

CARICOM GUIDELINES FOR USE IN THE NEGOTIATION OF BILATERAL TREATIES

- (i) Contribution Expected by CARICOM States from BITs BITs should provide real opportunities for the promotion of the economic and social development of CARICOM countries, individually and collectively, through the enhancement of their production base in accordance with each country's particular criteria, goals and development strategy;
- (ii) CARICOM States, in the conclusion and implementation of BITs, should ensure the preservation and strengthening of the CARICOM Integration Movement.

Article Type of Agreement Desired

- (i) The preamble of the BIT should include: a provision which reflects the objective of increasing capital flows from the USA to the CARICOM States to build up their productive base and hence enhance their economic and social development;
- (ii) a provision which reflects the undertaking of the USA to establish incentives and institutional arrangements to encourage the flow of investments from the USA to CARICOM States.

Article Most Favoured Nation Treatment

Subject to exceptions, preferential treatment should be given to investments in the following order:

- (i) nationals of country;
- (ii) nationals of other CARICOM countries;
- (iii) nationals of developing countries with whom there are arrangements;
- (iv) nationals of developed countries with whom there are arrangements;
- (v) nationals of other countries.

Article Performance Obligations

- (i) CARICOM countries should not accept any restrictions on their freedom to impose performance obligations;
- (ii) performance obligations, which should include but not limited to, export performance, employment, conformity with national laws and with trade union practices, and transfer of technology, should be linked to the benefits to be derived and in this context provision should be made for such obligations to be reviewed periodically.

Article Exclusion Areas

CARICOM countries should, as part of their development plans and strategies, determine the terms on which foreign investment may enter their economies; the areas of their economies from which foreign investment would be prohibited or in which it would be permitted only under special conditions and the circumstances and criteria which will occasion restriction of foreign investment from any sector or activity.

Where no determination of such areas, circumstances or criteria has been made in advance of the negotiations, the BIT should incorporate an elaboration of the policy and/or criteria governing foreign investment.

Article Nationalisation and Compensation

- (i) CARICOM host countries should ensure that in any bilateral investment treaty they maintain the right to nationalise

foreign-owned property, subject to fair and just compensation or other provisions as contained in national law;

(ii) CARICOM host countries should ensure that in any bilateral investment treaty they maintain the right to determine at the time of the nationalisation the quantum of compensation and the terms of payment;

(iii) in the event of any dispute, local remedies should be exhausted before recourse to any international remedy.

Article Dispute Settlement

(i) In the case of disputes between the investor and the host country, resort to arbitration would only be permitted after all national remedies have been exhausted;

(ii) In the case of disputes between the parties, or where there is resort to arbitration as provided for at (i) above, the following should be the proposed approach:

(a) ad hoc arbitration tribunal;

(b) arbitration takes place in the host country;

(c) the dispute be determined by national law and, where appropriate, rules of international law;

(d) to use the UNCITRAL Rules which are favoured by developing countries.

Article Retroactive Applicability and Duration of Treaty

The Treaty should apply to new investments. In this connection, Article IX, paragraph (i) of the US Draft Proposals should be amended by the deletion of 1(a) and (b) and the redrafting of (c) in such a way as to ensure that there was no automatic right of an existing investment to more favourable terms which might be in the Treaty.

Article Monitoring

(i) The US Government should undertake to do all in its power to ensure that US-based investors be good corporate citizens in CARICOM host countries;

(ii) The US Government should guarantee that machinery established under the CBI to promote capital transfer to CARICOM countries be effective.

Article Transfers

(i) Transfers must be subject to the national law of the host country;

(ii) A distinction should be made between the following types of transfers;

(a) capital transfer, however realised; and

(b) current transfer;

(iii) In view of possible size of capital transfers and the possible impact on the balance of payments, integrity of the currency, etc. capital transfers should be restricted; (Several existing reciprocal and investment promotion and protection agreements provide for this);

(iv) Free transfer of current account transactions is a desirable goal, subject to balance of payments and other economic considerations.