

**INVESTMENT<sup>1</sup>**

Negotiating Issue	CARIFORUM Position	EC Position	Business Impact
<p><b>Horizontal</b> <b>Definition of Investment<sup>2</sup></b></p>	<p>CARIFORUM has demonstrated interest in a modern agreement that recognizes that Caribbean futures will be based on creative expression and innovation. The agreement is slated to cover harmonious establishment in services and other sectors.</p> <p>It is also proposed that shares be included as a part of the definition where shares represent 10% or more of the total value of the assets (Assets-based approach)</p>	<p>The EC has displayed some leaning towards a definition that gives priority to establishment, stating that it is this that creates the most business and generates the most investment.</p> <p>The EC has agreed to consider the proposal on the inclusion of shares where these represent 10% or more of total assets.</p>	<p>A definition is needed for clarifying the pertinent provisions of the EPA. This will in turn determine the amount of investment that will be generated in the CARIFORUM region and exported into the European market.</p>
<p><b>Positive versus Negative List Approach to Investment</b></p>	<p>CARIFORUM proposes that a negative list approach to investment be utilized in the agreement. This approach will ensure that negotiations take place on all non-conforming measures in the specific sectors.<sup>3</sup></p>	<p>The EC proposes a positive list approach whereby commitments are listed in the various service sectors and the conditions that are to be attached. The EC expressed concern about the transparency of negative listing as proposed by CARIFORUM, and suggested that positive listing clearly states the relevant regulations in the specific sectors.</p>	<p>The same liberalization outcome can be achieved using either the negative or the positive approach. However, the negative list approach allows you to secure that objective in a much more transparent</p>

<sup>1</sup> It should be noted that both CARIFORUM and the EC had prepared draft legal texts on investment reflecting the contemplated structure and positions of an eventual EPA chapter on investment. The structures of the texts reflect the fundamental differences in the approaches.

<sup>2</sup> There is no universal definition of investment and many investment agreements do not incorporate a precise definition of investment.

<sup>3</sup> The negative list approach permits parties to include automatically, in an appropriate manner, services which are just being developed or will be developed in the future. It also allows for combinations of existing services to be offered in new and creative ways.

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			manner by listing all non-conforming measures.
<b>Scope of Coverage</b>	<p>This provision is slated to deal with issues concerning market access as well as the protection and promotion of investments. CARIFORUM States also aim to promote foreign investment that supports sustainable development.</p> <p>CARIFORUM has also proposed that preferential intra-CARIFORUM treatment be given as well as benefits under the CSME and the CARICOM-DR FTA be preserved.</p>	<p>The EC has suggested that the language of the text should reflect that investors from the region should have at least the same conditions as EU investors. This would be reflected in a national treatment provision.</p>	
<b>Rules governing pre and post establishment</b>	<p>CARIFORUM has proposed that based on the terms of the EPA, investors should not have rights to redress before establishment.<sup>4</sup></p>	<p>The EC has expressed a preference for avoiding specific language on pre and post establishment in the text and has cautioned on limitations on the rights of investors being placed in the text.</p>	
<b>Minimum International Standards</b>	<p>It is proposed that investors and investors be treated in accordance with customary international law concerning the fair and equitable treatment and full protection and security of the investment.</p>	<p>Agreed</p>	
<b>Most Favoured Nation Treatment (MFN)<sup>5</sup></b>	<p>The position was put forth that MFN discussions should take place horizontally at the end of the negotiations.</p>	<p>The EC was in agreement with this position. However, they noted that there would be some exemptions to the MFN rule, for example in Mode 4 and mutual recognition rules.</p>	
<b>Expropriation<sup>6</sup></b>	<p>The CARIFORUM position is that a provision be</p>	<p>The EC has expressed difficulty in including an</p>	

<sup>4</sup> For example, investors would not have the right to redress after having conducted a pre-feasibility analysis of an investment.

<sup>5</sup> This provision is intended to prevent discrimination in the investment arrangement. Each Party to the Agreement shall be accorded treatment no less favourable than that which is accorded, in like circumstances, to investors and investments of any other Party or of a non-Party with respect to the management, conduct, operation, expansion, sale or other dispositions of investments.

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	<p>included on expropriation. This is seen as an efficient way of importing beneficial provisions to regulate the CARIFORUM-EU relationship for those countries that do not have formal agreements or adequate regulatory frameworks.</p> <p>CARIFORUM has also requested that further information be provided on domestic laws on expropriation and has reiterated its concern about the lack of clarity and variance in regulations across the EC.</p>	<p>article on expropriation. They have asserted that Member States would not want expropriation guarantees at the EC level, but would rather utilize their respective domestic legislation and rules regulating the European Union internal market.</p>	
<b>Issuance of Compulsory Licenses<sup>7</sup></b>	<p>CARIFORUM has emphasized that intellectual property be incorporated as a type of investment. They view the inclusion of intellectual property as very pertinent to the agreement; hence, it deserves specific mention in the EPA.</p>	<p>The EC has viewed the WTO TRIPS Agreement and contractual guarantees as adequate instruments and do not see the need for specific inclusion in the EPA.</p>	
<b>National Treatment Provisions<sup>8</sup></b>	<p>CARIFORUM has indicated that where there are no national investors in the same industry, the national treatment provision would be mute.</p>	<p>The EC has maintained that the rights of investors would be best protected through the national treatment provisions and the understanding that states have to regulate.</p>	
<b>Transfer of Assets</b>	<p>This was found to be dependent on the outcome of the separate negotiations on Payments and Transfers in the general agreement. However, a separate article would be included in the investment chapter of the EPA.</p>	<p>Agreed</p>	

<sup>6</sup> There is no universal position on the issue of expropriation. However, with the proliferation of bilateral investment treaties, expropriation/ nationalized has been carried out only for a public purpose, on a non-discriminatory basis, in accordance with the due process of law and upon payment of compensation in accordance with the terms of the agreement.

<sup>7</sup> Compulsory licenses are licenses that are granted by a government to use patents, copyrighted works or other types of intellectual property.

<sup>8</sup> Each Party to the Agreement shall be accorded treatment no less favourable than that which is accorded, in like circumstances, to its own investors and investments with respect to the management, conduct, operation, expansion and sale or other disposition of investments.

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<b>Obligations and Duties of Investors and Investments</b>	<p>In this provision CARIFORUM proposes that investors and investments must comply with the laws and regulations of the host state including but not limited to measures prescribing the formalities of establishing an investment.</p> <p>CARIFORUM has also maintained that the rule of law be respected in the investment arrangement.</p>	<p>The EC agrees that the rule of law must be respected and that there is interest in quality investors and sustainable development, as well as in sending a clear message. However, the EC has suggested that this be incorporated in a single article rather than in different parts of the agreement.</p>	
<b>Host State<sup>9</sup> Obligations</b>	<p>Nothing in the investment chapter shall prevent host states from adopting, maintaining or enforcing any measure that it deems appropriate for the preservation and promotion of its domestic, environmental, labour, public health or safety standards.</p> <p>Host states shall also make available to the public any investment contracts or agreements with an investor or investment involved in the investment authorization process as well as all information relating to payments made to the host state public authorities.</p>	<p>AGREED</p>	
<b>Host State Rights</b>	<p>CARIFORUM has proposed that host states have the right to take regulatory or other measures to ensure that the development in their territory is consistent with the goals and principles of sustainable development, and with other social and economic policy objectives.</p> <p>It is also proposed that the host state has the right to impose performance requirements as well to seek information from a potential investor or its home state about specific matters pertaining to the</p>	<p>AGREED</p>	

<sup>9</sup> “Host state” means the state in which the investment is located.

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<b>Home State<sup>10</sup> Obligations</b>	Home states are obligated, upon the request of the potential host states, to provide necessary information concerning a potential investor or an investment. Home states are also obligated to protect confidential information in this regard.	AGREED	
<b>Provision concerning Senior Management and Board of Directors</b>	<p>This provision states that no Party may require that individuals of any particular nationality be appointed to senior management positions within an investment.</p> <p>CARIFORUM highlighted that the motivation behind this provision was to ensure that no undue interventions in management are made. Also, the relevance of the provision to commitments on the temporary movement of persons in services offers was highlighted.</p>	The EC, however, proposed that the provision allows for majority board composition in some cases once this is based on objectively justifiable grounds. They also expressed a preference to address the free movement of personnel in Mode 4 in Services.	
<b>Relationship with Other International Agreements</b>	A separate provision outlining relationship with other international agreements was seen as pertinent to the investment chapter, especially with regard to bilateral investment treaties (BITS).	The EC has queried the motivation and application of this provision, stating that it would be more appropriate for it to be subsumed in the general provisions of the agreement.	
<b>Rules on Taxation Measures</b>	Based on the CARIFORUM proposal, investors would not receive national treatment considerations in areas such as income tax payments.	The EC has suggested that a GATS-like approach be adopted, whereby there is the preservation of freedom to regulate as long as commitments are not negated.	
<b>Dispute Settlement Provisions</b>	In the event of a dispute between two or more parties as to the application or interpretation of the investment chapter, this shall be addressed under the provisions for dispute settlement outlined in the	AGREED	

<sup>10</sup> “Home State” means the state declared by the investor and accepted by the host state as such in accordance with rules laid down in the EPA.

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