul> <p>2) CEI-RD shall issue a Certificate of Registration of Foreign Direct Investment.</p> <p>3) CEI-RD shall provide the Central Bank with information on registered companies, in conformity with the Monetary and Financial Law.</p> <p>4) CEI-RD shall report annually to the National Congress on all matters regarding the flow of foreign investment in the country.</p> <p>5) The Request for Registration of Investment shall be accompanied by a contribution of the foreign investor to CEI-RD for services of evaluation and issuance of the</p> | <ul style="list-style-type: none"> <li>- If the original certificate of registration is lost, the procedure of Art. 36 of the Code of Commerce of the Dominican Republic shall be applied.</li> <li>- Special cases:</li> <li>- <u>Effects on the ecosystem</u>: If foreign investment affects the ecosystem in its area of influence, the foreign investor shall present a certificate issued by the Ministry or a competent authority, in view of repairing any ecological damage that may have been caused.</li> <li>- <u>Capitalization of technology</u>: The foreign investor shall present the contract signed between the parties, with indication of the amount of capitalization in foreign currency.</li> </ul> |

| Activity   | Responsible Institution | Procedure  | Remarks |
|--|-------------------------|--|---------|
|  |                         | <p>Certificate of Registration of Foreign Investment<sup>15</sup>:</p> <ul style="list-style-type: none"> <li>- RD\$5,000.00 upon deposit of the request for registration and corresponding documentation.</li> <li>- RD\$1,000.00 per issuance of additional certificates of registration.</li> <li>- RD\$2,000.00 per duplicate of certificate of registration (in the case of loss).</li> </ul> <p>Payment is in cash or by certified check to CEI-RD. A copy of the receipt of payment to CEI-RD shall be presented when depositing the request for registration with CEI-RD. The RD\$5,000.00 contribution is for each certificate to be issued (per foreign investor) and not per receiving company.</p> |         |
| <p><b>Foreign Direct Investment in Freely Convertible Currency (in cash)</b></p> | <p>CEI-RD</p>           | <ol style="list-style-type: none"> <li>1. Proof of entry in the country of foreign currency, i.e. copy of check(s) or notification(s) of transfer from financial entity (or entities) established abroad.</li> <li>2. Corresponding document of foreign exchange issued by an entity authorized by the Monetary Board to negotiate foreign currency.</li> <li>3. The request for registration of investment shall be accompanied by a contribution of the foreign investor to CEI-RD for services of evaluation and issuance of the Certificate of Registration of Foreign Investment<sup>16</sup>:</li> </ol>   |         |

<sup>16</sup> These powers are granted by Art. 17 Paragraph b) of Law No. 98-03 that creates CEI-RD.

| Activity | Responsible Institution | Procedure   | Remarks |
|----------|-------------------------|---|---------|
|          |                         | <ul style="list-style-type: none"> <li>- RD\$5,000.00 upon deposit of the request for registration and corresponding documentation.</li> <li>- RD\$1,000.00 per issuance of additional certificates of registration.</li> <li>- RD\$2,000.00 per duplicate of certificate of registration (in the case of loss).</li> </ul> <p>Payment is in cash or by certified check to CEI-RD. A copy of the receipt of payment to CEI-RD shall be presented when depositing the request for registration with CEI-RD. The RD\$5,000.00 contribution is for each certificate to be issued (per foreign investor) and not per receiving company.</p> |         |

| Activity  | Responsible Institution | Procedure   | Remarks  |
|---|-------------------------|---|--|
| <p><b>Foreign Direct Investment in Kind</b></p> | <p>CEI-RD</p>           | <p>1. Documents to be deposited for contributions in imported goods and/or services: commercial invoice; bill of lading; and customs clearance.</p> <p>2. Documents to be deposited for contributions in kind partially received during a particular period of time: a sworn statement including the goods to be imported and the estimated value of their customs clearance, as well as the period during which the imports shall be received.</p> <p>- Subsequently, a provisional certificate of registration shall be granted for the estimated value of these imports. Documentary evidence shall be: proof of payment, credit and order of purchase of the goods and/or services to be received from abroad.</p> <p>3. The investor shall present the necessary documents regarding natural persons (name, address, telephone, fax, nationality of the foreign investor and of the person representing him/her, and identification document (identity card or passport) and the provisional documents of registration issued in order to replace them by certificates of foreign investment.</p> <p>4. The request for registration of investment shall be accompanied by a contribution of the foreign investor to</p> | <p>- Credits or financing from abroad: foreign investment shall only be registered if credit is for the foreign investor and not for the company making the investment.</p> <p>- Intangible technological contributions: copies of the agreement with the receiving company shall be presented, as well as proof of entitlement to the property.</p> |

| Activity                               | Responsible Institution | Procedure  | Remarks |
|--|-------------------------|--|---------|
|  |                         | <p>CEI-RD for services of evaluation and issuance of the Certificate of Registration of Foreign Investment<sup>17</sup>:</p> <ul style="list-style-type: none"> <li>- RD\$5,000.00 upon deposit of the request for registration and corresponding documentation.</li> <li>- RD\$1,000.00 per issuance of additional certificates of registration.</li> <li>- RD\$2,000.00 per duplicate of certificate of registration (in the case of loss).</li> </ul> <p>Payment is in cash or by certified check to CEI-RD. A copy of the receipt of payment to CEI-RD shall be presented when depositing the request for registration with CEI-RD. The RD\$5,000.00 contribution is for each certificate to be issued (per foreign investor) and not per receiving company.</p> |         |
| <b>Reinvestment of Profits and New</b> | CEI-RD                  | 1. After registration, the same treatment shall be granted as for FDI. Within ninety (90) calendar days <sup>18</sup> , the following documents shall be presented:  | .       |

<sup>17</sup> These powers are granted by Art. 17 Paragraph b) of Law No. 98-03 that creates CEI-RD.

<sup>18</sup> Counted as of the date when the company decides to distribute profits.

<sup>19</sup> Optional information for statistical purposes of CEI-RD.

| Activity          | Responsible Institution | Procedure   | Remarks |
|-------------------|-------------------------|---|---------|
| <b>Investment</b> |                         | <ul style="list-style-type: none"> <li>- Copy of the audited financial statements of the profit-generating company.</li> <li>- Minutes of the Stockholders Assembly declaring distribution of profits.</li> <li>- Documentary evidence of payment of fiscal commitments of the foreign investor in the Dominican Republic.</li> <li>- In the case of reinvestment of profits, the amount of investment in freely convertible currency shall be presented.</li> </ul> <p>2. For new investments, the following additional information shall be deposited:</p> <ul style="list-style-type: none"> <li>- Amount of investment in freely convertible currency.</li> <li>- Country of origin of investment.</li> <li>- Name and documents of constitution of the company receiving the investment (bylaws of the company).</li> <li>- Branch of economic activity of the company receiving the investment.</li> <li>- Number of jobs generated by the foreign investment project.<sup>19</sup></li> </ul> <p>3. The request for registration of investment shall be accompanied by a contribution of the foreign investor to CEI-RD for services of evaluation and issuance of the Certificate of Registration of Foreign Investment<sup>20</sup>:</p> |         |

<sup>20</sup> These powers are granted by Art. 17 Paragraph b) of Law No. 98-03 that creates CEI-RD.

| Activity                     | Responsible Institution | Procedure  | Remarks |
|------------------------------|-------------------------|--|---------|
|                              |                         | <ul style="list-style-type: none"> <li>- RD\$5,000.00 upon deposit of the request for registration and corresponding documentation.</li> <li>- RD\$1,000.00 per issuance of additional certificates of registration.</li> <li>- RD\$2,000.00 per duplicate of certificate of registration (in the case of loss).</li> </ul> <p>Payment is in cash or by certified check to CEI-RD. A copy of the receipt of payment to CEI-RD shall be presented when depositing the request for registration with CEI-RD. The RD\$5,000.00 contribution is for each certificate to be issued (per foreign investor) and not per receiving company.</p>  |         |
| <b>Remittance of Profits</b> | CEI-RD                  | <ol style="list-style-type: none"> <li>1. To present request for registration, accompanied by the following documents:                             <ul style="list-style-type: none"> <li>- Copy of the audited financial statements of the profit-generating company.</li> <li>- Minutes of the Stockholders Assembly declaring distribution of profits.</li> <li>- Documentary evidence of payment of fiscal commitments of the foreign investor in the Dominican Republic.</li> <li>- Copy of the currency sales form, duly stamped by the financial intermediation entity and/or foreign exchange agent authorized by the Monetary Board to conduct foreign exchange intermediation.</li> </ul> </li> <li>2. For advance dividends remitted during the current fiscal</li> </ol> |         |



| Activity                              | Responsible Institution | Procedure   | Remarks |
|---------------------------------------|-------------------------|---|---------|
|                                       |                         | <p>year, the following documents shall be presented:</p> <ul style="list-style-type: none"> <li>- Documentary evidence of payment of fiscal commitments of the foreign investor in the DR.</li> <li>- Copy of the Resolution of the Board of Directors declaring advance dividends to be paid during the current fiscal year.</li> </ul> <p>3. After the Assembly has ratified the dividends for the corresponding period, the minutes and the audited financial statements shall be communicated to CEI-RD.</p>  |         |
| <p><b>Repatriation of Capital</b></p> | <p>CEI-RD</p>           | <p>1. The sale, transfer or cession of stock, shares or rights of a foreign investor, to another national or foreign investor, shall be notified to CEI-RD, within sixty (60) calendar days after total or partial transfer of property or liquidation of the company.</p> <p>2. Before the repatriation of capital, CEI-RD shall receive the original of the registration certificate for the purpose of payment.</p> <p>3. The purchaser shall have sixty (60) calendar days to obtain the new registration certificate and to deposit the following documents:</p> <ul style="list-style-type: none"> <li>- The original of the certificate of registration of transferred foreign investment.</li> <li>- Documentary evidence of payment of tax commitments of the foreign investor in the DR, beyond the scope of the</li> </ul> |         |

| Activity                      | Responsible Institution | Procedure  | Remarks   |
|-------------------------------|-------------------------|--|---|
|                               |                         | investment.<br>- Satisfactory documentation for CEI-RD, as proof of transfer of property of foreign capital.<br>- Request by the new foreign investor for issuance of the certificate of registration of foreign investment.<br>- In the case of natural persons: name, address, telephone, fax, and nationality of the foreign investor and of the person who represents him/her, if any.<br>- In the case of legal entities: trade name, domicile, telephone, fax, and name of the persons who are part of the Board of Directors.<br>- Amount of investment in freely convertible currency.<br>- Proof of authorization to operate branches through the establishment of domicile for the company where the investment is to be made, as the case may be. |   |
| <b>Transfer of Technology</b> | CEI-RD                  | 1. To deposit request for registration of technology transfer contracts, together with the following documents:<br>- Copy of the contracts.<br>- Documentary proof that the granter possesses entitlement to the property of said technology.<br>2. The company shall present the following to CEI-RD, within sixty (60) days after remittance of royalties abroad:<br>- Copy of the currency sales form, duly stamped by the financial intermediation entity and/or foreign exchange agent authorized by the Monetary Board to conduct foreign exchange intermediation.   | - <u>Effects on the ecosystem:</u> If foreign investment affects the ecosystem in its area of influence, the foreign investor shall present a certificate issued by the Ministry or a competent authority, for the repair of any ecological damages caused. |

| Activity | Responsible Institution | Procedure  | Remarks |
|----------|-------------------------|--|---------|
|          |                         | <ul style="list-style-type: none"><li>- Documentary evidence of payment of fiscal commitments of the foreign investor in the DR.</li><li>- Communication of the granting company, with detailed calculations to determine the amount of royalties paid.</li><li>- Proof that the granting company abroad has received payment of the documented royalties.</li></ul> |         |

## 6. Dominican Republic's Trade Agreements – BITs and FTAs

The developing countries, as Dominican Republic, wishing to facilitate FDI flows have signed an increasing number of bilateral and multilateral treaties, which establish predictable, transparent and non-unilateral frameworks, as opposed to strictly domestic legislations.

**Table No. 4**  
**List of Investment Agreements of the Dominican Republic**

| Description           | Number |
|-----------------------|--------|
| Bilateral Agreements  | 8      |
| Free Trade Agreements | 3      |
| Pending               | 23     |
| Total                 | 34     |

### 6.1 Bilateral Agreements

In the Dominican Republic, a total of eight (8) bilateral agreements are in force for the protection and promotion of investment. These agreements were signed with the following countries: Argentina, Chile, Ecuador, France, Germany, Republic of China (Taiwan), Spain and the United States.

On the other hand, five (5) agreements have been signed that are not yet in force: Cuba, Finland, Morocco, Swiss Confederation and United Kingdom. And, sixteen (16) agreements are in process of negotiation with: Austria, Belgium, Bolivarian Republic of Venezuela, Canada, Colombia, Czech Republic, Denmark, Israel, Italy, Kuwait, Norway, Peru, Russian Federation, South Korea, Ukraine and Sweden.

On October 11, 2002, the negotiation process concluded for agreements with the Netherlands and with Italy, but they are still awaiting signature.

These agreements have several common elements such as guarantee of national treatment to foreign investors. The agreement with France contains an exception for countries belonging to integration systems, which means that this treatment shall not be granted when one of the Parties has signed any other free trade agreement, customs union, common market, etc.

### 6.1.1 List of Bilateral Agreements

| Country          | Name of the Agreement  | Date of Signature (Signed) | Date of Ratification                             | Remarks                          |
|------------------|--|----------------------------|--|----------------------------------|
| <b>Argentina</b> | Agreement for the Reciprocal Promotion and Protection of Investments between the Dominican Republic and Argentina  | March 16, 2001             | N/A  | In force                         |
| <b>Chile</b>     | Agreement between the Dominican Republic and the Republic of Chile for the Reciprocal Promotion and Protection of Investments                                    | November 28, 2000          | May 8, 2002<br>Approved by Resolution No. 63-02. | In force                         |
| <b>Cuba</b>      | Agreement between the Government of the Dominican Republic and the Government of the Republic of Cuba for the Reciprocal Promotion and Protection of Investments | November 15, 1999          | -  | Ratification pending by Congress |
| <b>Ecuador</b>   | Agreement for the Promotion and Protection of Investments between the Government of the Dominican Republic and the Republic of Ecuador                           | July 26, 1998              | N/A  | In force                         |
| <b>Finland</b>   | Agreement between the Government of the Dominican Republic and the Government of the Republic of Finland on the Promotion and Protection of                      | November 27, 2001          | -  | Ratification by Congress pending |

|                                   | Investments  |                             |   |  |
|-----------------------------------|--|-----------------------------|---|--|
| <b>France</b>                     | Agreement between the Government of the Dominican Republic and the Government of the Republic of France for the Reciprocal Promotion and Protection of Investments         | January 14, 1999            | Approved by the Senate of the Republic on June 3, 2000 and by the House of Representatives on October 30, 2002.<br>Approved by Resolution No. 177-02. | In force                                       |
| <b>Germany</b>                    | Treaty between the Dominican Republic and the Federal Republic of Germany  | Signed on December 23, 1957 | Ratified by the National Congress on February 5, 1958   | In force                                       |
| <b>Morocco</b>                    | Agreement between the Government of the Dominican Republic and the Government of the Kingdom of Morocco on the Reciprocal Promotion and Protection of Investments          | May 23, 2002                | -   | Ratification by the Dominican Congress pending |
| <b>Republic of China (Taiwan)</b> | Agreement for the Reciprocal Protection and Promotion of Investments between the Government of the Dominican Republic and the Government of the Republic of China (Taiwan) | November 5, 1999            | November 27, 2001.<br>Approved by Resolution No. 193-01   | In force                                       |
| <b>Spain</b>                      | Agreement for the Reciprocal Promotion and Protection of Investments between the Dominican Republic and the Kingdom of Spain   | Signed on March 16, 1995    | Ratified by the National Congress on October 7, 1996  | In force                                       |
| <b>Switzerland</b>                | Agreement between the Swiss Confederation and the  | January 27, 2004            | -   | Ratification by the National                   |

|   |  |                       |                          |                                  |
|---|--|-----------------------|--------------------------|----------------------------------|
|   | Dominican Republic on the Promotion and Protection of Investments  |                       |                          | Congress pending                 |
| <b>United Kingdom of Great Britain and Northern Ireland</b> | Agreement between the Government of the Dominican Republic and the Government of the United Kingdom of Great Britain and Northern Ireland on the Development and Protection of Investments | July 11, 2002         | -                        | Ratification by Congress pending |
| <b>United States of America</b>                             | Agreement between the Government of the Dominican Republic and the Government of the United States of America on Guarantees for Investment   | Signed on May 2, 1962 | In force as of this date | In force                         |

Source: CEI-RD

## 6.2 Free Trade Agreements

The Dominican Republic has signed Free Trade Agreements with CARICOM<sup>21</sup>, with Central America and, more recently, with the United States and Central America, better known as DR-CAFTA.

The first two agreements, CARICOM and Central America, are similar in contents, but not necessarily in approach. Both texts regulate the trade in goods, and consequently deal with rules of origin, customs procedures, technical barriers to trade, and sanitary and phytosanitary measures. They, also, include norms regarding the trade in services, investments, public procurement, and temporary entry of businesspeople.

In general terms, Annex III of the FTA with CARICOM, the “Agreement on Reciprocal Promotion and Protection of Investments”, and Chapter X on “Investment” of the treaty signed with Central America, deal with investment relations in similar fashion. These texts establish the principles of National Treatment and of Most Favored Nation in relations with third parties, as well as MFN for investors in the case of losses due to national emergencies or other similar events. And while both agreements do not address performance requirements, they do establish the obligation to implement a mechanism that enables

<sup>21</sup> The following countries are Members of CARICOM: Antigua and Barbuda, Barbados, Belize, Dominica, Guyana, Jamaica, Montserrat, St. Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, and Trinidad and Tobago.

temporary entry of businesspeople. They also envisage free convertibility and transfer of dividends, capital and any other profit, as well as a mechanism to settle disputes between a State Party and an investor, or between Parties.

However, in both FTAs, regarding trade in services, investment, government procurement, and temporary entry of businesspeople, the market access negotiations were not completed, but the legal frameworks governing these relations were defined.

After the signature of DR-CAFTA, this agreement covers the matters still pending for the Parties in the agreement between the Dominican Republic and Central America.

Regarding the most recent agreement signed by the Dominican Republic with Central America and the United States (DR-CAFTA), it aims at more legal security, which is closely linked to the flow of Foreign Direct Investment (FDI) towards developing countries, as increased legal stability creates a favorable climate for business in the signatory country.

DR-CAFTA deals with Market Access topics, such as National Treatment and Access of Goods to the Market, Rules of Origin, Customs Procedures, Customs Administration and Trade Facilitation, Sanitary and Phytosanitary Measures, Technical Barriers to Trade and Commercial Defense. The themes of Services, Investment, Telecommunications, E-Commerce and Finances are treated in individual chapters. Other cross-sectional and institutional themes are Public Procurement, Intellectual Property Rights, Transparency, Dispute Settlement, and others.

Concerning the Investment Chapter, this was negotiated with a negative approach, and consequently, the opening up is total except for what is stated in Annex I of Non-Conforming Measures and Annex II of Future Measures. Also, the drafting and contents are more accurate than the BITs and the FTAs already signed by the country. This Chapter codifies pre-establishment and a dispute settlement mechanism to avoid frivolous claims. The State raised two kinds of reservations: 1. Exceptions to the NT and MFN principles, number of executives working in the companies, and performance requirements; 2. The State reserved for itself the right to adopt new discriminatory measures in specific areas such as border properties, government finances, fisheries, communications, etc.

### **6.2.1 List of Free Trade Agreements that Include a Chapter on Investments**

- The Free Trade Agreement between the Dominican Republic and the Caribbean Community (CARICOM) was signed on August 22, 1998, ratified on February 28, and came into force in December 2001. It is currently in force.
- The Free Trade Agreement between the Dominican Republic and Central America was signed on April 16, 1998, ratified on April 2, 2001 and came into force in October 2001. It is currently in force.



- The Free Trade Agreement between the Dominican Republic, Central America and the United States was signed on August 5, 2004 and ratified by the House of Representatives of the Dominican Republic on September 6, 2005, after ratification by the Dominican Senate.

## 7. Approach of the DR Legislation vs. Draft CARICOM Investment Code

**7.1** We are faced with two legal texts that are different in both nature and scope but basically pursue the establishment of clear rules to promote a business climate that is attractive to foreign direct investment and thus sets the basis for more development and economic growth, including the transfer of technology and knowledge.

The Dominican legal framework, i.e. Law 16-95 on Foreign Investment in the Dominican Republic, is general domestic legislation applicable to all investment in the country. The CARICOM text mentioned above, the CARICOM Investment Code (CIC), currently under negotiation within this integration system, is an intergovernmental agreement or an instrument of international law, and as such part and parcel of the process to implement the CARICOM Single Market and Economy (CSME). Consequently, many of the aspects contained in the draft CIC do not fall under Law 16-95.

In this regard, the approach of this section is not to present a summary of these texts, but to identify the common aspects and those which differentiate the two legal frameworks, in terms of the principles they promote, and of some of the implications of the said differences.

It should be pointed out that CARICOM has not yet defined what is going to happen with the draft CIC but consultations on the text have been conducted in several Member States. And although a CARICOM Agreement Investment had first been proposed as an instrument to rule intra-regional investment relations, while an Investment Code would address third country investment, the initiative was recently changed. The intent is to have the Investment Code (CIC) as the sole legal framework for both intra and extra-regional investments (i.e., those originating in third countries) in the CARICOM Single Market.

The above raises the following questions: What would be the difference in treatment for Member Countries of the Community and for third countries, in general? On the other hand, what treatment would be granted to the countries that have signed a free trade agreement with CARICOM that

includes a Chapter or Annex on Protection and Promotion of Investments? The lack of definition of common norms for CARIFORUM Members in their intra and extra-regional relations is, also, a challenge for the negotiation of an Economic Partnership Agreement (EPA) with the European Union.

**7.2** Dominican investment legislation has an open approach and, ever since the early 1990s, it has consistently tried to adapt its regime to attract investment, mainly for exports and, more recently, in advanced technology or in processes of domestic added-value. This is the reason why there are practically no limitations on investment.

A first distinctive element in these texts is the definition of “investor” as active subject in a process whose activity is the object of the same. For the Dominican Republic, this simply means “the owner of the foreign investment”, and its legal forms are not limited or specifically defined. The ownership or origin of the capital of a company does not determine the kind of treatment that will be given to an investment. And, commercial presence is not expressly required for receiving the status of investor or the prerogatives established in Law 16-95, although there are special legislations for certain sectors that require such presence, as is the case of Telecommunications and Financial.

The draft CARICOM Investment Code (CIC) defines an investor as any natural person executing a legal act that commits capital, in accordance with the legislation of each nation, or with the harmonized regulations of CARICOM. However, it also points out (Art. 1) that “with respect to intra-CARICOM relations, in order to enjoy preferential market access investors would need to have certain defined characteristics.”<sup>22</sup> It is not clear, though, to which texts or norms the Code refers or what exactly is meant by the term “harmonized regulations of CARICOM”.

Now, the more restrictive the definition is, the less open the regime will be, and the more difficult it will become to reach the objective of promoting FDI. This also leads to distortions in the treatment given to companies established in CARICOM territory but whose capital originates in a third country, versus companies of Caribbean citizens or citizens from countries that have signed free trade agreements. This is the case of the Agreement between the Dominican Republic and CARICOM where “investor” is: “... ii) any corporation, company, association, firm or other organization legally constituted under the laws of one of the Parties, established or not for profit or ownership, under private or governmental control or not.” Hence, it is understood that the authorities of CARICOM should consider this issue in order to avoid undesired consequences.

**7.3** Concerning the scope, and regardless of the differences due to the legal nature of the analyzed texts, Dominican legislation does not envisage any restriction to the type of activity to be conducted. Three specific cases are considered: public health, environment, and equipment for national defense, and toxic products that are of the exclusive purview of the Dominican State. Certain limitations apply to the share of foreign capital in activities of internal land and air transport,

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<sup>22</sup> This refers to the definition in the Revised CARICOM Treaty (Art. 32) of a CARICOM investor as any citizen of a Member State of CARICOM, or any company legally constituted in a Member State whose stock is owned 50% by a CARICOM citizen or national. A footnote in the draft CIC recommends that CARICOM governments amend the Treaty such that “special rights are conferred on a bonafide CARICOM Company when (i) more than 33 percent of the equity interest is collectively owned by nationals of the Region, and (ii) CARICOM nationals collectively have the power to name a majority of its directors or otherwise legally to direct its actions.”

maritime coasting and international traffic; commercial and investment banks, and other financial institutions; fisheries; insurance; and agricultural, poultry and livestock operations.

In the draft CIC however, a negative approach to market access is used; this means that everything is ruled by these frameworks, except for the listings in the Annexes of Reservations. However, these Drafts do not clearly establish which activities are covered, and the elaboration of the Lists of Annexes remains open for negotiation. This implies that each country could have its own list of exceptions, which would turn the system into a very complicated mechanism, especially for third countries. The CIC lists several manufacturing services and activities where barriers could be erected against the entry of foreign investment in any of its forms.<sup>23</sup>

Nevertheless, it is a fact that these legislations do not include measures taken by the financial sector, nor those which affect national security or investments proceeding from illicit activities. Likewise, there are general exceptions for several reasons: intra and extra-regional relations, public order, impact on the environment and on the security of citizens, balance of payments problems, money laundering and terrorism, etc. The Dominican legislation on investments does not regulate so strictly, although there are special provisions for similar purposes, such as the prevention of laundering of assets.

**7.4** All the legislations examined follow the same approach towards managerial positions<sup>24</sup> in companies established in the different territories, although the concepts may differ. They encourage recruitment of the greatest possible number of nationals in high-level executive and managerial positions, but do not prohibit the presence of foreign staff. In the Dominican Republic, the Labor Code (Law 16-92 promulgated by the Executive Power on May 29, 1992) indicates in its Article 144 that “the administrators, managers, directors and other persons occupying positions of administration and direction shall preferably be of Dominican nationality”. However, said Code also establishes a general limitation, in the sense that 80% of the personnel of a company has to be Dominican.

It should be pointed out that the Dominican Republic has a Presidential Decree – not a law – that establishes a fast-track procedure for granting work permits or temporary residence to foreign investors or officials who occupy executive positions in companies registered with CEI-RD, in conformity with Law 16-95. A similar administrative procedure could be considered by CARICOM, not only regarding permits for business executives, but also as a mechanism to facilitate the circulation of Dominican businesspeople who continually face serious difficulties when traveling in the region. The opposite is not true, as only Guyana, Belize and Haiti require a visa from Dominicans.

**7.5** As far as the principles of National Treatment (NT) and Most Favored Nation (MFN)<sup>25</sup> are concerned, it should be noted, once again, that these instruments differ in legal nature. Both the Investment Code and the Dominican Law establish NT for all investors.

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<sup>23</sup> Article 13 “Sector Reservations” of the CARICOM Investment Code.

<sup>24</sup> The DR-CAFTA contains the non conforming measures on Annex I and II where references are made concerning the treatment of this subject.

<sup>25</sup> The DR-CAFTA contains the non conforming measures on Annex I and II where references are made concerning the treatment of this subject.

In terms of NT, there are also differences with Dominican legislation, as the limitations or exceptions established in the latter, as explained earlier, are reduced to matters of national security reserved for the State, or areas where Dominican majority capital is required.

And, although the purpose of the Investment Code of CARICOM is to market the Caribbean region as one single space with one single investment policy, the disparity among legislations and the possibility for each country to raise its own reservations, actually defeats this purpose.

**7.6** Regarding the concepts of pre-establishment and post-establishment, Dominican legislation honors the principle of post-establishment, because it guarantees national treatment for foreign investors and their investments, once they are established or admitted in the country. Pre-establishment is not regulated nor considered within the framework of current legislation on rights granted to investors. However, DR-CAFTA does recognize it and commits the responsibility of the Dominican State in the case the rights of the potential investor are violated.

On the other hand, the Investment Code proposed by CARICOM reserves the right to distinguish between pre-establishment and post-establishment of investors, without indicating any criteria for or implications of the same. This might create an unstable investment climate in the CARICOM region, as each member nation would have discretion to decide differently on how to distinguish one from the other.

**7.7** Dominican legislation does not include themes such as indirect expropriation or mechanisms for the settlement of disputes between the investor and the State, unlike the CARICOM Investment Code. Said matters are part of international agreements, such as DR-CAFTA, although the agreement with Central America does not take into account possible investor-State litigation.

**7.8** One topic that is included in most investment guarantee agreements is compensation for losses caused by armed conflict. Dominican legislation does not contain any such provision for losses due to war, armed conflict and revolution. However, the CARICOM Investment Code does take this issue into account and regulates these aspects by referring simply to national treatment.

**7.9** Law 16-95 does not contain any provision regarding performance requirements,<sup>26</sup> but it should be pointed out that this law only regulates the investment registration procedure, not for reasons of repatriation of profits or capital, but for statistical purposes, and for the application of a fast-track procedure to obtain residence or work permits in the Dominican Republic. Law 8-90 on Free Zones, on the other hand, establishes performance requirements for receiving profits.

**7.10** All the examined texts include the concept of free transfer of profits, dividends, interest, capital gains, royalty payments, payments for compensation, expropriation, and others. Said transfers are to be made in freely convertible currency.

The CIC establishes general exceptions to National Treatment and MFN, in order to protect the balance of payments, to ensure conformity with the laws and regulations aimed at protecting the

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<sup>26</sup> The DR-CAFTA contains the non conforming measures on Annex I and II where references are made concerning the treatment of this subject.

privacy of individuals regarding the processing and dissemination of personal information, as well as confidentiality, compliance with fiscal laws, etc.

Although Dominican legislation is not explicit on this point, according to the commitments, obligations and duties under the WTO, the Dominican State has the power to limit transfers because of balance of payments problems. This scenario is different for Central America and the United States, once the DR-CAFTA comes into force, as explained hereafter.

## 8. Analysis of the investment provisions in CARICOM-DR FTA, DR-CAFTA and CARICOM Investment Code

**8.1** Although our initial purpose was to analyze the DR-CAFTA as compared to the DR-CARICOM FTA, we thought it would be convenient to also review said agreements in the light of the draft CARICOM Investment Code (CIC).

The legal nature of these legislative frameworks is the same: they are all international agreements between States of different levels of development, and their purpose is to define a common framework favorable to foreign investment. Also, they commit or legally bind the signatory parties, regardless of the forms they have adopted, such as an annex to a free trade agreement – as is the case of the DR-CARICOM FTA -, a Bilateral Investment Agreement (BIT) or a chapter in a treaty on free trade, e.g. Chapter 10 of the DR-CAFTA. This is set forth in Article 31.2 of the Vienna Convention on the Law of Treaties:

### *General Rule of Interpretation:*

1. *A treaty shall be interpreted in good faith, in accordance with the general meaning attributed to the terms of the treaty in their context, and taking into account their object and purpose.*
2. *To the effect of the interpretation of a treaty, its context – including its preamble and annexes – shall include:*
  - a) *Any agreement that refers to the treaty and that has been agreed upon by all the parties upon celebration of the treaty.*
  - b) *Any instrument formulated by one or more parties upon celebration of the treaty, and accepted by all the other parties as an instrument referring to the treaty.*

Now, the main difference between a BIT and a chapter on investments in a treaty on free trade, such as the DR-CAFTA, lies in the contents, which may express different levels of commitment taken on by the signatory parties.

For instance, the BITs signed by the Dominican Republic and the majority of developing countries are based on framework agreements for the promotion and protection of investments, with minimum commitments and a general declaration of intent and of general principles by the parties. This kind of agreement gives the foreign investor in the Dominican Republic less solid guarantees or a weaker commitment by the country than would be the case with the DR-CAFTA.

The DR-CAFTA has a chapter dedicated exclusively to this topic – Chapter 10 – as well as annexes and side letters that present reservations to a text that was negotiated with a negative list approach.

In the case of the text being negotiated by CARICOM - the proposed Investment Code - the obligations that would be taken on, in certain cases, go slightly beyond the traditional commitments of a BIT but maintain a conservative and restrictive approach.

**8.2** One of the aspects defining the scope of a treaty is that of the definitions that establish how restrictive or open the regime is that the parties have adopted. In this regard, and in order to understand the scope, it is essential to define the term “investment”. The extension of this concept is fundamental to know which level of protection the investors have access to, once the investments have been made in the receiving country.

In its Article 10.28, the DR-CAFTA defines “investment” in its broadest sense as asset-based, but with more limitations when said investment is based on ownership and control of a business. This agreement establishes that investment is *“all the assets owned or controlled directly or indirectly by an investor and which have the characteristics of an investment, including the commitment of capital or other resources, the expectation to obtain profits or gains, or the assumption of risk.”*

Thus, a company that is not controlled by, or does not have, Dominican, Central American or U.S. capital, shall not benefit from the prerogatives extended by this Chapter on Investments, or from those granted, among others, by the dispute settlement procedure within the framework of the agreement. When the asset-based concept is used, it is necessary to regulate certain types of investment that might cause destabilization, such as short-term capital, which in turn limits the coverage of the concept and, hence, of the investment agreement itself. This perspective has not been considered explicitly in any of the texts reviewed. Another traditional limitation to the scope of these definitions is that of the provisions that limit the investment regime and regulate the same when the balance of payments is unstable. The DR-CAFTA contains a waiver of this right for reason of omission. In order to verify this right, in a negotiation that was conducted with a negative approach, any expression to the contrary had to be made through a reservation, which did not occur.



Additionally, this same definition lists the possible forms of investment: “A company; stock, capital and other forms of participation in the capital of a company; bonds, obligations, other debt and loan instruments; turnkey, building, management, production, concession, and revenue-sharing contracts; intellectual property rights; licenses, authorizations, permits, and similar rights accorded in conformity with domestic legislation; tangible or intangible, personal or real estate property rights; related property rights such as leases, mortgages, liens, collateral, and others.”

On the basis of this concept contained in the DR-CAFTA, and after comparative analysis of the legal texts aforementioned, we may conclude that the definitions of investment are similar in several aspects. In principle, they are all asset-based, and the relation between the possible forms of investment is similar, although the breadth of the concept is not.

From another standpoint, one element that limits the scope of this agreement appears in “Scope of Application” in Article 10.1:

1. *This Chapter deals with the measures adopted or maintained by a Party regarding:*
  - (a) *the investors of one Party;*
  - (b) *the **investments covered**; and,*
  - (c) *Articles 10.9 and 10.11, all the investments in the territory of the Party.*

*This Chapter does not apply to the measures adopted or maintained by one Party to the extent that they are covered in Chapter Twelve (Financial Services).*

In this sense, the Chapter of General Definitions indicates that “investment covered” means, as far as a Party is concerned, an investment, according to the definition of Article 10.28 (Definitions), in its territory, by an investor of the other Party, existing on the date of entry into force of this Treaty, or established, acquired or expanded after this date.

Although the DR-CAFTA is sufficiently specific as far as the principles already mentioned and the objectives of the Chapter are concerned, Article 10.28 also defines “investor” through aspects such as the intention to make an investment, which generates rights in favor of said investor: “It means a Party or a company of the State of this Party, or a national or company of the Party, with the intention to make, or making, or having made, an investment in the territory of the other Party; considering, however, that a natural person possessing double citizenship shall be considered exclusively as a national of the State of its dominating and effective nationality.”

This clearly shows an interest in limiting the scope of the agreement, by eliminating possible benefits for investors of third countries not party to the treaty, in the case of events caused by problems linked to the investment before the entry into force of the treaty, or in the case of judicial or extra-judicial proceedings before the entry into force of the same.

On the other hand, the CIC also apparently has a limitation based on property or control of the investment assets. In order to benefit from preferential treatment within the intra-CARICOM Market (under the CIC), the active subject of investment shall be a CARICOM national, native or resident of the State, or a company legally constituted in a Member State under the laws of this State, and developing substantial activities in the Community, and

controlled in at least 50% of its stock capital by a national of a Member State. This has serious implications for long-term investment. However, to define who is or is not a national of a country party to a multilateral agreement, complicates the administration and management of the treaty itself, and also limits its development.

The Investment Code proposed by CARICOM also applies the asset-based definition of investment, which assets are listed, not in an exhaustive manner but in very detailed fashion, if compared to other agreements.

Regarding the DR-CARICOM FTA, Annex III presents the Agreement on Reciprocal Promotion and Protection of Investments and lists the assets that are considered as constituent elements of investment. Concerning the investor, Article 2(a) only refers to any national of one of the parties and to any company or association constituted under the laws of one of the parties, for profit or not, of private or government property or control.

This principle might be interpreted broadly as giving benefits to companies of foreign control and capital, established in the Dominican Republic under Dominican law and which comply with the definition of investor as contained in the CARICOM-DR Agreement. Obviously, this would have consequences for the internal relations of the CARICOM nations and for the foreign investors installed in CARICOM territory, regarding the CIC proposal, as explained above, and in terms of the ownership of stock capital and of the nationality of the owners.

Article 1.1 of the Investment Code defines “investor” quite broadly: *“It means a natural person who carried out juridical acts involving a commitment of capital in a CARICOM Member State in accordance with either that country’s domestic legislation and/or the harmonized regulations of the Member States of the Caribbean Community (CARICOM) region.”*

**8.3** The principles of National Treatment and Most Favored Nation are contained in the texts that have been reviewed to ensure that there exists no discrimination between foreigners and nationals, both in terms of the person of the investor and the treatment of the investment itself.

This treatment is granted to the investors of the parties that have signed the treaties. In the case of the DR-CARICOM FTA, the parties are the Dominican Republic and CARICOM, Central America and the United States, while the DR-CAFTA and CIC are limited to the Member Countries of CARICOM.

The exceptions to the most favored nation treatment are indicated in the texts mentioned above.

The DR-CARICOM FTA specifies that the obligation to accord MFN to third countries shall not be applicable to any treatment or advantages resulting from a customs union or free trade area, common market, monetary union or similar agreement, nor international agreements or arrangements regarding taxes.



The Investment Code, which is the regulatory framework for CARICOM relations as a single space vis-à-vis third countries, contains general exceptions to these principles, for reasons of public order, morality, protection of human, animal and plant life, protection of balance of payments, and other classical aspects.

The DR-CAFTA establishes NT both for the investor and for the investment, and includes pre-establishment. However, MFN treatment is only granted for substantive aspects and not for dispute settlement procedures.

**8.4** The legal frameworks that have been reviewed, establish restitution or compensation for losses suffered by investments on their territories because of armed conflicts, civil strife or similar circumstances. The DR-CAFTA simply requires non-discriminatory treatment, while the DR-CARICOM FTA accords MFN in these cases. In the text proposed by CARICOM, mention is made of treatment “no less favorable than that accorded to its own investors”.

**8.5** Expropriation is a common theme in the investment frameworks presented here. But, as expressed above, there exist obvious differences in the contents of the BITs and the free trade agreements, and the levels of commitment of the State Parties. All reviewed legislation establishes that no expropriation or nationalization shall be allowed of any [covered] investment, either directly or indirectly, by measures equivalent to expropriation or nationalization, except for reasons of public interest, in non-discriminatory fashion, and after timely payment of damages or compensation.

The DR-CARICOM FTA limits itself to stating the above, beyond which the different texts get deeper into certain topics.

Annex 10-C of the DR-CAFTA defines, by common agreement between the parties, both direct and indirect expropriation. For the latter, a procedure is established of factual investigation, on a case-by-case basis, of conditions such as the impact of government action, measures affecting investment expectations, and others. Likewise, for indirect expropriation, the CARICOM Investment Code and the DR-CAFTA stipulate when there is no indirect expropriation, which occurs when regulatory actions are designed and applied to protect legitimate objectives of public welfare, such as public health, security and the environment.

An interpretation of the definition of indirect expropriation considers that it is a measure or action implemented by the State that reduces the profits or expected gains of an established investment. This may even include non-discriminatory measures that reduce dividend prospects.

On the other hand NAFTA, for example, establishes the exclusions that are included in all treaties regarding the decisions that the State might take for reasons of national security, health or environmental matters. However, the same Annex 10-C, Paragraph 4, Section b) of the DR-CAFTA envisages the - albeit exceptional - possibility that the measures taken by the State in matters of health, national security and the environment, might be considered as indirect – but not discriminatory – expropriation.

As far as the scope is concerned, it should be pointed out that both DR-CAFTA specifically indicate that the above is not applicable to the issuance of obligatory licenses for intellectual property rights.

Last but not least, the draft Investment Code of CARICOM establishes the right of the investor to request a revision of the case and a valuation of the expropriation.

**8.6** The provisions on transfers contained in these agreements guarantee that transfers related to the investment of an investor of another country party shall be performed freely and without delay to the territory of the investor. Moreover, such transfers may be executed in freely convertible currency and at the exchange rate in force at the time of the transfer.

The DR-CARICOM FTA restricts the process of repatriation of the product of total or partial settlement of an investment in the case of balance of payment difficulties. The corresponding transfers shall be made in phases over a period of up to three years.

The DR-CAFTA makes a distinction for transfers of gains in kind linked to a covered investment. These transfers shall be made as authorized or specified in a written agreement between one party and the covered investment or investor of the other party. In this kind of agreement it is not possible to limit the transfers for reasons of balance of payment problems.

**8.7** The DR-CARICOM FTA, as well as the Investment Code proposed by CARICOM, establish fair and equitable treatment for the investors of the parties in accordance with international legislation. The DR-CAFTA, on the other hand, establishes more obligations and a minimum level of treatment for covered investments, and defines the meaning of “fair and equitable treatment” and “full protection and security”. Its Annex 10-B indicates that “the minimum level of treatment for foreigners under international common law refers to all the principles of international common law that protect the economic rights and interests of foreigners”. In these legal frameworks, a violation of an obligation does not imply violation of the established standard.

**8.8** Three of the analyzed agreements impose the prohibition of establishing performance requirements that are incompatible with the WTO Agreement on Trade-Related Investment Measures (TRIMs). (But the CIC allows for performance requirements relating to training, research and development or location of an investment in a particular in exchange for an incentive or benefit). The DR-CAFTA is, in fact, TRIMs-plus, as it goes further than these agreements in restricting the right of the States to establish performance requirements.

Both the CIC and the DR-CAFTA cover goods and services and establish certain limitations to the possibilities that the Member States of the agreements have to demand performance requirements.

In addition, certain exceptions have to be considered. According to the DR-CAFTA, a Member State of the agreement may always condition its preference to compliance by the other party with the requirements of establishment or commercial presence contained in the legislations of the corresponding sectors and which do not violate the commitment contained in Article 10.9.

Other exceptions contained in both the CIC and the DR-CAFTA concern the objectives of complying with the laws, protecting human, animal and plant life, and preserving non-renewable living and other natural resources. Additionally, the DR-CAFTA has a few exceptions that are not contained in the other agreements. These prerogatives refer to export promotion and external aid programs, government procurement, and the contents of goods necessary to qualify for preferential tariffs or quotas, in the case of the importing party.

**8.9** Recent documents discuss the need to guarantee market access for potential investors before the investment is made, and deal with the regulation of pre-establishment. This figure is contemplated in the very definition of investment<sup>27</sup> of the DR-CAFTA, which indicates that investment shall be protected or guaranteed, including “the expectation of obtaining profits or gains, or the assumption of risk”; also, in the definition of investor<sup>28</sup>, where it is said that this condition pertains to “a Party or a business of a State of this Party that **has the intention to make an investment**, is investing, or has invested, in the territory of the other Party; ...”

As indicated earlier, the DR-CAFTA was negotiated with a negative list approach and the Dominican Republic did not present any reservation in this regard, as the phases preceding investment are not discriminatory and do not contemplate MFN treatment. The Investment Code reserves the right to make a distinction between pre-establishment and post-establishment in the treatment of foreign investors.<sup>29</sup>

**8.10** The DR-CARICOM FTA does not regulate the recruitment of key personnel for upper management positions to administer investment, but only the entry and stay of foreigners to allow the investors of the Parties to facilitate the process of establishing, developing and administering the investments made or to be made.

On the other hand, the DR-CAFTA allows an investor of a certain nationality to have the majority in a board of directors, provided this condition does not harm the investment. However, the entry of business people is not regulated.

The CIC stipulates that the entry of foreigners may be restricted for certain services and manufacturing activities.

According to the DR-CARICOM FTA, the entry and stay of persons shall comply with the laws in force in the State parties. This topic is still under discussion within the agreement,

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<sup>27</sup> Article 10.28 of the DR-CAFTA.

<sup>28</sup> Article 10.28 of the DR-CAFTA.

<sup>29</sup> Article 5, Paragraph 2, CARICOM Investment Code.

as Dominicans need a visa to travel to all CARICOM countries, while only the nationals of three countries in the integration agreement need a visa to enter the Dominican Republic, one of them being Haiti.

In this regard, it is necessary to design a common policy within the framework of the DR-CARICOM agreement, in order to facilitate the movement of business persons and their installation for the administration of their established investments, while preserving a margin for operation for the investing party.

**8.11** The denial of benefits is a prerogative that is only established in Article 10.12 of the DR-CAFTA, in the sense that a party may deny the benefits of the chapter on investments to an investor of the other party which is a business of that party, as well as to the investments of said investor, if the business in question is property of, or is controlled by, persons of a country that is not party to the treaty. Consequently, it is necessary to know the origin of the capital or of the control of a company, in order to establish who may benefit from the agreement. The party denying the benefit shall take this measure when the business or the persons controlling the same are from a country that is not party to the treaty, or when the country denying the benefit does not maintain diplomatic relations with the non-party country.

Also, benefits may be denied by virtue of Articles 18.3 (Chapter on Transparency) and 20.4 (Consultations) if the company does not develop substantial commercial activities in any party, except in the territory of the party denying the benefit. It should be pointed out that this provision is inspired by and based on the Helms-Burton Law.

**8.12** Measures of disagreement only exist in three out of the four regimes studied, i.e. those designed or negotiated with a negative list approach. In the DR-CAFTA there are three types of measures of disagreement: Annex of Existing Measures (Annex I), Annex of Future Measures (Annex II) and Notes of Interpretation.

These measures are National Treatment, Most Favored Nation Treatment, Performance Requirements, and the provision on Upper Management and Boards of Directors, maintained by the parties and linked to different levels of government (central, regional and local). But, there are exceptions for government procurement, subsidies or donations made by one party.<sup>30</sup>

The CARICOM Investment Code (CIC), on the other hand, allows for the negotiation of annexes with the reservations of certain sectors against existing or future measures, or measures reserved for the State.

We consider that the legal framework established by the Investment Code would be most convenient in the negotiation process between the DR and CARICOM, as it would open up the countries of the region whose level of access would come closer to the level existing in the Dominican Republic.

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<sup>30</sup> Includes loans, guarantees, insurance backed by the government.

**8.13** All the legal frameworks discussed in this review include dispute settlement mechanisms, with different levels of depth, between an investor and a State party, in addition to the traditional State-State conflicts.

The drafts of the corresponding commitments have different degrees of detail. The DR-CAFTA, for instance, in its Section B of Chapter 10, defines specific rules for arbitration procedures in cases of disputes to be settled between investors and States.

Both this agreement and the CIC establishes that these procedures shall be applied in accordance with the ICSID<sup>31</sup> Convention, the ICSID Rules of Procedure for Arbitration, the ICSID Additional Facility Rules and the Rules of Arbitration of the United Nations Commission on International Trade Law (UNCITRAL). This means that the adopted system is that of managed arbitration and that ad-hoc arbitrations are not envisaged in said agreements.

In the case of the DR-CAFTA, it is important to remember that the foreign investor may submit a dispute to arbitration, provided no internal procedure has been applied for settlement in the country where the case has occurred and before the agreement has come into force.

Regarding the venue of arbitration, the DR-CAFTA specifies that the parties may decide on the same, but that if they do not reach an agreement, the decision shall be made by the Court of Arbitration, which to this effect shall select the territory of a Member State party to the New York Convention. The DR-CAFTA also establishes procedures for the confirmation of arbitration verdicts, and each State party shall commit itself to comply with the arbitration decisions in its territory.

As indicated previously, the DR-CAFTA is more exhaustive in terms of procedures and specific rules for the presentation of claims to arbitration, for the consent of each of the arbitration parties, the conditions and limitations of consent of the parties, selection of arbitrators, the arbitration itself, transparency in the arbitration proceedings, applicable law, decisions, and delivery of documents.<sup>32</sup> Annex 10-F of the aforementioned Chapter indicates that an appeal body or mechanism shall be defined when the treaty shall be in force. In addition, a six-month consultation period is provided to avoid unjustified demands, which is a matter of great concern because of the regulation regarding pre-establishment.

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<sup>31</sup> International Center for the Settlement of Investment Disputes (ICSID).

<sup>32</sup> The Chapter on Investments has an Annex that specifies the documents that the party countries have to submit to the different instances.

## **9. Interests of the DR regarding investment in the EPA and recommendations for a common approach by CARICOM and DR on Investment in the EPA negotiations**

**9.1** It is understood that the Dominican Republic aims to finalize the negotiations on investment, as well as on others still pending within the framework of the DR-CARICOM FTA; and this is without any doubt a top priority on the country's agenda. The negotiation process on the postponed issues of the DR-CARICOM FTA has been extremely delayed. On the other hand, the calendar of negotiations of the Economic Partnership Agreement (EPA) is up to date; these negotiations could very well determine the final scenario for the issues that are still under discussion in the CARICOM-DR context.

The region is currently in the third stage of its negotiations with Europe in order to define the EPA. However, the meetings of the CARICOM-DR Joint Council, of the standing committees and of the negotiation committees are constantly being postponed. Consequently, the rules on investment between the DR and CARICOM have not been harmonized yet, nor have market access commitments on the Services, which is closely linked to investment.

**9.2** Within the framework of this process, it is necessary to point out that the Center for Export and Investment of the Dominican Republic (CEI-RD) does not participate in the negotiations of CARIFORUM for an Economic Partnership Agreement (EPA), which means that this Dominican entity is absent from the College of Negotiators, more specifically on the issues of services and investment. The CEI-RD considers that it should be more actively involved in the negotiations with the Europeans.

**9.3** It is of interest for the Dominican Republic that the Coordinator and the Alternate Coordinator of the theme on Services and Investment hold joint consultations with the CEI-RD at national level, in order to know the concerns, the defensive and offensive positions and the interests of the Dominican Republic on these topics. There is no doubt that a broader and deeper debate is necessary to define and specify the different scenarios of this negotiation, as well as the strategy to follow, not so much as a country, but as part of CARIFORUM.

**9.4** The evolution of its investment regime shows that the Dominican Republic has adopted a more liberal system than the CARICOM countries and might, therefore, be interested in a more open regional model. And, although as yet the Dominican Republic has not expressed clearly or specifically what its expectations are, several sub-sectors, particularly in services, are interested in a clear and favourable framework to guarantee their investment, not only in terms of market access, but also of protection once the investment



has been made in a CARICOM Member State. This is why it is important to finalize the negotiations on both aspects within the framework of the FTA.

**9.5** The Dominican Republic negotiated the DR-CAFTA with a negative list approach, while CARICOM has followed its positive list tradition. Consequently, as this theme has been defined, it should now be considered and evaluated by the General Secretariat of CARICOM and the CRNM, in order to determine the best scenario for CARIFORUM from a regional perspective. The Dominican Republic has expressed its interest in negotiating in CARIFORUM with a negative list approach, with each nation making its own reservations, and with a positive list with the European Union, so that lesser developed countries would have a larger margin of negotiation and protection, without having to ask expressly for special treatment.

**9.6** In terms of scope and coverage, it is understood that a broad asset-based definition is most convenient for a region that needs to offer a business-friendly climate to foreign investors, particularly for long term investment. The major advantage of this definition of investment is its flexibility and the possibility it offers to cover assets still to be defined or to be used in the region. It also ensures more stability, as there would be no need for constant modifications and adaptations to new forms of investment. If said definition were to be agreed upon, pre-establishment should also be considered, provided mechanisms are in place to avoid unjustified claims that could profoundly affect the national economies of the Caribbean.

**9.7** This broader definition raises the question of the “control or ownership of capital” that would limit the definition and create a mechanism of protection and promotion of intra-regional investment, as the concept of control is based on the CARIFORUM region. Thus, it would be necessary to define or redefine the concept of “investor”, particularly in regard of legal entities or businesses, as stated in the DR-CARICOM FTA. It is obvious that the main consequence of adopting this kind of definition would be, among others, to make the region less attractive to European investors, unless the same treatment were given to companies of European capital or administrative control, thus establishing a regime similar to DR-CAFTA.

**9.8** Along these same lines, the principle of denial of benefits should be implemented, which would avoid benefiting ghost companies that are legally constituted but have no real direct investment or presence, and only want to take advantage of the agreements.

**9.9** On the other hand, for the sake of predictability and stability, clear dispute settlement procedures or mechanisms should be considered for conflicts between an investor and a State party, or among States that have signed the agreement. The establishment of clear, transparent and durable procedures create a better investment climate, thus attracting more long-term European investment. This will also greatly benefit direct investment in the region by the community itself.

**9.10** One of the essential aspects of investment promotion regimes is the freedom investors have to transfer their profits or investment. With the DR-CAFTA, the Dominican Republic has a WTO Plus regime, as the country has renounced the possibility of limiting

remittances or repatriations because of balance of payments problems. This situation is not ideal for countries with unstable economies that depend excessively on vulnerable sectors exposed to external events, such as natural disasters and the fluctuations of the larger economies. This is why it is recommended in EPA negotiations to limit the remittance or repatriation rights of companies established in the territories of CARIFORUM nations when balance of payments or currency problems occur.

**9.11** It is essential to create a mechanism that guarantees the transparency of the norms that rule the procedures for the establishment, implementation and protection of investment. In other words, potential investors should have access to the whole legal framework that regulates investment, regardless of the kind of provisions in place. But, it is also useful to include a provision obliging potential investors to provide the relevant entities of the receiving country with all the necessary information on the company, the investment and the business.

**9.12** In relation to pre-establishment, the DR has the precedent of the DR-CAFTA, but this agreement was signed recently and has not come into force yet, so its consequences for the country are still not clear. The main fear is that this might give rise to a great number of unjustified claims that would compromise the State for not responding to all the expectations of potential investors. This might be the reason why the inclusion of pre-establishment in the Dominican legal framework does not identify possible scenarios or alternatives for the negotiations.

**9.13** The commitment of all CARIFORUM members to facilitate the movement of persons between CARICOM and the DR, and to allow the entry of executive personnel for the management of investment, is another element that should be considered and resolved, first within the framework of the DR-CARICOM FTA, and next for the EPA with the European Union.

**9.14** In a negotiation with a negative list approach, commercial presence is protected through reservations of the priority sectors. In the WTO, the DR committed itself not to demand commercial presence to do business or operate in the country. However, this situation is covered by the non-liberalization of those sectors whose special regulations require commercial establishment to operate. In the case of the DR-CAFTA, this point is safeguarded by the reservations of the different sectors as well as by horizontal ones. It should be stressed that FDI is fundamental for the region, and in this regard, commercial presence is very important for certain sectors.

**9.15** As indicated in the previous paragraphs, the agreements of the DR-CAFTA are fairly recent and have not come into force yet, so that the actual implications of these decisions are still unknown. The lesson to be drawn from this is to achieve a well-drafted text, clear and unambiguous, with little margin for interpretation, in order to guarantee a stable and transparent investment regime for European Union investors, as well as a well-balanced system for the sustainable development and growth of the economies of the Caribbean ACP countries.



## 10. Acronyms

|                |  |
|----------------|--|
| ACP            | Africa, Caribbean and Pacific  |
| TRIPS [ADPIC]  | Agreement on Trade-Related Aspects of Intellectual Property Rights                         |
| BIT            | Bilateral Investment Treaty  |
| CAFTA          | Central America Free Trade Agreement   |
| CAI            | CARICOM Agreement on Investment  |
| CARICOM        | Caribbean Community and Common Market  |
| CARIFORUM      | Caribbean Forum of ACP States  |
| CEI-RD         | Office for the Promotion of Exports and Foreign Investment in the Dominican Republic       |
| CNZFE          | Consejo Nacional de Zonas Francas de Exportación   |
| CRIP           | Caribbean Regional Indicative Programme  |
| CRNM           | Caribbean Regional Negotiating Machinery   |
| CSME           | Caribbean Single Market and Economy  |
| DR             | Dominican Republic   |
| DR-CAFTA       | Free Trade Agreement between the Dominican Republic, Central America and the United States |
| EPAs           | Economic Partnership Agreements  |
| FTAs           | Free Trade Agreements  |
| FTA RD-CARICOM | Free Trade Agreement between the Dominican Republic and the Caribbean Community            |
| FDI            | Foreign Direct Investment  |
| GATS           | General Agreement on Trade in Services   |

|       |   |
|-------|---|
| GNP   | Gross National Product  |
| ITBIS | Transfer of Industrial Goods and Services Tax                 |
| ICSID | International Centre for Settlement of<br>Investment Disputes |
| MFN   | Most Favored Nation Treatment                                 |
| TN    | National Treatment  |
| WTO   | World Trade Organization                                      |

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Law 98-03 of June 17, 2003 which creates the Office for the Promotion of Foreign Investment and Exports in the Dominican Republic

Law 173 of April 6, 1966 of Protection to Local Importers and Representative Laws

Law No. 358-05 of February 14, 2005 of Protection of the Consumer Rights

Law 861 of July 22, 1978 of Foreign Investment

Law 251 of May 11, 1964 that regulates the International Transference of Funds and its Rules of Application

Law 8-90 of January 15, 1990 about the Promotion of New Free Zones and the growth of existing ones

Law 150-97 of July 7, 1997 which establishes zero custom duties to supplies, equipment and agriculture machinery

Law 153-98 of May 27, 1998 of Telecommunication

Law 20-00 of May 8, 2000 on Intellectual Property Rights

Law 19-00 of May 8, 2000 on Stock Markets

Law 64-00 of August 18, 2000 on Environment and Natural Resources

Law 28-01 of February 1, 2001 which creates a Special Zone for Border Development

Law 158-01 of October 9, 2001 about Promotion on Tourism Development

Law 183-02 of November 26, 2002 on Monetary and Financial Regulations

Law 126-02 of August 14, 2002 about Electronic Commerce, Digital Documents and Signatures

Law 3-02 of January 18, on Commercial Registry

Law 1-02 of January 18, 2002 on Antidumping Practices

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## 12. Annexes

- Annex 1 Law 16-95 on Foreign Investment in the Dominican Republic of October 24, 1995 (English)
- Annex 2 Rules of application No. 214-04 of March 11, 2004 of the Law 16-95 on Foreign Investment in the Dominican Republic of October 24, 1995
- Annex 3 Law 153-98 of May 27, 1998 on Telecommunication (English-electronic)
- Annex 4 Law No. 98-03 from June 17th, 2003, which modified the Law No. 137 of May 21, 1971, and creates the Export Promotion of the Dominican Republic
- Annex 5 Free Trade Agreement between the Dominican Republic and CARICOM: Annex 3 on the Agreement on Reciprocal Promotion and Protection on Investment of August 12, 1998
- Annex 6 Draft CARICOM Agreement on Investment of March 2005
- Annex 7 Draft CARICOM Investment Code and its annexes of March 2006
- Annex 8 Chapter 10 on Investment DR-CAFTA of August 5, 2005 (English)
- Annex 9 Requirements for registering the new Investment established by the Export Promotion of the Dominican Republic
- Annex 10 Requirements for the remittance or repatriation of capital, administrative procedure established by the Export Promotion of the Dominican Republic
- Annex 11 Requirements for remittance of profits administrative procedure established by the Export Promotion of the Dominican Republic
- Annex 12 Requirements to obtain residence by investment, administrative procedure established by the Export Promotion of the Dominican Republic
- Annex 13 Request Form for Residence by Investment established by the National Administration on Immigration (English)

- Annex 14 Request form for renovation of residence by investment established by the National Administration on Immigration (English)
- Annex 15 Requirements to establish Free Zones established by the National Council of Free Zones of the Dominican Republic (Consejo Nacional de Zonas Francas de Exportación) published in their website