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DISCUSSION PAPER: RECOMMENDATIONS FOR INVESTOR-STATE DISPUTE SETTLEMENT REFORM IN CARICOM

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ABBREVIATIONS AND ACRONYMS

BIT	Bilateral Investment Treaty
CARICOM	The Caribbean Community
CARIFORUM	The Caribbean Forum
CAROLA	The Center for the Advancement of the Rule of Law in the Americas
CCJ	The Caribbean Court of Justice
COFAP	The Council for Finance and Planning
COHSOD	The Council for Human and Social Development
COTED	The Council for Trade and Economic Development
CSME	CARICOM Single Market Economy
ECLAC	Economic Commission for Latin America and the Caribbean
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GATT 1994	General Agreement on Tariffs and Trade 1994
ICSID	International Center for Settlement of Investment Disputes
IIA(s)	International Investment Agreement(s)
ISDS	Investor-State Dispute Settlement
JCPC	Judicial Committee of the Privy Council
MFN	Most Favored Nation
MIGA	Multilateral Investment Guarantee Agency
OECD	Organization for Economic Co–operation and Development
RTC	Revised Treaty of Chaguaramas
SADC	Southern African Development Community
SDGs	Sustainable Development Goals
SIS	Small Island States
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	United Nations Commission on International Trade Law
WG III	Working Group III
WTO	World Trade Organization

EXECUTIVE SUMMARY

The global recognition that the international investment law regime is not fit for purpose has led to reform efforts across multiple fora. CARICOM member states should capitalize on the current momentum to better align international investment obligations with their development goals.

This policy brief was prepared to provide representatives of the Caribbean Community (CARICOM) with recommendations for reforming their relationship to Investor-State Dispute Settlement (ISDS). In recommending implementation of reforms, special focus was given to whether and how CARICOM should engage in the ongoing reform efforts of the United Nations Commission on International Trade Law (UNCITRAL) Working Group III (WGIII).

The recommendations result from an assessment of the position of CARICOM members in the landscape of international investment and its related law and policies. Key findings of the assessment are listed in this summary, followed by synopses of recommended conceptual approaches to reform and reforms to substantive investor protections.

KEY FINDINGS FROM ASSESSMENT

- There is no conclusive evidence that the adoption of ISDS provisions correlates with Foreign Direct Investment (FDI). Further, not all FDI promotes sustainable development, and thus blanket investment incentives may not align with a sustainable development strategy.

- The International Investment Agreements (IIAs) of CARICOM members are mostly "old generation" agreements that do not align with sustainable development strategies in substance or procedure. Substantively the IIAs provide overly broad protections to foreign investment without discriminating between investments that have positive and negative effects on sustainable development. Procedurally, the IIAs generally allow claimants to bypass the domestic court systems by choosing arbitration.

- CARICOM members have faced a relatively small number of investment arbitrations. However, they have seen large arbitral awards. The complexity and costs associated with these claims results from both the substance of the IIAs and ISDS procedure.

- The Caribbean Single Market and Economy (CSME) has not yet achieved harmonization of investment law and policy in the region that is a prerequisite to capital market integration. Harmonization would be most directly achievable through a replacement of IIAs with a regional investment code, ultimately subject to dispute settlement under a regional authority.

SUMMARY OF RECOMMENDATIONS

This brief presents a range of options for ISDS reform, loosely grouped under three approaches. These recommended approaches are presented in conceptual categories, but should be viewed as a continuum, from the most to least extensive. Specific reform options outlined under each approach are not mutually exclusive, and many recommended reforms appear under multiple recommended approaches. Separately, reforms to substantive investor protections are recommended regardless of which approach is adopted.

Recommendations are further elaborated in the respective section.

Option A: Regionalization

- This approach rejects ISDS in favor of regional dispute settlement. A regional system could take a variety of forms, including the creation of a new regional body or utilization of an existing one (e.g., a regional court).
- Substantively, a regional system could adjudicate current treaty obligations, national investment laws, entirely new regional investment laws, or some combination thereof.
- Procedurally, a regional dispute settlement system could function to replace domestic courts (e.g., arbitration without local remedies) or complement domestic courts (e.g., an appellate function)
- Steps to implement a regionalization plan would likely include: amending or reforming ISDS provisions under existing IIAs; amending or adopting domestic law; amending or adopting a regional law.
- Versions of this approach are most in line with CARICOM integration efforts. However, most versions of this approach require a politically complicated execution and have the potential to increase inconsistencies.

Option B: Redomestication

- This approach rejects ISDS in favor of domestic dispute settlement.
- Substantively, redomestication would involve domestic courts adjudicating treaty provisions, contract provisions, and national investment laws.
- Procedurally, this approach would follow the rules of the domestic court system. For members that have adopted the Caribbean Court of Justice (CCJ) as their highest court of appeal, this approach is effectively a version of regionalization.
- Steps to implement redomestication would likely include: amending or reforming IIAs by eliminating ISDS provisions to require domestic dispute settlement; adopting or updating a national investment
- Redomestication is recommended as either an alternative or precursor to regional integration. It is not as politically complex and would eliminate some present obstacles to regional harmonization, while still realizing benefits of cost reduction and improved consistency over the current system

Option C: Mitigation

- Mitigation maintains the ISDS system and focuses on discrete problems and abuses.
- Substantively, mitigation involves a similar construction of the ISDS system, arbitrating investment protections under treaties.
- Procedurally, mitigation involves a more restricted range of options, such as reform to selection of arbitrators, a code of conduct for arbitrators, restrictions on third-party funding, and enhanced dispute prevention procedures.
- Steps to implement these reforms would take place almost entirely at the international level through amending and renegotiating IIAs. UNCITRAL WGIII is exploring an option for multilateral implementation of some reforms.
- This approach is considered inferior to options A and B because it does not clearly serve regional integration goals and may pose an obstacle to later regional harmonization if it results in different members adopting more disparate international obligations. However, this approach still has the potential to be a substantial improvement over the status quo by reducing costs and enhancing state involvement.

Recommended Reforms to Substantive Investor Protections

Numerous options exist for updating substantive investor protections. These recommendations are focused on the most problematic provisions that deserve greater attention.

- The definition of "investment" should be updated to an exhaustive or limited list to reduce ambiguities and inconsistencies in scope of protected interests.
- Most-Favored Nation (MFN) clauses should be either eliminated or updated. Eliminating MFN clauses would leave national treatment (NT) provisions intact while preventing claimants from relying on rights under other BITs. Alternatively, an updated MFN clause could be designed to exclude rights and protections in other BITs.
- "Fair and Equitable Treatment" (FET) clauses should be eliminated or updated. Eliminating FET provisions would prevent claimants from seeking protections that are above NT standards. An updated FET could be a "Fair Administrative Treatment" standard that essentially functions as a protection against denial of justice while reducing the ambiguities and inconsistencies of FET claims.
- An explicit "right to regulate" clause should be adopted. Such a provision would guarantee that a State's basic regulatory functions cannot be considered violations of one of investor protections.

INTRODUCTION

What is at Stake for CARICOM in ISDS Reform?

BACKGROUND

Both the substance and procedure of the current international investment regime have been subject to widespread and wide ranging criticisms. The substantive rights and obligations under international investment law are accused of empowering investors and constraining state action in ways that do not align with development goals. Further, the process of ISDS, primarily conducted through ad hoc arbitral tribunals, has received special criticism for its demonstrated inconsistencies, steep expenses, and high damage awards.

Some of the worst effects of ISDS may have been unintentional, but the design was not. The adoption of modern IIAs began post-World War II, and accelerated at the end of the cold war, chiefly pushed by capital-exporting countries to secure foreign investments against the expropriation driven by decolonization.[1] Security was achieved through a unique method of enforcement, investor-state arbitration, where a sovereign state consents to third-party arbitration of claims brought by foreign investors regarding breach of investor rights under the agreement.

Capital-importing countries were told that ISDS was a means to serve the common interest of creating an attractive climate for foreign investment.[2] Many countries accepted the bargain, but after the conclusion of more than 3000 IIAs and 770 ISDS arbitrations,[3] evidence demonstrating a relationship between ISDS and FDI trends is inconclusive.[4] In contrast, ISDS has conclusively cost states tens of millions in legal fees and billions in damage awards.[5]

However, the current shift in sentiment is also driven by broader economic conditions: the financial crisis in 2008 that caused productivity to stagnate in many advanced economies; the COVID pandemic that cut economic growth and FDI across much of the globe; the need to

[1] For a more extensive account of policies behind modern IIAs see e.g., David Schneiderman, *The Coloniality of Investment Law*, (2019). Available at SSRN: https://ssrn.com/abstract=3392034; Kate Miles, *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital*. Cambridge: Cambridge University Press, 2013. Pp. 464, ISBN: 9781107039391; Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51.2 Harv. Int'l L.J. 427-473 (2010).

[2] See Wolfgang Alschner, *Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law*, 5 Goettingen J. Int. Law, 455-486 (2013); see also Deborah L. Swenson, *Why Do Developing Countries Sign BITs*, 12 U. C. Davis J. Int'l L. & Pol'y 131 (2005).

[3] Investor-state dispute settlement cases: Facts and figures 2020, IIA Issues Note, No. 4, 2021, available at: https://unctad.org/system/files/official-document/diaepcbinf2021d7_en.pdf

[4] Josef C. Brada et al., *Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis*, 30 September 2020, available at: https://doi.org/10.1111/joes.12392.

[5] The average ISDS proceeding costs roughly 13 million USD for both the claimant and respondent. See, https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement#:~:text=The%20average%20ISDS%20proceeding%20costs,stakes%20cases%20can%20cost%20more

rapidly decarbonize the global economy by mid-century.[6] These pressing challenges call for new investment policy frameworks, and a reconsideration of whether and how ISDS aids the accomplishment of policy goals.[7]

Efforts to reform international investment law vary in approach, scope, and implementation. In approach, from systemic overhaul, to minor targeted remedies. In implementation, from unilateral to regional to multilateral. In scope, from entire investment policy framework packages,[8] to specific wording for treaty clauses.[9] Given the numerous options, it is necessary to assess what reforms best align with national and regional economic goals.

A notable multilateral reform effort is ongoing through the United Nations Commission on International Trade Law (UNCITRAL) Working Group III (WGIII). In 2017, UNCITRAL[10] entrusted WGIII[11] with a mandate to consider reforms to ISDS,[12] and facilitate this process with transparent, consensus-based, government-led deliberations between a wide breadth of stakeholders.[13]

OPPORTUNITIES FOR CARICOM

The member countries of CARICOM have an array of IIAs, many of which provide for ISDS. The provisions of these agreements show little consistency, mostly aligning with the model agreements of other parties. To date, ten ISDS proceedings against CARICOM members have been concluded, resulting in awards totalling hundreds of millions.[14] ISDS reform for members presents an opportunity to better align investment obligations with development goals. For CARICOM as a region, the current push to update ISDS multilaterally is an opportunity to

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[6] See, OECD, *The future of investment treaties: Background note on potential avenues for future policies*, March 2021, available at: https://www.oecd.org/daf/inv/investment-policy/Note-on-possible-directions-for-the-future-of-investment-treaties.pdf.

[7] See Lise Johnson, Lisa Sachs, and Nathan Lobel, *Briefing Note: Aligning International Investment Agreements with the Sustainable Development Goals*, COLUMBIA CENTER ON SUSTAINABLE INVESTMENT, (November 2020), https://ccsi.columbia.edu/sites/default/files/content/docs/publications/Briefing-Aligning-International-Investment-Agreements-with-the-Sustainable-Development-Goals.pdf.

[8] See e.g., UNCTAD, *REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME*, 2018 ed. UN.

[9] See e.g., Draft on the regulation of Third-Party funding, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/210506_tpf_initial_draft_for_comments.docx

[10] Subsidiary legal body of the UN founded in 1966 to "promote the progressive harmonization and unification of international trade law." (see. Frequently Asked Questions - Mandate and History | United Nations Commission On International Trade Law).

[11] Working Group III is one of six "Working Groups" organized under UNCITRAL to carry out the substantive work of the body on a particular topic of legal reform.

[12] Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17), paras. 263 and 264. https://documents-dds-ny.un.org/doc/UNDOC/GEN/V17/058/89/PDF/V1705889.pdf?OpenElement

[13] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-first session, A/CN.9/1086, 13 December 2021, https://documents-dds-ny.un.org/doc/UNDOC/GEN/V21/094/44/PDF/V2109444.pdf?OpenElement

[14] *See e.g., Dunkeld International Investment Limited v. The Government of Belize (Number 1),* Perm Ct. of Arb. Case No. 2010-13, Award ¶362 (June 28, 2016).

harmonize investment protections and obligations, potentially leading to a more integrated regional capital market.

RESEARCH APPROACH

This Policy Brief was formulated through the following *three* steps:

- *First*: the authors made assessments of the following:
    - National and Regional trends in Foreign Direct Investment (FDI);
    - Investment law and policy regimes of CARICOM members;
    - International Investment Agreements (IIAs) of CARICOM members;
    - ISDS disputes involving CARICOM members as respondents;
    - ISDS reform efforts of CARICOM members already underway; and
    - ISDS reform proposals at UNCITRAL WG III.

    FDI was assessed for common trends. Data on FDI was mostly accessible through common sources like the World Bank and UNCTAD. Data was not always broken down by industry or sector.

    Investment law and policy regimes were assessed for alignment and interaction with international obligations. Comprehensive pictures of CARICOM members' investment policy regimes were often indiscernible due to a lack of official published strategies.[15]

    International Investment Agreements were assessed for trends both in substantive and procedural provisions. Consistency in provisions of IIAs were also compared with model treaties of treaty partners to identify trends in "rule-making" and "rule-taking."[16] Assessment of the IIAs relied heavily on data collected by the Shridath Ramphal Centre during their ISDS Clinics.

    ISDS disputes involving CARICOM members as respondents were assessed for trends in sectors of claimant-investors, provisions giving rise to claims, interactions between national, regional, and international disputes settlement fora, and resulting awards. Like the assessment of IIAs, this brief relied on data collected by the Shridath Ramphal Centre

[15] Several CARICOM members are or were recently in the process of developing investment promotion strategies to better align policies with goals. These are noted in the brief. *See infra*, Assessment subsection B. Investment Law and Policy Regimes.

[16] The terms 'rule-making' and 'rule-taking' generally denote the existence of two corresponding trends: one party's consistency in form or provisions across multiple treaties (a 'rule-maker'); and a related party's inconsistency in form or provisions across similar treaties (a 'rule-taker'). *See generally*, Wolfgang Alschner, *"Rule-Takers and Rule-Makers in the BIT Universe: Empirical Evidence of a North-South Divide"* http://mappinginvestmenttreaties.com/blog/2016/07/rule-takers%20and%20rule-makers/; Wolfgang Alschner & Dmitriy Skougarevskiy, *Mapping the Universe of International Investment Agreements*, No. ID 2801608 (Jun. 2016).

during their ISDS Clinics. This was complemented with data collected by the authors relating both to additional ISDS disputes and additional factors of disputes listed in the SRC data.
CARICOM members' involvement in ISDS reform efforts were assessed for commonalities in goals, approaches, and implementation. Descriptions of these efforts are incomplete due to lack of publicly available information.

UNCITRAL WG III reform proposals were assessed in terms of both the issue(s) they aim to address and the potential impact of the reform on CARICOM members.

- *Second*, three categories of 'approaches' to ISDS reform are presented:

    - Regionalization;
    - Redomestication; and
    - Mitigation.

  The approaches are presented in order of perceived alignment with the development goals of CARICOM members both individually and as a region. The rationale for both options is presented, as are general contours and ambiguities. Approaches are categorized for purposes of analysis but are not described as mutually exclusive.

  The categories of approaches are loosely adopted from a policy brief developed by Georgetown Law's Center for the Advancement of the Rule of Law in the Americas (CAROLA).[17] The categories are modified to account for the development of the regional legal system in CARICOM.

- *Third*, possible steps for implementing each of the recommended approaches are described in terms of three different levels of actions:

    - Unilateral national reforms;
    - Plurilateral or multilateral regional reforms; and
    - Plurilateral or multilateral international reforms.

  Implementation of reforms is recognized to be complex, and thus descriptions of implementation are necessarily lacking exhaustive details.

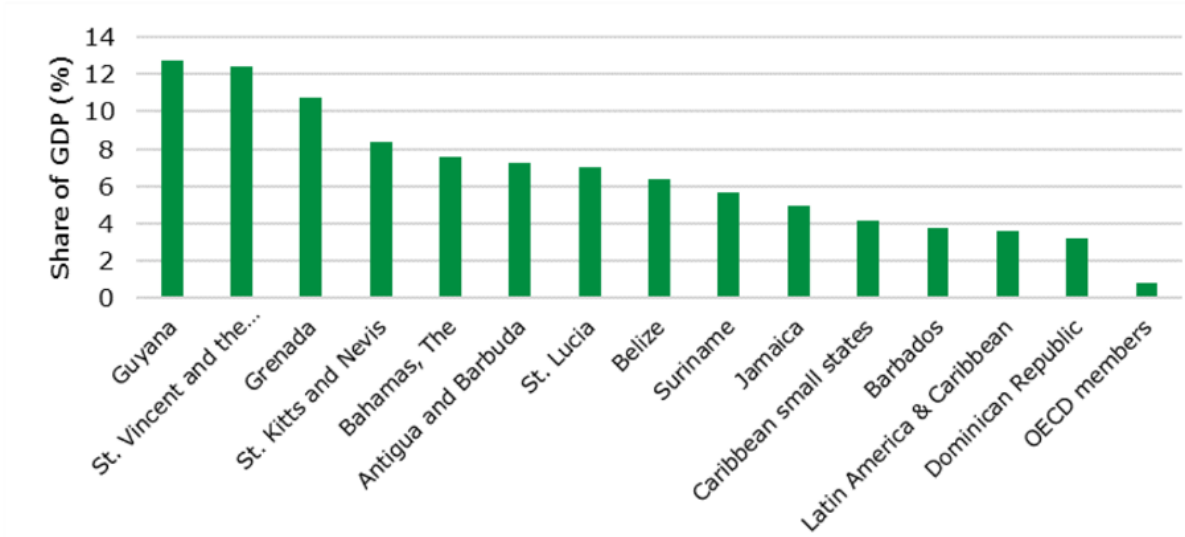
[17] *See* Nazly Duarte Gomez et al., *New Directions in International Investment Law: Alternatives for Improvement*, CAROLA, (2021), https://isdslac.georgetown.edu/wp-content/uploads/2021/11/Carola_PolicyBrief.pdf *Carola_PolicyBrief.Pdf*. (presenting three approaches termed: re-domestication, reconceptualization, and reform).

ASSESSMENT

A. FDI Flows

Net FDI inflows represent substantial portions of the GDPs of CARICOM member states, indicating that transnational businesses account for high percentages of the overall economic activity.[18] The high levels of FDI relative to GDP exposes countries to several potential issues, including overreliance on foreign capital and high susceptibility to financial shocks.

Table 1. Foreign direct investment, net inflows (% of GDP, 2018)[19]



FDI in the Caribbean is predominantly split between production of goods (primarily natural resource extraction) and provision of services (primarily tourism).[20] The economies of CARICOM members are similarly split between those based principally on natural resource extraction or services, with the majority of the economies being service based.[21]

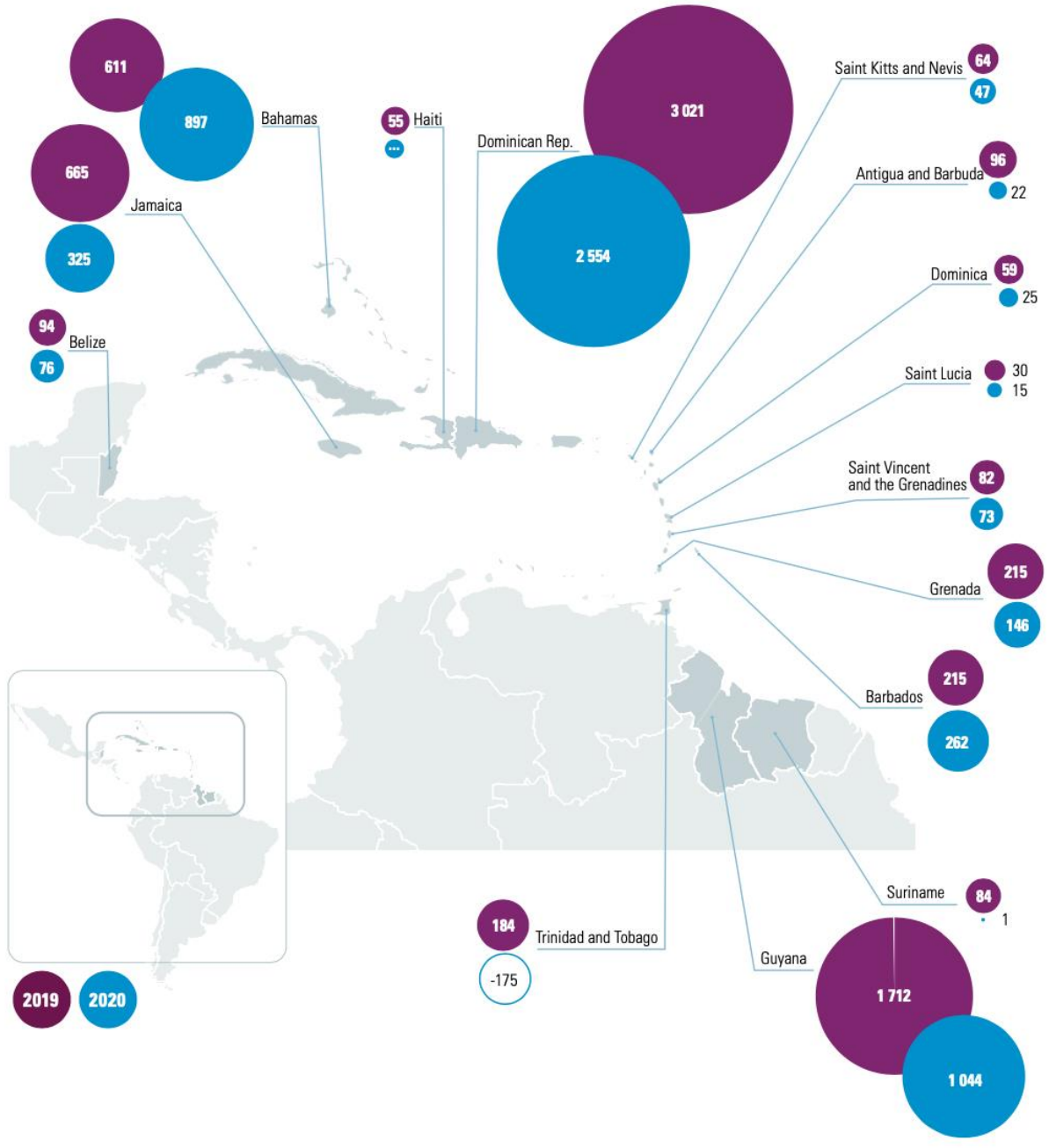
[18] The most extreme case of this is the recent investment in oil production in Guyana, totalling over 20% of the nation's GDP in 2020. *See e.g.*, Economic Commission for Latin America and the Caribbean (ECLAC), *Foreign Direct Investment in Latin America and the Caribbean*, (LC/PUB.2021/8-P), Santiago, (2021) ("ECLAC 2021"); *see also* Olaf De Groot et al., *Foreign direct investment in the Caribbean, Trends, determinants and policies*, (LC/CAR/L.433), Santiago, (February 2014) ("ECLAC 2014").

[19] *See* European Commission, Directorate-General for Trade, *Ex-post evaluation of the EPA between the EU and its Member States and the CARIFORUM Member States: final report with annexes*, Publications Office, 2021, 91, https://data.europa.eu/doi/10.2781/014005.

[20] *See* European Commission, Directorate-General for Trade, *Ex-post evaluation of the EPA between the EU and its Member States and the CARIFORUM Member States: Revised Interim Report*, at 62-63 (2021); https://trade.ec.europa.eu/doclib/html/158657.htm.

[21] Economic Commission for Latin America and the Caribbean, *Economic Survey of the Caribbean 2018*, (CEPAL Feb. 2019).

MAP 1. Selected Caribbean countries: FDI inflows, 2019 and 2020 (Millions of USD)[22]



Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of official figures and estimates as of 27 July 2021.

[22] ECLAC 2021 at 65.

FDI in natural resource extraction has primarily gone to Belize, Guyana, Suriname, and Trinidad and Tobago.[23] Guyana, Suriname, and (to a limited extent) Jamaica have all attracted investment in mining activities. Belize and Trinidad and Tobago have previously received major investment in oil production, though both have fallen off with Trinidad and Tobago experiencing recent negative FDI flows as a result.[24] Both Guyana and Suriname have experienced large growth in FDI in oil production, particularly since exploitation of new deep-water fields began in 2018.[25] Of the more than 1 billion USD in FDI in Guyana in 2020, 98% went to the energy sector.[26]

CARICOM member states with FDI primarily in the service sector include Antigua & Barbuda, Bahamas, Barbados, Grenada, Jamaica, Saint Kitts and Nevis, Saint Lucia, and Saint Vincent and the Grenadines.[27] Tourism related services are primary targets of FDI in this sector. Generally, tourism related FDI projects are much smaller than those related to natural resource extraction or processing.[28] Aside from tourism, Jamaica, Guyana and Belize have all received market-seeking FDI in telecoms, financial services, and in business process outsourcing (BPO).[29]

Tourism and its associated FDI are quite volatile and have also been substantially reduced by the COVID-19 pandemic. In 2020, CARICOM member states saw tourism related FDI fall precipitously, often by more than 50%.[30] Barbados and the Bahamas were the only CARICOM member states to see a rise in FDI during 2020.[31] In Barbados, despite the drop in tourism, FDI rose in the services sector, due in part to outsourced business service providers.[32]

While FDI in the region has complemented domestic capital, there is no evidence that FDI has actually improved productivity.[33] Further, there is an acknowledged, but presently unquantified, gap between available financing and the financing necessary for CARICOM members to meet the SDGs.[34] Given this, future FDI in the region will likely need to be both increased and more targeted to help implement any industrial policies designed to meet the SDGs.[35]

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[23] *See* Olaf De Groot et al., *Foreign direct investment in the Caribbean: Trends, determinants and policies*, prepared for Investment and Corporate Strategies Unit, ECLAC, at 19, LC/CAR/L.433 (Feb. 2014).

[24] ECLAC 2021, at 68.

[25] ECLAC 2021, at 66.

[26] ECLAC 2021, at 66.

[27] ECLAC 2021, at 64-68.

[28] ECLAC 2014, at 26.

[29] ECLAC 2014, at 26.

[30] ECLAC 2021, at 68 (Suriname's 2020 FDI fell by 99% from 84 million USD in 2019 to 800,000 USD in 2020).

[31] ECLAC 2021, at 67.

[32] ECLAC 2021, at 67.

[33] ECLAC 2020.

[34] *See* Alicia Nicholls, *Investment Promotion and Facilitation for Financing the Sustainable Development Goals (SDGs) in the Caribbean*, at 2, SRC POLICY BRIEF #1 (June 2021), https://www.researchgate.net/profile/Alicia-Nicholls/publication/352384146_Investment_Promotion_and_Facilitation_for_Financing_the_SDGs_in_the_Caribbean/links/60c7b3f3299bf108abd94e7a/Investment-Promotion-and-Facilitation-for-Financing-the-SDGs-in-the-Caribbean.pdf.

[35] ECLAC 2021, at 46 (identifying eight sectors that should be targets of future FDI incentives to improve productivity while achieving SDGs. The eight identified sectors are: the transition to renewable energy, sustainable electromobility in cities, the inclusive digital revolution, the health manufacturing industry, the bioeconomy, the care economy, the circular economy and sustainable tourism).

B. Investment Law and Policy Regimes

The investment regimes of CARICOM members are dissimilar and often not integrated into an overarching strategy. A regionally harmonized investment regime is an explicit goal of the CARICOM Single Market Economy (CSME), but the process is still ongoing and there has not yet been agreement on a regional investment code.[36] Regional harmonization of investment laws and policies is one of many necessary steps to achieve a regionally integrated capital market.

Investment regimes cover a wide range of domestic and international laws and policies governing private investments both in an economy generally and specific sectors or ventures. This includes both investment specific policies (e.g., establishment, protection, promotion, and facilitation) and investment-related policy areas (e.g., taxation, intellectual property, competition, labor, environmental).

National Legislation

A limited number of CARICOM members have national law specifically aimed at regulating foreign investments, but most have laws governing investment incentives. Foreign investments in CARICOM countries are also broadly subject to the laws governing specific sectors.[37]

Three CARICOM members (Antigua and Barbuda, Guyana, and Haiti) have national legislation that specifically provides protections for foreign investors. The national law of Antigua and Barbuda provides for national treatment, free transfer of funds, and prohibits expropriation (direct or indirect).[38] Investor protections in Guyana's Investment Act are similar but seemingly only cover direct expropriation and MFN.[39] Haiti's investment law provides for national treatment, transfer of funds, and covers expropriation.[40]

Both the legislation of both Antigua and Barbuda, and Guyana provide special disputes settlement procedures for investment claims. Antigua and Barbuda's investment law provides for the option to arbitrate disputes, but only with the agreement of both parties.[41] Notably, Guyana's Investment Act provides consent to arbitrate.[42] The Foriegn Investment Act of Trinidad and

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[36] *See* Abdullah Al Hassan et al., *"Is the Whole Greater than the Sum of its Parts? Strengthening Caribbean Regional Integration"* page 58, IMF Working Paper WP/20/8, January 2020.

[37] See e.g., Petroleum Act 1990 (Surin.) (allowing for foreign investment in oil operations only through production sharing agreements with the state-owned oil monopoly).

[38] *See* The Investment Authority Act, 2006, § 4, (Ant. & Barb.). Note here that this is the same standard for expropriation that exists in the nation's two BITs (requiring such measures bet taken for the public good, and done "in accordance with due process of law, on a non-discriminatory basis and accompanied by prompt, adequate and effective compensation.").

[39] Investment Act 2004, § 28, (Guy.).

[40] Code des Investissements [Investment Code], Decree of 30 October 1989, (Haiti).

[41] The Investment Authority Act, 2006, § 4, page 27, 33-34 (Ant. & Barb.) (providing for arbitration "as may be agreed between the investor and the Government").

[42] See also, Tarald Laudal Berge et al., *Why Do States Consent to Arbitration in National Investment Laws?*, International Institute for Sustainable Development (IISD, Investment Treaty News, June 20, 2020, https://www.iisd.org/itn/en/2020/06/20/why-do-states-consent-to-arbitration-in-national-investment-laws-tarald-berge-taylor-john/#_ftnref2.

Tobago governs licensing requirements on foriegn investment.[43] In Suriname, the domestic legislation provides rules on taxation and incentives for foreign investments.[44]

Five CARICOM members, Dominica, Antigua and Barbuda, Saint Lucia, St Kitts and Nevis and Grenada, have "citizenship by investment" laws. These programs allow individuals to acquire citizenship through making a "qualifying investment," usually an investment in a national fund.[45] However, citizenship by investment programs are controversial, both within CARICOM and further abroad.[46] Other investment incentives are often provided ad hoc, and there is evidence of "race to the bottom" style competition harming the region overall.[47]

Adjudication of national investment law varies by state. Generally, domestic courts have adopted and relied on British common law in their judgments. Notably, while claims can be brought in domestic courts, most CARICOM members already provide for independent settlement of disputes through appeals mechanisms. The nine CARICOM members that make up the Organization of Eastern Caribbean States (OECS)[48] allow appeals from domestic courts to be heard by the regional Eastern Caribbean Supreme Court. Further, parties may appeal from this court to the Judicial Committee of the Privy Council (JCPC) of the United Kingdom, as the court of last resort.[49] Three additional CARICOM members (Barbados, Belize, and Guyana) have adopted the CCJ as their court of last resort.[50]

Regional Harmonization

The Revised Treaty of Chaguaramas (RTC) calls for harmonized macroeconomic policies, including a region-wide investment policy and system for investment incentives.[51] Regional coordination of investment promotion has been enhanced through the work of the Caribbean Associate of Investment Promotion Agencies (CAIPA) and Caribbean Export. A Regional

[43] Foriegn Investment Act, No. 16 of 1990 (Trin. & Tobago).

[44] Investeringswet 2001, SB 2002 no. 42 [Investment Act] (Surin.). Note here that Suriname has been in the process of updating its' national investment law for sometime, however this process is likely delayed further given the recent change in government. In 2019 a draft revised Investment law with investor protections was mentioned in Suriname's WTO Trade Policy Review. *See* WTO Trade Policy Review: Suriname, WT/TPR/M/391/Add.1, (14 January 2020), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/TPR/M391A1.pdf&Open=True.

[45] *See e.g.*, Citizenship by Investment Act, SAINT LUCIA, No.14 of 2015 (requiring a minimum investment of 100,000 USD in one of four options, with the Saint Lucia National Economic Fund being the most popular).

[46] In March 2022, the European Parliament voted to adopt a report calling for the EU to enact legislation and strictly regulate such programs. *See* The Caribbean Council, *Western countries moving against Caribbean CBI Schemes*, (April 1 2022) https://www.caribbean-council.org/western-countries-moving-against-caribbean-cbi-schemes/.

[47] *See* Abdullah Al Hassan et al., *"Is the Whole Greater than the Sum of its Parts? Strengthening Caribbean Regional Integration"* page 59, IMF Working Paper WP/20/8, January 2020.

[48] Anguilla, Antigua & Barbuda, British Virgin Islands, Commonwealth of Dominica, Grenada, Montserrat, Saint Lucia, St. Christopher (St. Kitts) & Nevis, St. Vincent & the Grenadines.

[49] See International Justice Resource Center, *Caribbean Court of Justice*, https://ijrcenter.org/regional-communities/caribbean-court-of-justice/#:~:text=The%20CARICOM%20Member%20States%20are,Suriname%20and%20Trinidad%20and%20Tobago.

[50] Id.

[51] Revised Treaty, Articles 14, 68, 69.

Investment Promotion Strategy (RIPS)[52] was developed by Caribbean Export with the firm Consultoria Financiera Integral.[53] During the development of the RIPS, it was discovered that only 4 of the 14 CARICOM members had a defined "National Investment Promotion Strategy."[54] From that report a handbook was created to assist the development and implementation of National Investment Promotion Strategies. The strategy recommended in the RIPS flows from identifying goals to implementation, and recognizes the need for sector and market targeted investment to diversify and improve competitiveness. Several CARICOM members have used the report to develop and launch their own national strategies.[55]

[52] Note the authors of this brief were unable to find a publicly accessible copy of the regional strategy.

[53] Funding provided by the European Union, under the 10th European Development Fund, Regional Private Sector Development Programme.

[54] *See* Caribbean Export Development Agency, *THE DEVELOPMENT AND IMPLEMENTATION OF NATIONAL INVESTMENT PROMOTION STRATEGIES: A STEP BY STEP GUIDE*, at 4; https://www.ceintelligence.com/files/documents/NIPS_Handbook.pdf

[55] *See e.g.*, Beltraide, *Government of Belize Launches the National Investment Policy and Strategy (NIPS)*, (December 2, 2019), https://belizeinvest.net/2019/12/02/government-of-belize-launches-the-national-investment-policy-and-strategy-nips/.

C. International Investment Agreements (IIAs)

The number of bilateral investment treaties ("BITs") varies significantly between CARICOM members. CARICOM members collectively have over 50 active BITs, with some members having zero (e.g., the Bahamas) while others have as many as twelve (e.g., Trinidad and Tobago). The treaty partners of CARICOM members' collective 50 active BITs are; the United Kingdom (10 treaties with CARICOM members), Germany (9), China (4), the United States (3), and the remaining are other European states and a few Latin American states. Most BITs, particularly those signed with the United Kingdom, were signed during the 1980s and 1990s and are of a standard form that varies little between treaties.

This section provides an assessment of several key substantive provisions common to investment treaties including; the definition of an investment, most-favored nation clauses, fair and equitable treatment, and full protection and security. Although the areas discussed below do not provide a comprehensive overview of an entire bilateral investment treaty, when investment disputes arise, these provisions often are at the center of the dispute. This section also discusses the dispute settlement provisions of agreements.

Table 2. *Nations with whom CARICOM Members have signed bilateral investment treaties*[56]

	ATG	BRB	BLZ	DMA	GRD	GUY	HTI	JAM	LCA	VCT	SUR	TTO
Germany	X	X		X		X	X	X	X	X		X
UK	X	X		X	X	X	X	X	X			X
US					X		X	X				X
Canada		X										X
Italy		X						X				
Switzerland		X	X			X		X				X
France							X	X				X
Spain								X				X
Austria			X									
The Netherlands			X					X			X	
BL-EU		X										
Brazil						X					X	
Venezuela		X										
Cuba		X	X									X
Mexico												X
El Salvador			X									
Guatemala												X
Argentina								X				
Korea						X		X				X
China		X				X		X				X
Taiwan			X							X		
India												X
Indonesia						X		X			X	
Egypt								X				
Mauritius		X										

[56] See data in attached Annex A: Selected Data from UWI - BITs and TIPs provisions survey

This section also makes frequent references to the Southern African Development Community ("SADC") 2012 Model BIT.[57] The SADC Model BIT is the product of the Southern African Development Community, a Regional Economic Community consisting of sixteen southern African states.[58] Confronted with a number of adverse arbitration awards, South Africa began reviewing its investment policy in 2010 and mass-terminating most of its BITs.[59] As part of South Africa's effort to redefine its investment policy and SADC's effort to promote regional economic integration and cooperation, South Africa spearheaded SADC in 2012 to release its model BIT, which, in contrast to prior BITS, emphasizes not just investor rights and protections, but importantly investor obligations as well as the government's ability and responsibility to promote human, labor, and environmental rights and regulations.[60] Because of the SADC Model BIT's shift in emphasis from solely the investor's rights to the state's rights as well, the SADC Model BIT offers a useful starting point for areas of substantive investment treaty reform.

Investment

The definition of an investment within a bilateral or multilateral investment treaty is a threshold jurisdictional and economic issue within investment arbitration. The investment definition defines what sorts of economic activities enjoy rights and protections under an investment treaty, e.g., stocks, debentures, and concessions. An investor can successfully bring a claim to arbitration only when the investor's claim arises from a covered investment — when a claim does not arise from an investment, there is no consent by the state to arbitration and thus no jurisdiction for the arbitration tribunal to hear the dispute.[61]

The definition of an investment may be non-exhaustive or limited. In a non-exhaustive definition, the BIT will list examples of an investment but have language that states that said examples do not constitute all possible examples of an investment. For example, in the Belize — Austria BIT, investment is defined: "'investment by an investor of a Contracting Party means every kind of asset in the territory of one Contracting Party, owned or controlled, directly or indirectly, by an investor of the other Contracting Party, including:… [list of examples of an investment follows]."[62] Here "*including*" denotes that the following list includes examples of an asset owned or controlled by an investor but that the list does not necessarily include every kind of an investment. An example of a BIT that explicitly states that its definition of an investment does not exhaustively list all possible types of investment is the Guyana — Switzerland BIT which begins its definition of investment as: "The term 'investments' shall include every kind of

[57] Southern African Development Community ("SADC") Model Bilateral Investment Treaty Template with Commentary, https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf (July 2012).
[58] *About SADC*, SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, https://www.sadc.int/about-sadc (last visited Mar. 29, 2022).
[59] Erika George & Elizabeth Thomas, Bringing Human Rights into Bilateral Investment Treaties: South Africa and A Different Approach to International Investment Disputes, 27 Transnat'l L. & Contemp. Probs. 403, 406 (2018)
[60] *Id.* at 424 et seq.
[61] *See, e.g.*, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 25(1), Mar. 18, 1965 [hereinafter ICSID Convention]
[62] Agreement between the Government of the Republic of Austria and the Government of Belize for the Promotion and Protection of Investment, art. 1(2), July 17, 2001 [entered into force Feb. 1, 2002], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/172/download.

asset in particular, though not exclusively:…"[63] Here it is especially clear that an asset not listed under the definition of an investment may nonetheless qualify as an investment under the BIT.

Non-exhaustive definitions of an investment are the prevailing standard across BITs signed by CARICOM members. For example, all six of the publicly available BITs signed by Belize contain non-exhaustive "including" and/or "not exclusively" language in their definition of an investment.[64] Likewise five of Guyana's six publicly available BITs contain "including" and/or "not exclusively" language in their definition of an investment.[65] Similarly, the Jamaica — UK BIT defines investment to "mean every kind of asset and in particular, though not exclusively, includes: [more specific list of qualified assets such as stock and claims to money,"[66] and this language is repeated word for word in the United Kingdom's other BITs with CARICOM members such as with Barbados;[67] Belize;[68] Dominica;[69] and Trinidad & Tobago.[70]

By contrast a limited definition of an investment defines what is *not* an investment in addition to its definition of what is an investment. For example in the Guyana — Brazil BIT, Article 3.1.1 states, "For the purposes of this Agreement and for greater certainty, 'Investment' does not include:… [list of examples]."[71] Limited definitions of an investment are, however, less common amongst CARICOM member's BITs. The Guyana — Brazil BIT is the only publicly available

[63] Agreement between the Swiss Confederation and the Republic of Guyana on the Promotion and Reciprocal Protection of Investments, art. 1(2), Dec. 13, 2005 [entered into force May 2, 2018], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3042/download.

[64] Belize, UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/countries/20/belize (last visited Mar. 13, 2022).

[65] *Guyana*, UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/countries/89/guyana (last visited Mar. 13, 2022). The only one that does not contain the non-exhaustive language is Guyana's BIT with Germany.

[66] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Jamaica for the Promotion and Protection of Investments, art. 1(a), Jan. 20, 1987 [entered into force May 15, 1987], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1725/download.

[67] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Barbados for the Promotion and Protection of Investments, art. 1(a), Apr. 7, 1993 [entered into force the same day], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/287/download.

[68] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belize for the Promotion and Protection of Investments, art. 1(a), Apr. 30, 1982 [entered into force the same day], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/436/download.

[69] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Commonwealth of Dominica for the Promotion and Protection of Investments, art. 1(a), Jan. 23, 1987 [entered into force the same day], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1040/download.

[70] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Trinidad and Tobago for the Promotion and Protection of Investments, art. 1(a), July 23, 1993 [entered into force Oct. 8, 1993], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2348/download.

[71] Cooperation and Investment Facilitation Agreement between the Federative Republic of Brazil and the Co-Operative Republic of Guyana, art. 3.1.1., Dec. 13, 2018, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5763/download.

BIT signed by Guyana that contains an exclusions clause in its definition of an investment.[72] Similarly, of the ten publicly available BITs signed by Barbados, only its BIT with Canada[73] excludes certain kinds of assets from its definition of an investment.[74]

Non-exhaustive definitions of an investment can lead to litigation where there is ambiguity as to what qualifies as an investment under the BIT. For example, in F-W Oil v Trinidad & Tobago, F-W Oil brought a claim against Trinidad & Tobago alleging that a conditional tender offer and money spent negotiating it to explore an oil field constituted an investment, even though F-W Oil never reached or signed a final agreement with the state-owned oil company.[75]

The governing Trinidad and Tobago — US BIT defined investment as follows:

> ""Investment" of a national or company means every kind of investment owned or controlled directly or indirectly by that national or company, and includes consisting or taking the form of:
>
> 1. A Company;
> 2. Shares, stock, and other forms participation, and bonds, debentures, forms of debt interests, in a company;
> 3. Contractual rights, such as under turnkey, construction or management contracts, production or revenue-sharing contracts, concessions, or other similar contracts;
> 4. Tangible property and intangible property, including rights, such as mortgages, liens and pledges:
> 5. Intellectual property, including:… [list of specified IP]
> 6. Rights conferred pursuant to law, such as licenses and permits"[76]

Analyzing the BIT's definition of investment, the Tribunal concluded that an investment under the BIT "can only realistically be understood as referring to something in the nature of a legal right or entitlement… the intention [cannot] have been to bring within the scope of the term claims other than those based on proprietary or contractual rights, which, in the Tribunal's view, corresponds in any event to the whole underlying notion of an "investment"… It would be difficult, or even impossible, to apply these standards in any meaningful way to claims falling short of actual proprietary or contractual rights."[77] Because the tender offer was never ultimately

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[72] *Guyana*, UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/countries/89/guyana (last visited Mar. 13, 2022).

[73] Agreement between the Government of Canada and the Government of Barbados for the Reciprocal Promotion and Protection of Investments, art. 1(f)(vi), May 29, 1996 [entered into force Jan. 17, 1997], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/280/download.

[74] *Barbados*, UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/countries/17/barbados (last visited Mar. 13, 2022).

[75] F-W Oil v Trinidad & Tobago, ICSID Case No. ARB/01/14, Award ¶ 5-13 (Mar. 3, 2006).

[76] Treaty between the Government of the United States of America and the Government of the Republic of Trinidad concerning the Encouragement and Reciprocal Protection of Investments, art. I.1(c), Sep. 26, 1994 [entered into force Dec. 26, 1996], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2349/download.

[77] F-W Oil v Trinidad & Tobago, ICSID Case No. ARB/01/14, Award ¶ 125 (Mar. 3, 2006).

approved by the relevant ministry, no proprietary or contractual right existed, and the tribunal therefore agreed with Trinidad and Tobago that no investment existed.[78]

MFN

MFN, or most-favored-nation, as applied to investment is the concept that a state's treatment of an investor must meet or exceed the treatment the state had agreed to provide to investors of other nations. Essentially, MFN broadly means that a state cannot discriminate against an investor in favor of investors of third-party states.

A standard MFN clause in BITs of CARICOM members provides MFN treatment to investors without exceptions. For example, the Trinidad and Tobago — UK BIT, Art. 3.1, whose language is repeated across BITs signed with the United Kingdom, simply provides: "Neither Contracting Party shall in its territory subject investors or returns of nationals or companies of the other Contracting Party to treatment less favorable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State."[79]

[78] *Id.* at ¶ 126, 213.

[79] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Trinidad and Tobago for the Promotion and Protection of Investments, art. 3.1, July 23, 1993 [entered into force Oct. 8, 1993], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2348/download.

Table 3. *Whether MFN Treatment Clauses in CARICOM BITs cover substantive ("S") and/or procedural ("P") (e.g. dispute settlement provisions) matters* [blank spaces = no signed BIT][80]

	ATG	BRB	BLZ	DMA	GRD	GUY	HTI	JAM	LCA	VCT	SUR	TTO
Germany	Both S&P	Both S&P		Both S&P		Both S&P	Only S	Both S&P	Both S&P	Only S		Only S
UK	Both S&P	Both S&P		Both S&P	Only S	Both S&P	Only S	Both S&P	Both S&P			Both S&P
US					Only S		Only S	Both S&P				Only S
Canada		Both S&P										Only S
Italy		Both S&P						Both S&P				
Switzerland		Both S&P	Both S&P			Both S&P		Both S&P				Only S
France							Both S&P	Both S&P				Only S
Spain								Both S&P				Only S
Austria			Both S&P									
The Netherlands			Both S&P					Both S&P			Both S&P	
BL-EU		Both S&P										
Brazil						Only S					Both S&P	
Venezuela		Both S&P										
Cuba		Both S&P	Both S&P									Only S
Mexico												Only S
El Salvador			Both S&P									
Guatemala												Only S
Argentina								Both S&P				
Korea						Both S&P		Both S&P				Only S
China		Both S&P				Both S&P		Both S&P				Only S
Taiwan			Both S&P							Only S		
India												Only S
Indonesia								Both S&P			Both S&P	
Egypt								Both S&P				
Mauritius		Both S&P										

By contrast, some BITs and free-trade agreements, including ones signed by the United States and European countries, either define under what circumstances MFN treatment applies or provide carve-outs for when MFN treatment does not apply. For example, Article 10(3) of the US–Chile Free Trade Agreement (2004) states "1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory." (emphasis added).[81] Article 5 of the Netherlands–Argentina BIT (1994) states: "With respect to taxes, fees, charges and to fiscal deductions and exemptions, each Contracting Party shall accord to investors of the other Contracting Party who are engaged in any economic activity in its territory, treatment not less favourable than that accorded to its own investors or to those of any third State, whichever is more favourable to the investors concerned…."[82] Both these treaties provide for specific MFN protections limited to specific areas of investment activity. Taxation, specifically international

[80] *See also* Q21 Do the Most-Favoured Nation Treatment Clauses in your country's BITs include reservations/exceptions? If so, what are these reservations/exceptions?' In attached Exhibit A in sheet 'BITs' for a chart of exceptions to MFN clauses

[81] United States — Chile Free Trade Agreement, art. 10(3), entered into force Jan. 1, 2004, https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text.

[82] Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Argentine Republic, art. 5, Oct. 20, 1992 [entered into force Oct. 1, 1994], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/107/download.

tax treaties, is an area that is relatively frequently exempted from MFN protection, included, amongst others, in the Trinidad and Tobago – India BIT,[83] in the Barbados — Mauritius BIT,[84] and in the Suriname — Netherlands BIT.[85]

[83] Agreement between the Government of the Republic of India and the Government of Republic of Trinidad and Tobago for the Promotion and Protection of Investments, art. 4.3, Mar. 12, 2007 [entered into force Oct. 7, 2007], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1609/download.

[84] Barbados — Mauritius Bilateral Investment Treaty, art. 4.3, Sep. 28, 2004 [entered into force June 18, 2005], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/284/download.

[85] Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Suriname, art. 3.3, Mar. 31, 2005 [entered into force Sep. 1, 2006], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2085/download.

Fair and Equitable Treatment

Fair and Equitable Treatment (FET) provisions are broad and extremely common protections granted by BITs to investors guaranteeing rights roughly similar to due process of law. In arbitrations against CARICOM members were FET claims were raised, such claims have revolved around denial of the investor's legitimate expectations[86] and failure to afford due process.[87]

Table 4. *Whether FET clauses in CARICOM BITS are qualified (linked to international law or customary international law) or unqualified (unlinked)* [blank spaces = no signed BIT]

	ATG	BRB	BLZ	DMA	GRD	GUY	HTI	JAM	LCA	VCT	SUR	TTO
Germany	*UQ*	*UQ*		*UQ*	*UQ*	*UQ*	*UQ*	*UQ*	*UQ*	*UQ*		*UQ*
UK	*UQ*	*UQ*		*UQ*	*UQ*	*UQ*	*UQ*	*UQ*	*UQ*			*UQ*
US					*Q (linked to international law)*		*UQ*	*Q (linked to international law)*				*Q (linked to international law)*
Canada		*Q (international law)*										*Q (linked to international law)*
Italy		*UQ*						*UQ*				
Switzerland		*UQ*	*UQ*			*UQ*		*UQ*				*UQ*
France							*Q (linked to international law)*	*Q (linked to international law)*				*Q (linked to international law)*
Spain								*Q (linked to international law)*				*UQ*
Austria			*UQ*									
The Netherlands			*UQ*					*UQ*			*UQ*	
BL-EU		*UQ*										
Brazil						*N/A*					*N/A The BIT explicitly provides that the FET standard is not covered*	
Venezuela		*Q (international principles)*										
Cuba		*UQ*	*UQ*									*UQ*
Mexico												*Q (linked to customary international law/minimum standard of treatment)*
El Salvador			*UQ*									
Guatemala												*Y*
Argentina								*UQ*				
Korea						*UQ*		*UQ*				*UQ*
China		*UQ*				*UQ*		*UQ*				
Taiwan			*UQ*							*UQ*		*UQ*
India												*UQ*
Indonesia						*UQ*		*UQ*			*UQ*	
Egypt								*UQ*				
Mauritius		*UQ*										

FET has become increasingly controversial as investors often may claim a violation of FET where a law or regulation passed by the State harms the investor's investment.[88] Most

[86] Peter A. Allard v. The Government of Barbados, Perm. Ct. Arb. Case No. 2012-06 ¶ 172 (June 27, 2016).

[87] British Caribbean Bank v. Belize, Perm. Ct. Arb. Case No. 2010-18 ¶ 270–73 (Dec. 19, 2014).

[88] *See, e.g.*, Kendra Leite, The Fair and Equitable Treatment Standard: A Search for A Better Balance in International Investment Agreements, 32 Am. U. Int'l L. Rev. 363, 366–67 (2016).

CARICOM BITs guarantee investors "Fair and Equitable Treatment" without qualifications. A typical FET clause in a CARICOM BIT states: "Investments made by investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party." Trinidad and Tobago — South Korea BIT.[89] Likewise, all BITS signed by CARICOM members with the United Kingdom have extremely similar FET clauses, e.g., "Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party." Saint Lucia — UK BIT (1983).[90]

The claims brought under FET provisions can be broad. For example, in Peter A. Allard v. The Government of Barbados, a Canadian investor who had developed an ecotourism resort at a mangrove swamp/sanctuary alleged that Barbados had denied him FET by making representations that it would protect the environment around the sanctuary and then failing to do so.[91] Like other FET clauses, Article 2.2 of the Barbados — Canada BIT states, "Investments… shall at all times be accorded fair and equitable treatment in accordance with the rules and principles of International law."[92] Although the tribunal did not address whether this treaty language created an autonomous treaty standard or simply provided for a minimum standard of treatment under customary international law, the tribunal assumed for analysis the claimant's interpretation was correct that the FET clause, "protects an investor's legitimate expectations arising from representations made by the host State."[93] While the tribunal found that neither Barbados had made any representations to the investor nor had the investor relied on any putative representations,[94] it is easy to see how a right that protects an investor's quasi-contractual expectations can be investor-friendly.

The tribunal in British Caribbean Bank v. Belize, also referenced the investor's 'legitimate expectations' in its consideration of FET and further defined FET: "fair and equitable treatment is frequently noted to include a prohibition on conduct that is 'arbitrary,' 'idiosyncratic,' or 'discriminatory'"; and more specifically, "Conduct that is motivated by an improper purpose, by a purpose with no relation to the means adopted, or by no purpose whatsoever is difficult to characterize as either fair or equitable, whatever the actual effects may be."[95]

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[89] Agreement between the Government of the Republic of Korea and the Government of the Republic of Trinidad and Tobago for the Promotion and Protection of Investments, art. 2.2, Nov. 5, 2002 [entered into force Nov. 27, 2003], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1838/download.

[90] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Saint Lucia for the Promotion and Protection of Investments, aArt. 2.2. Jan. 18, 1983 [entered into force on the same day], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2242/download.

[91] Peter A. Allard v. The Government of Barbados, Perm. Ct. Arb. Case No. 2012-06 ¶ 172 (June 27, 2016).

[92] Agreement between the Government of Canada and the Government of Barbados for the Reciprocal Promotion and Protection of Investments, art. 2.2, May 29, 1996 [entered into force Jan. 17, 1997], https://www.italaw.com/sites/default/files/laws/italaw6030.pdf.

[93] Allard v. Barbados, at ¶ 192–93.

[94] Allard v. Barbados, at ¶ 208, 220.

[95] British Caribbean Bank v. Belize, Perm. Ct. Arb. Case No. 2010-18 ¶ 270–73 (Dec. 19, 2014).

However, some newer CARICOM BITs, from the 2000s or more recently, have either placed qualifications that more narrowly define FET or have removed FET altogether. For example, in the Trinidad and Tobago — Mexico BIT (2007), Art. V, "Minimal Level of Treatment" states,

> "1. Each Contracting Party will grant the investment of investors of the other Contracting Party, treatment according with customary international law, including fair and equitable treatment, as well as full protection and security 2. For greater certainty: (a) the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to that required by the minimum level of treatment of foreigners under customary international law, or that goes beyond it; and (b) a finding in the sense that a different provision of this Agreement has been violated, or of a different international Agreement, does not establish that this Article has been violated."[96]

The Trinidad and Tobago — Guatemala BIT (2013), Art. 4.1, removes FET altogether and instead provides, "Each Contracting Party shall accord to investments of investors of the other Contracting Party treatment in accordance with customary international law."[97]

Full Protection and Security

In addition, it may be noted that many of the older treaties that provide FET also provide "full protection and security" to the investor in the same or a nearby clause/article. "Full protection and security" is a right that requires reasonable action by police and state security forces to prevent physical damage to an investment, which typically is suffered due to war and conflict.[98] We do not believe CARICOM members need to devote significant time to reforms of "full protection and security" clauses. Claims of FPS violations are most likely to happen in states experiencing significant civil unrest, e.g., war, insurrections, and terrorism, where the investor claims that the State failed to protect its investment from physical attack. Typical FPS claims have arisen in states experiencing civil war (e.g. Sri Lanka — AAPL v. Sri Lanka)[99] and with active terrorist movements inside their borders (e.g., Ampal-Am. Isr. Corp. v. Arab Republic of Egypt).[100]

It should be noted however that the investor in Peter A. Allard v. The Government of Barbados, the investor, in addition to his FET claims, also alleged the Government of Barbados had

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[96] Agreement between the Government of the United Mexican States and the Government of the Republic of Trinidad and Tobago for the Reciprocal Promotion and Protection of Investments, art. V, Oct. 3, 2006 [entered into force Sep. 16, 2007], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2008/download.

[97] Agreement between the Republic of Guatemala and the Republic of Trinidad and Tobago on the Reciprocal Promotion and Protection of Investments, art. 4.1, Aug. 13, 2013 [entered into force June 23, 2016], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3155/download.

[98] Nartnirun Junngam, The Full Protection and Security Standard in International Investment Law: What and Who Is Investment Fully(?) Protected and Secured from?, 7 Am. U. Bus. L. Rev. 1, 4 (2018); Nicole O'Donnell, Reconciling Full Protection and Security Guarantees in Bilateral Investment Treaties with Incidence of Terrorism, 29 Am. Rev. Int'l Arb. 293, 297 (2018).

[99] AAPL v. Sri Lanka, ICSID Case No. ARB/87/3, Award (June 27, 1990).

[100] Ampal-Am. Isr. Corp. v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss (Feb. 21, 2017).

violated FPS by failing to take reasonable measures to prevent environmental damage to a mangrove sanctuary the investor had established an ecotourism investment in.[101] The tribunal did not address whether FPS includes an obligation to protect against environmental damage to an investment because, assuming FPS includes such an obligation, the tribunal found Barbados had taken reasonable measures and there was no FPS violation. Namely, Barbados had established a committee to investigate coordinate the government's response to the environmental damage to the sanctuary, caused by a sewage release from a treatment plant and a failure of a sluice gate, which was sufficient given Barbadian experts established that repair of the sluice gate required complex considerations of various community stakeholders.[102]

To the extent that Allard accepts an environmental protection obligation under FPS, it only requires "due diligence" and "reasonable actions" to prevent environmental damage.[103] As interpreted in Allard, this obligation would not seem to place an undue burden upon CARICOM members, especially for states that seek to expand their environmental regulations and enforcement. Nonetheless, states that are concerned about possible environmental obligations under FPS may still argue that FPS does not include any such obligation should a future environmental FPS claim arise. Alternatively, states may add qualifying language to their BITs' FPS clause such that FPS only applies to damages suffered due to armed conflict.[104] States may also consider removing FPS protection from their BITs and instead require investors to purchase political risk insurance.[105]

Whether CARICOM BITs include protection for physical ("P") security and/or legal ("L) security [blank spaces = no signed BIT]

[101] Peter A. Allard v. The Government of Barbados, Perm. Ct. Arb. Case No. 2012-06, at ¶232 (June 27, 2016).
[102] *Id.* at ¶245 et seq.
[103] *Id.* at ¶243–44.
[104] *See, e.g.*, SADC Model Bilateral Investment Treaty Template with Commentary, pg. 29, art. 9.1-9.2 (July 2012); LESI SpA v. République Algérienne Démocratique et Populaire, ICSID Case No. ARB/05/3, Award, ¶ 173 (Nov. 12, 2008).
[105] *See* Mary Kabir-Seraj Bischoping, The Rise of the Nonstate Actor: The New Face of the Bilateral Investment Treaty in the Middle East, 61 Va. J. Int'l L. 111, 132–35 (2020).

	ATG	BRB	BLZ	DMA	GRD	GUY	HTI	JAM	LCA	VCT	SUR	TTO
Germany	*Both P&L Security*	*Both P&L Security "shall provide protection"*		*Both P&L Security*		*Both P&L Security*	*Both P&L Security*	*Both P&L Security*	*Both P&L Security*	*Both P&L Security*		*Both P&L Security*
UK	*Both P&L Security*	*Both P&L Security*		*Both P&L Security*	*Both P&L Security*	*Both P&L Security*	*Both P&L Security*	*Both P&L Security*	*Both P&L Security*			*Both P&L Security*
US					*Both P&L Security*		*Both P&L Security*	*Both P&L Security*				*Both P&L Security*
Canada		*Both P&L Security*										*Both P&L Security*
Italy		*N/A (does not contain FPS provision)*						*N/A (does not contain FPS provision)*				
Switzerland		*Both P&L Security "shall provide protection"*	*Both P&L Security*			*Both P&L Security*		*Both P&L Security*				*Both P&L Security*
France							*Both P&L Security*	*Both P&L Security*				*N/A (does not contain FPS provision)*
Spain								*Both P&L Security*				*Both P&L Security*
Austria			*Both P&L Security*									
The Netherlands			*Both P&L Security*					*Both P&L Security*			*Both P&L Security*	
BL-EU		*Both P&L Security*										
Brazil						*N/A (does not contain FPS provision)*					*N/A The BIT explicitly provides that the FPS standard is not covered*	
Venezuela		*Both P&L Security*										
Cuba		*Both P&L Security "shall provide protection"*	*Both P&L Security*									*Both P&L Security*
Mexico												*Both P&L Security*
El Salvador			*Both P&L Security*									
Guatemala												*N/A (does not contain FPS provision)*
Argentina								*Both P&L Security*				
Korea						*Both P&L Security*		*Both P&L Security*				*Both P&L Security*
China		*Both P&L Security*				*Both P&L Security*		*Both P&L Security*				*Both P&L Security*
Taiwan			*Both P&L Security*							*Both P&L Security*		
India												*Both P&L Security*
Indonesia						*Both P&L Security*		*Both P&L Security*			*Both P&L Security*	
Egypt								*N/A (does not contain FPS provision)*				
Mauritius		*Both P&L Security*										

ISDS Provisions

Within ISDS, articles concerning specific aspects about ISDS in a BIT may cover a wide array of topics. For example, individual articles may address, amongst other topics: 1) choice of arbitral institution; 2) choice of law and venue; 3) possible local remedy/litigation requirement; 4) alternative disputes resolution, e.g., consultations or mediation; 5) appointment of arbitrators; 6) submissions of evidence; and 7) transparency of proceedings. Alternatively, some BITs may just state that any dispute between an investor and the State will be heard by a given arbitral institution and that the procedural rules shall be determined by the arbitral institution. This latter approach is prevalent among older CARICOM BITs. For example, the Jamaica — UK BIT, Article 9 simply establishes the Parties' consent to conciliation or arbitration by the International Center for the Settlement of Investment Disputes (ICSID) but does not provide guidance on any other procedural issue.[106] By contrast, Article 10 of the same treaty, concerning disputes between states, provides limited procedural rules for the appointment of the tribunal and apportionment of the arbitration's costs.[107]

Somewhat newer BITs such as the Barbados–Mauritius BIT provide greater clarifications. For ex., the BIT provides the investor and contracting party the option to conduct an arbitration

[106] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Jamaica for the Promotion and Protection of Investments, art. 9, Jan. 20, 1987 [entered into force May 15, 1987].
[107] *Id.* at art. 10.

either via ICSID or via an UNCITRAL rules ad hoc tribunal (art. 10.2).[108] The article then states issues of venue (10.4), choice of law (10.5).[109] Similarly, the T&T—South Korea BIT provides for consultation and negotiation as a precondition to arbitration (art. 8.1) and the availability of local remedies to the investor on a non-discriminatory and MFN basis (art. 8.2) prior to providing the three arbitration options, namely ICSID, the Court of Arbitration of the International Chamber of Commerce (ICC), and an ad hoc tribunal according to UNCITRAL rules.[110] Both the Barbados–Mauritius (art. 9) and the T&T—SK (art. 9) BITs also provide for procedures to appoint an ad hoc tribunal to judge any dispute that may arise between the State parties to the BIT but note that the tribunals, once constituted, shall determine their own procedure.

While all three of these treaties devote approximately one page each to the articles concerning settlement of disputes between an investor and the state and disputes between the two Contracting States, by contrast, the relatively new Trinidad and Tobago — Guatemala BIT devotes comparatively more space its corresponding articles; the BIT devotes four articles to investor-state disputes, covering: choice of mechanism for dispute resolution; constitution of the tribunal; applicable law; and provisional measures.[111] Similarly, the SADC Model BIT devotes twenty subparagraphs to investor-state dispute settlement (art. 29.1-20).[112] However, in all of the BITs here discussed, the driving force of the ISDS article is to establish which arbitral institution shall be resorted to for disputes resolution. BITs provide relatively few conditions precedent to arbitration while most procedural rules are determined by the arbitral institution

[108] Barbados — Mauritius Bilateral Investment Treaty, art. 10.2, Sep. 28, 2004 [entered into force June 18, 2005].
[109] *Id.* at art. 10.4-5.
[110] Agreement between the Government of the Republic of Korea and the Government of the Republic of Trinidad and Tobago for the Promotion and Protection of Investments, art. 8.1-8.2, Nov. 5, 2002 [entered into force Nov. 27, 2003].
[111] Agreement between the Republic of Guatemala and the Republic of Trinidad and Tobago on the Reciprocal Promotion and Protection of Investments, art. 10-13, Aug. 13, 2013 [entered into force June 23, 2016].
[112] SADC Model Bilateral Investment Treaty Template with Commentary, pgs. 55-70 (July 2012).

D. ISDS Disputes

To date, ten investment disputes have been concluded involving CARICOM members as respondents, of which half were resolved in favor of the defendant state, two resulted in awards in favor of the investor, while three were settled. Although ten cases across fourteen states as an absolute number might suggest a relative absence of investment disputes, seven of the ten resolved disputes were initiated from 2010 or later while there are currently several disputes that are ongoing. Moreover, the investor claims, which ranged from $20 million USD to over $500 million USD, represent significant fractions of the annual gross domestic product of member states. This section provides a selected overview of the publicly available cases.

Barbados: Peter A. Allard v. The Government of Barbados, Perm. Ct. Arb. Case No. 2012-06 (June 27, 2016)

Type (Conciliation/Arbitration)	● Arbitration
Institution	● Permanent Court of Arbitration
Location	● United Kingdom
Date of Arbitration Request	● May 21, 2010
Date of Decision/Award	● June 27, 2016
Arbitral Rules	● UNCITRAL
Governing Law	● Agreement between the Government of Canada and the Government of Barbados for the Reciprocal Promotion and Protection of Investments, signed on 29 May 1996, entered into force 17 January 1997
Party Appointed Arbitrators (party, nationality)	● Gavan Griffith (President, Australia) ● Andrew Newcombe (Investor appointment, Canada) ● W Michael Reisman (State appointment, U.S.A.)
Investor Nationality	● Canadian
Decision/award	● Investor's claims dismissed ● State awarded $2.5 million USD in legal fees and other expenses, as well as $0.5 million in arbitration costs.

Factual background

A Canadian investor in 1994 purchased land at a mangrove swamp/lagoon wildlife sanctuary to develop an ecotourism resort (¶33). In 2005 a failure at a sewage plant led to discharge of sewage into the sanctuary, causing environmental degradation of the sanction and ultimately closure of the resort (¶43). The investor alleged under the Barbados — Canada BIT (1996) that he was denied:

> Fair & Equitable Treatment because Barbados represented it would uphold its environmental and conservation policies and failed to act in accordance with those representations. (¶172).
> Full Protection and Security, claiming the *Convention on Biological Diversity and the Ramsar Convention* required a heightened level of due diligence to "protect investments against injury by private parties," and that "the FPS standard is not limited to protection against 'physical interference with property, let alone ... physical violence' [but also includes] physical interference with property through the unlawful trespass of pollutants." (¶230-31). FPS was denied because Barbados failed to take reasonable care to protect the sanctuary despite being on notice of the damage to the sanction, failing to properly maintain the sluice gate and enforce its environmental laws. (¶232).
> The investor also claimed violations of indirect expropriation because Barbados designated the area of investment a conservation area that could only be developed for conservation purposes but then failed to properly maintain the environmental quality of the area. (¶255).

Legal analysis

The tribunal first rejected that any environmental damage was attributable to actions of the state, and therefore even if there were any breaches of treaty obligations, damages would be zero (¶87-166).

However, despite the lack of any damages, the tribunal addressed the investment claims as follows. It:

> 1) rejected a violation of FET because
> > A) Barbados had not made any representations either regarding its maintenance of a sluice gate into the sanctuary or its general environmental standards (¶208) and
> > B) the investor "did not make either his initial or later investment decisions in reliance on any representations made by Barbados" (¶220);
>
> 2) accepting, *in arguendo*, that FPS includes obligations to protect against environmental pollutants, the tribunal found that Barbados took reasonable actions to prevent environmental damages to the sanctuary and therefore there was no FPS violation. (¶239-52). Notably, the tribunal said that the FPS due diligence standard requires only reasonable actions to prevent damage and does not require any specific actions as requested by the investor, nor is the standard heightened by the State's signature to other international treaties and obligations. (¶244). In addition, as noted, although the tribunal

analyzed FPS as though it includes an obligation on the "host State to protect foreign investments against environmental damage," because the tribunal concluded that there was no FPS violation, regardless of standard, the tribunal assumed, and did not analyze whether, FPS includes an environmental obligation. (¶252).

3) rejected the claim of indirect expropriation because
   A) the investor continued to maintain a café on the property, and therefore he had "not been deprived of his *entire* [sic] investment" and
   B) the investor failed to establish that he closed the sanctuary due to environmental degradation not because of business reasons. (¶264-65).

Award

"The Claimant was to bear only $2.25m of the Respondent's claimed $5.2m in counsel fees. (paragraph 313). The Respondent was awarded $567,162 in costs of arbitration, and $2,508,144 in costs incurred by the parties. (paragraph 316)." ¶H3.

Belize: British Caribbean Bank v. Belize, Perm. Ct. Arb. Case No. 2010-18 (Dec. 19, 2014)

Type (Conciliation/Arbitration)	● Arbitration
Institution	● Permanent Court of Arbitration
Location	● Belize
Date of Arbitration Request	● May 4, 2010
Date of Decision/Award	● December 19, 2014
Arbitral Rules	● UNCITRAL
Governing Law	● Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belize for the Promotion and Protection of Investments of 30 April 1982
Party Appointed Arbitrators (party, nationality)	● Albert Jan van den Berg (President, Belgium) ● John Beechey (Investor, United Kingdom) ● Rodrigo Oreamuno (State [appointed by the PCA], Costa Rica)
Investor Nationality	● Turks and Caicos (British for treaty purposes
Decision/award	● Claimants awarded $44.8 million USD in damages as well as approximately £1.63 million and €0.31 million to cover legal and arbitration costs respectively.

Facts and procedural history

The British Caribbean Bank is a Turks and Caicos investor that in the 2000s purchased loan and security instruments in Belize Telemedia Limited and Sunshine Holding Limited, the former the main Belize telecommunications corporation and the latter an entity that owned shares of the former. (¶1-4). In 2009, the National Assembly of Belize passed the Acquisition Act and the Ministry of Finance issued an order expropriating BCB's interests in Telemedia and Sunshine. (¶85–88).

Pursuant to Article 8.1 of the Belize — United Kingdom BIT (1982),[113] in December 2009, BCB commenced arbitration proceedings via UNCITRAL rules against Belize. (¶5). BCB alleged that Belize's expropriation of its interests in Telemedia and Sunshine violated the terms of Article 5, requiring a public purpose for expropriation, and of Article 2.2, concerning Fair and Equitable Treatment. (¶116). In December 2010, the arbitration proceedings were suspended as the Supreme Court of Belize issued an injunction against BCB's pursuing arbitration. (¶21).

In June 2011, the Belize Court of Appeals ruled in BCB's favor, finding that the government's expropriation lacked a public purpose and therefore the Acquisition Act and implementing order were unlawful. (¶98). Nevertheless, ten days later the National Assembly modified the act in an attempt to address the public purpose issue, and the Ministry of Finance issued a new order expropriating BCB's interests. (¶100). This time, upon legal challenge, the Belize Court of Appeals ruled the 2011 expropriation order was legal and constitutional. (¶107). In June 2013, the Caribbean Court of Justice discharged the anti-arbitration injunction, and in July 2013 the Government of Belize agreed to continue with the arbitration proceedings. (¶24-25).

Legal analysis

With respect to expropriation, Article 5 of the Belize – UK BIT provides:

> (1) Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party and against just and equitable compensation.

The tribunal found that Belize's expropriation of BCB's interests in Telemedia did not comply with Article V because it was not undertaken for a public purpose. (¶241). The expropriation lacked a public purpose because the expropriation was undertaken primarily to avoid certain interest payments on debt obligations. (¶236). Nonetheless, the tribunal found with respect to damages that the legality of an expropriation has no effect. (¶247, 260–62).

With respect to Fair and Equitable Treatment, Article 2.2 of the BIT provides: "Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment."

[113] The BIT was extended to include the Turks and Caicos in 1985. (¶3).

BCB argued that "core elements of the fair and equitable treatment standard include good faith, stability of the legal and business environment, and protection of the investor's legitimate expectations, as well as due process and transparency." (¶270). BCB argued that its legitimate expectations were not upheld, specifically that:

> (a) "BCB would be consulted before the acquisition of its rights."
> (b) "Telemedia would be allowed to function as a private enterprise and not be brought under Government control.
> (c) "The Government will comply with the decisions of the Belizean courts and BCB will receive effective redress in domestic courts."
> (d) "BCB will be allowed to exercise its Treaty rights without any interference from or threats by the Government." (¶272).

BCB then argued that the rushed nature, in a single day, of the legislation expropriating its rights was "without any warning or for any legitimate purpose," and that BCB was denied due process by not being afforded under Article 5 of the BIT "prompt review by a judicial or other independent authority of that Party, of [] its case and of the valuation of [] its investment." (¶273). Belize, in part, responded that consideration of Fair and Equitable Treatment under Article 2.2 did not apply because the dispute is governed by Article 5 which "expressly governs the subject of expropriations." (¶275).

The tribunal first rejected the notion that a violation can occur of one treaty provision only and no other. (¶280). Thus the government's conduct that violated Article 5's protections on expropriations may also violate Article 2.2's protection of Fair and Equitable Treatment. With respect to the definition of Fair and Equitable Treatment, the tribunal noted that it encompasses two concepts. First, "fair and equitable treatment is frequently noted to include a prohibition on conduct that is 'arbitrary,' 'idiosyncratic,' or 'discriminatory"; and more specifically, "Conduct that is motivated by an improper purpose, by a purpose with no relation to the means adopted, or by no purpose whatsoever is difficult to characterize as either fair or equitable, whatever the actual effects may be." (¶282). Thus an expropriation lacking in public purpose is unfair and inequitable. Second, the tribunal affirmed the idea, discussed in Allard v. Barbados, that Fair and Equitable Treatment includes the fulfillment of the investor's 'legitimate expectations.' (¶283). In the case of this BIT, the tribunal states that BCB had a legitimate expectation that its investment would not be expropriated without a public purpose. (¶283). Because the government's 2009 and 2011 orders' expropriation of BCB's investment lacked a public purpose and negated BCB's legitimate expectation, BCB was denied Fair and Equitable Treatment. (¶284).

Award

In total compensation, including interest, the tribunal awarded BCB approximately $44.8 million USD as well as approximately £1.63 million and €0.31 million to cover legal and arbitration costs respectively. (¶328).

Belize: *The Dunkeld Arbitrations* – Dunkeld International Investment Limited v. The Government of Belize, Perm Ct. of Arb. Case No. 2010-13 (June 28, 2016)

Type (Conciliation/Arbitration)	● Arbitration
Institution	● Permanent Court of Arbitration
Date of Arbitration Request	● December 4, 2009
Date of Decision/Award	● June 28, 2016
Arbitral Rules	● UNCITRAL
Governing Law	● Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belize for the Promotion and Protection of Investments of 30 April 1982
Party Appointed Arbitrators (party, nationality)	[NB: same panel as in *BCB v. Belize*] ● Albert Jan van den Berg (President, Belgium) ● John Beechey (Investor, United Kingdom) ● Rodrigo Oreamuno (State [appointed by the PCA], Costa Rica)
Investor Nationality	● Turks and Caicos (British for treaty purposes)
Decision/award	● Investor awarded $169 million USD as well as £1.7 million and €68 thousand in litigation and arbitration costs.

The Dunkeld arbitrations are related to the BCB case. Through a complicated series of transactions Dunkeld came to own by the mid 2000s a significant stake in the Belize Telemedia Limited Corporation. In 2009, the National Assembly of Belize passed a law nationalizing Telemedia. (¶133). Although the government offered compensation, Dunkeld felt the government's offer was below fair market value. (¶146). After arbitration proceedings were initiated by Dunkeld, Belize and Dunkeld settled Dunkeld's liability claims and agreed to submit the quantum of damages to arbitration. (¶86 et seq.). The tribunal ordered that Belize pay Dunkeld total compensation, including interest of approximately $169 million USD as well as £1.7 million and €68 thousand in litigation and arbitration costs. (¶362).

Grenada: Grenada Private Power Limited and WRB Enterprises Incorporated v Grenada, ICSID Case No ARB/17/13, Award (Mar. 19, 2020)

Type (Conciliation/Arbitration)	● Arbitration
Institution	● ICSID
Date of Arbitration Request	● May 5, 2017
Date of Decision/Award	● March 19, 2020
Arbitral Rules	● ICSID Convention
Governing Law	● International law, domestic Grenadine law
Party Appointed Arbitrators (party, nationality)	● Ian Binnie (President, Canada) ● Richard Boulton (Investor, United Kingdom) ● Olufunke Adekoya (State, United Kingdom/Nigeria);
Investor Nationality	● United States of America
Decision/award	● State to pay investor: $58,427,962 as compensation ● $239,972.37 for ICSID fees and costs ● $6,333,142.51 for attorneys' fees and costs

The interpretation of Grenadine law was a primary issue at dispute in Grenada Private Power. In the case, the investors in the main power utility company exercised an alleged repurchase right, requiring the Grenadine government to repurchase their shares, after the government passed rate regulations negatively affecting their return on investment.

> (a) the Respondent says that its repurchase obligation is "void and unenforceable" under Grenadian law. The Claimants counter that the SPA is governed by international law and, by its own terms, expressly excludes rules of Grenadian law inconsistent with the repurchase obligation. Moreover, the GOG is estopped by its words and conduct over the years from challenging the validity of the repurchase provisions;
> (b) the Respondent argues that the SPA repurchase obligation constitutes a penalty under Grenadian law, which renders it unenforceable, and in any event, the repurchase provisions are void as unconstitutional because their effect (and perhaps intent) is to fetter the authority of the GOG to regulate the electricity sector in the public interest. (¶6)

As part of the Grenadine government's contract with the utility company, the government had agreed to not apply any inconsistent provisions of Grenadine law, leading to the tribunal to conclude in favor of the claimant:

> The Parties' common intent regarding the choice of law is clear and unambiguous and will be given effect. The Tribunal sits as an international tribunal applying rules of international law. The rules include respect for party autonomy. International law permits

> (and there is no evidence that the law of Grenada expressly prohibits) giving effect to the parties' choice of "rules of law" including a carve out of such rules as the parties agree, including the rule against penalties. (¶215).

The tribunal awarded the claimants over $65 million in combined damages and reimbursement for costs. (¶380).

Grenada: RSM Production Corporation and Others v Grenada, ICSID Case No ARB/05/14, Award (Mar. 13, 2009)

Type (Conciliation/Arbitration)	● Arbitration by International Investment Agreement
Institution	● ICSID
Date of Arbitration Request	● Prior to September 20, 2005 (appointment of Investor's Arbitrator)
Date of Decision/Award	● March 13, 2019
Arbitral Rules	● ICSID Convention
Governing Law	● Laws of Grenada; Agreement between Parties; ICSID Convention
Party Appointed Arbitrators (party, nationality)	● VV Veeder (President, United Kingdom) ● Bernard Audit (Investor, France) ● David S. Berry (State, Barbados);
Investor Nationality	● United States of America
Decision/award	● Investor's claims dismissed

RSM signed a written agreement with Grenada to apply for an oil exploration license in 1996. RSM invoked force majeure clause suspending the tolling period to apply for the license due to Grenada's border disputes with Venezuela and Trinidad and Tobago that complicated any oil exploration. When RSM finally ended its force majeure invocation and applied for a license in 2004, Grenada denied its application. The tribunal ultimately dismissed the investor's claims because the written agreement required the investor to apply for the oil exploration license within 90 days of the written agreement — the total number of days that passed, when excluding the period invoked under force majeure — exceeded 90 days, and therefore the government was not under an obligation to issue the license.

Saint Kitts and Nevis: Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of St. Kitts and Nevis, ICSID Case No. ARB/95/2, Award (Jan 13. 1997).

Type (Conciliation/Arbitration)	● Arbitration by Contract
Institution	● ICSID
Location of Proceedings	● Barbados/United States
Date of Arbitration Request	● October 23, 1995
Date of Decision/Award	● January 13, 1997
Arbitral Rules	● ICSID Convention
Governing Law	● Investment Agreement dated September 18, 1986, between the Government of Nevis and Cable ● ICSID Convention
Party Appointed Arbitrators (party, nationality)	● Woodbine A. Davis, (President, Barbados) ● G. Arthur A. Maynard (Investor, Barbados) ● Rex Mckay, (State, Guyana)
Investor Nationality	● United States of America
Decision/award	● Claims dismissed for lack of ICSID jurisdiction

This award only covered issues of jurisdiction and did not reach the merits of the investor's dispute. The dispute arose when Cable Television of Nevis, a US corporation, alleged that the Federation of St. Kitts and Nevis prevented CTN from increasing its rates for service. (¶1.05). The Federation objected to ICSID's jurisdiction on several grounds, including that the Nevis Island Administration and not the Federation was the proper party to the dispute and that substitution of the NIA for the Federation was improper. (¶1.12). The tribunal agreed, finding that the Federation had not consented to ICSID jurisdiction of the dispute, and dismissed CTN's arbitration request. (¶8.01, 8.06). Notably, both party appointed arbitrators as well as the president of the tribunal were citizens of CARICOM member states. (¶1.09).

Saint Lucia: RSM Production Corporation v. Saint Lucia, ICSID Case No. ARB/12/10, Decision on Annulment (Apr. 29, 2019)

Type (Conciliation/Arbitration)	● Arbitration
Institution	● ICSID
Location	● France
Date of Arbitration Request	● March 30, 2012

Date of Decision/Award	● July 15, 2016 (Panel Award) ● April 29, 2018 (Annulment Decision)
Arbitral Rules	● ICSID Convention
Governing Law	● Agreement between the Government of Saint Lucia and RSM Production Corporation, entered into on March 29, 2000 ● ICSID Convention
Party Appointed Arbitrators (party, nationality)	Arbitration Panel ● Siegfried H. Elsing (President, German) ● Edward Nottingham (Investor, American) ● Gavan Griffith (State, St. Lucia) Annulment *Ad hoc* Committee (all members appointed by ICSID ● Donald M. McRae (President, Canada) ● Andreas Bucher (Switzerland) ● Alexis Mourre (France)
Investor Nationality	● United States of America
Decision/award	● Panel dismissed proceedings for Claimant's failure to post $750,000 bank guarantee for costs of the arbitration. ● Claimant ordered to pay $615,670.25 USD for arbitration costs ● Claimant ordered to reimburse Saint Lucia for legal and other costs in the amount of "$291,153.76 USD plus interest at the rate of 3 months LIBOR plus 4% per annum from the notification of the Award until full and final payment." ● Annulment committee affirmed – investor would be allowed to bring claims again should the investor post the bank security guarantee.

NB: the primary award is unavailable, the facts elaborated here are drawn from the Decision on Annulment.

Per the annulment committee: "The underlying dispute relates to the implementation of the Agreement [signed in 2000], whereby the Respondent granted RSM [an oil company] an exclusive oil exploration license in an area off the coast of St. Lucia. A boundary dispute developed, affecting the exploration area, in particular in relation to Martinique, Barbados and St. Vincent, which allegedly prevented RSM from initiating exploration. RSM argued that the Agreement was still in force, while St. Lucia argued that the Agreement had expired or at least was not enforceable due to force majeure. The present annulment proceeding relates however to

the Award issued by the Tribunal that dismissed the case with prejudice and the disqualification decision issued by the majority of the Tribunal with respect of Dr. Gavan Griffith, arbitrator." (¶3).

During the initial arbitration St. Lucia had successfully petitioned for provisional measures requiring RSM to post security for the costs of the arbitration. (¶9-10). When RSM refused to post security in the form of a bank guarantee, Saint Lucia successfully moved to suspend the proceedings. (¶16-18). RSM claims at the annulment proceeding centered on the alleged improper constitution of the tribunal (alleging that Dr. Griffith lacked impartiality) and on the tribunal's alleged manifest exceeding of its powers both in granting the provisional measures and vacating the proceedings before hearing the merits. (¶26).

The annulment committee affirmed the tribunal's award except as to the tribunal's decision to dismiss the proceedings 'with prejudice,' which amounted to a ruling on the merits by preventing RSM from bringing a new arbitration in the future should it post the security guarantee. (¶192-201). Because neither the award nor the decision on the annulment reach the merits of the dispute, this case does not offer much guidance to CARICOM members with respect to the substantive provisions of their BITs.

Trinidad and Tobago: Tesoro Petroleum Corporation v. Trinidad and Tobago, ICSID Case No. CONC/83/1 (Nov. 27, 1985)

Type (Conciliation/Arbitration)	● Conciliation
Institution	● ICSID
Location	● United States
Date of Arbitration Request	● August 22, 1983
Date of Decision/Award	● February 5, 1985
Arbitral Rules	● Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings. ICSID Basic Documents 55, ICSID Doc. ICSID/15 (Jan. 1985)
Party Appointed Conciliator (party, nationality)	● Lord Richard Wilberforce (Joint-Appointment, United Kingdom)
Investor Nationality	● United States of America
Cost of arbitration	● Less than $11,000 USD
Decision/award	● Recommendation that led to settlement. Oil company issued $143 million USD dividend that was split evenly between the investor and Trinidad and Tobago

NB: The case text is unavailable; however, the summary below is derived from a law review article[114] written by the counsel for Trinidad and Tobago at the conciliation.[115]

Unlike the other cases summarized here, Tesoro v. Trinidad and Tobago was resolved by conciliation and not via arbitration. The authors of the law review article note: "In the Tesoro-Trinidad conciliation total administrative costs, including the fees of the conciliator, were less than $11,000, which under the Rules were divided equally between the parties. While figures for the costs in ICSID arbitrations have not been made public, we understand that they have tended to be considerably more expensive, ranging in some cases from $120,000 to $170,000."[116]

Factual background

Tesoro Petroleum, a U.S. corporation, and the Government of Trinidad and Tobago in 1968 created a joint venture, Trinidad-Tesoro Petroleum, as equal partners to purchase and develop oil fields then owned by the British Petroleum Company. (Pg. 343). Tesoro and Trinidad each appointed half the company's board of directors, while the chairman was appointed by Trinidad and approved by Tesoro. (Id.). Tesoro and Trinidad signed various documents, including a "Heads of Agreement" and ten "side letters" that included provisions for the disbursement of dividends. (Pgs. 343-44). The Heads of Agreement provided that no dividends would be distributed the first five years of the joint venture. (Pg. 343). The Heads of Agreement and side letters also provided for certain conditions precedent to the distribution of dividends thereafter related to board approval, necessary levels of available cash after tax, and reinvestment of available cash after tax in petroleum development projects. (Pgs. 343-44).

After the initial five year period without dividends, dividends were declared each year through fiscal year 1980, whereupon in response to the OPEC price increases in 1979, Trinidad imposed a new petroleum tax effective as of January 1980. (Pg. 344-45). At the same time, Tesoro appointed directors blocked significant expenditures in new oil exploration projects. (Pg. 345). In turn, Trinidad at the 1982 and 1983 shareholders' meetings refused to give approval for the 1981 and 1982 dividends. (Id.). By August 1982, Tesoro announced its intention to sell its shares, which by the terms of the Heads of Agreement, Tesoro was required to offer for sale to the Government first. (Id.). The Heads of Agreement contained a dispute resolution clause that provided for ICSID jurisdiction for settlement first by conciliation, followed by arbitration if the dispute is not resolved after six months. (Pg. 344).

The conciliation

Tesoro initiated a request for conciliation proceedings under ICSID in August 1983. Tesoro claimed it was entitled to dividends equal to 50% of net earnings, which had been improperly blocked by Trinidad's failure to have its board members vote in favor of dividends. (Pg. 345).

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[114] Lester Nurick & Stephen J. Schnably, The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago, 1 ICSID Rev.—Foreign Investment L.J. 340 (1986).

[115] Christopher M. Koa, The International Bank for Reconstruction and Development and Dispute Resolution: Conciliating and Arbitrating with China Through the International Centre for Settlement of Investment Disputes, 24 N.Y.U. J. Int'l L. & Pol. 439, 462 n.120 (1991).

[116] Costs are of course higher now given inflation.

Tesoro and Trinidad then agreed to appoint a single conciliator, the British judge Lord Wilberforce, although ICSID conciliation rules allowed for the appointment of a commission of three conciliators. (Pg. 346). Because only one conciliator was appointed, Lord Wilberforce was agreed to and appointed as conciliator in only four months, by December 1983, instead of the more common five to thirteen month time period for appointing a commission of three conciliators. (Id.).

In its counter-memorial, Trinidad objected to ICSID jurisdiction, claiming that to the extent Tesoro's claims were based on the side letters, only the Heads of Agreement contained an ICSID clause. (Pg. 347). Trinidad also counterclaimed on the merits, arguing that Tesoro had failed to identify new petroleum investment projects, and, had such projects been identified, insufficient cash as required by the documents would have been available to declare a dividend. (Id.).

The law review article then notes that the claims and counterclaims raised complicated legal issues of Trinidadian, U.S., and English law, the merits of which the article did not purport to analyze. (Id.).

In February 1985, Lord Wilberforce issued his report, finding that he had had jurisdiction over the dispute as the Heads of Agreement and side letters were in effect one agreement, in which the Heads of Agreement clearly contained an ICSID clause. (Pg. 348). He also analyzed and made recommendations concerning the merits, which were not presented in the article. (Id.). These recommendations led to negotiations between the parties over the following eight months, the result of which was a settlement in October 1985 between the two parties whereby Trinidad-Tesoro agreed to issue a dividend of $143 million to be split equally between Trinidad and Tesoro. (Id.)

Trinidad and Tobago: F-W Oil Interests Inc v Trinidad and Tobago, ICSID Case No ARB/01/14, Award, (Mar. 3, 2006)

Type (Conciliation/Arbitration)	● Arbitration
Institution	● ICSID
Location	● United States
Date of Arbitration Request	● September 28, 2001
Date of Decision/Award	● March 3, 2006
Arbitral Rules	● ICSID Convention
Governing Law	● The Treaty between the United States of America and the Government of the Republic of Trinidad and Tobago Concerning the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol, Signed at Washington on September 26, 1994

Party Appointed Arbitrators (party, nationality)	● Fali S. Nariman (President, India) ● Franklin Berman (Investor, United Kingdom) ● Lord Mustill (State, United Kingdom)
Investor Nationality	● United States of America
Decision/award	● Investor's claims dismissed for failure to arise from an investment ● Each party to pay its own costs

The claimant "FWO was formally notified that it had been awarded [a] tender [to operate an oil field], "subject to the negotiation and execution of a mutually agreeable operating agreement..."" (¶8) which negotiations ultimately fell through. The claimant brought an arbitration claim against Trinidad and Tobago, the substance of which was:

> "FWO had the benefit of a binding pre-contractual agreement, which constituted an investment in Trinidad and Tobago, and which the State unfairly infringed, either by using its powers to ensure that [the state-owned-enterprise counterpart] did not take the bidding process to a conclusion, or (if on a true understanding of the contractual situation the counterparty to FWO in this agreement was the State, and not just [SOE]), by itself failing to perform the agreement." (¶16)

Trinidad and Tobago responded that the investor's claims amounted to pre-contractual expenditures that did not qualify as an investment (¶40), to which the panel agreed (¶160). The investor's claims were dismissed and each party paid its own costs. (¶213-14).

E. ISDS Reform Efforts

Regional Reform Efforts

CARICOM members have recognized the opportunity to pursue reform to IIAs, but have yet to implement comprehensive changes. Presumably, work that has been done in preparation for reforms is not public. However, we do note that CARICOM members participated in a forum on IIAs in 2019, jointly organized with IISD, the United Nations Conference on Trade and Development (UNCTAD), and the Commonwealth Secretariat.[117] This forum was based around an analytical framework for assessing IIAs reform developed by UNCTAD; the Reform Package for the International Investment Regime.[118] The UNCTAD Reform Package is built from the analyses in UNCTAD's World Investment Reports and is organized into three phases; an assessment, modernization, and improved coherence.[119]

Discussions at the forum focused on a phase 1 assessment, and covered a range the provisions of older BITs that might need reformed, including: the expansive definition of investment; the coverage of sensitive sectors and measures; the inclusion of umbrella clauses; the inclusion or formulation of the fair and equitable treatment obligation; the inclusion or formulation of the indirect expropriation standard; the inclusion or scope of application of the most-favored nation treatment standard; and the absence of exceptions to the free transfer of funds obligation.

Discussions at the forum noted the need for a cost-benefit assessment of Phase 2 reforms.[120] CARICOM members agree that there is a need to improve domestic legal frameworks. Suggestions to improve the domestic framework have ranged from increasing the number and training of judges to establishing a regional arbitration center or extending the original jurisdiction of the CCJ to cover investment disputes.[121] CARICOM has also drafted an updated CARICOM Investment Code and a template for Investment Chapters, including provisions on promotion, protection and facilitation of investment.[122]

Jamaica is one of the few members to publish a statement regarding their "Perspective on Reform of the Global Investment Regime." This statement expressed the need going forward to consider "broad systemic reforms which focus on how international law should promote the

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[117] See Chantal Ononaiwu, *Remarks at UNCTAD High Level IIA Conference*, 13 November 2019, Geneva, CARICOM Secretariat; https://investmentpolicy.unctad.org/uploaded-files/document/High-level-IIA-Conference-13Nov2019-Statement-CARICOM-RightToRegulate.pdf

[118] See Ononaiwu.

[119] The World Investment Report is a yearly publication of UNCTAD that provides analysis of FDI trends, and in-depth analysis of selected topics. See UNCTAD, World Investment Report, https://unctad.org/topic/investment/world-investment-report

[120] See Ononaiwu.

[121] Omar Chedda, *Jamaica's Perspective on Reform of the Global Investment Regime*, at 6, SouthViews No. 232, (10 December 2021) (noting disagreement among CARICOM partners on this recommendation due to questions about the appropriate jurisdiction of the CCJ) https://www.southcentre.int/wp-content/uploads/2021/12/SV232-211210.pdf

[122] Ononaiwu. Note that neither the updated draft Investment Code nor the draft template for Investment Chapters are publicly accessible. Thus, any relevant positions developed that are not otherwise disclosed were not used in the development of this brief.

relationship between FDI and the SDGs."[123] The statement further identified a list of principles and objectives that Jamaica would be considering in negotiations and revisions of IIAs; including an interest in interim measures such as a moratorium on ISDS and a requirement for the exhaustion of local remedies.[124]

Non-CARICOM Reform Efforts

ISDS reform is ongoing in multiple fora. Multilateral reforms efforts include the amendment of the ICSID rules, and the ongoing negotiations at UNCITRAL. Further, multiple countries have taken on reform efforts through updating model treaties and renegotiating existing ones.

At ICSID, amendments to the procedural rules were approved by members in March, 2022. Those amendments contain new procedural rules on mediation and fact-finding. Both procedures may be used alongside arbitrations or as stand-alone proceedings.[125] Other reforms include standing for Regional Organizations (like the EU) and requirements to disclose third-party funding.

Many individual countries are either pursuing reform efforts, or have recently changed positions on ISDS. Perhaps most notable of these is the change in the position of the United States from explicit support of ISDS to clear disapproval.[126] CARICOM members that pursue ISDS reform through amending treaties should assess any change of position in treaty partners that aligns with reform goals.

UNCITRAL WG III Reform Proposals

UNCITRAL WGIII negotiations began in 2017. with a mandate to consider reforms to ISDS.[127] WGIII has proceeded with this task in three phases. First, it identified and considered concerns regarding ISDS. Second, it considered whether reform was desirable in light of identified concerns. Third, where reform has been deemed desirable, it is working to develop relevant

[123] Ononaiwu at 8.

[124] Ononaiwu.

[125] See *ICSID Administrative Council Approves Amendment of ICSID Rules*, https://icsid.worldbank.org/news-and-events/communiques/icsid-administrative-council-approves-amendment-icsid-rules

[126] The United States supported ISDS in the 2015 TPP negotiations, but purposefully excluded it from the later NAFTA renegotiations. Current USTR maintains that ISDS is not generally desirable. *Compare* effrey Zients, *Investor-State Dispute Settlement (ISDS) Questions and Answers*, White House Blog, (2015), https://obamawhitehouse.archives.gov/blog/2015/02/26/investor-state-dispute-settlement-isds-questions-and-answers (arguing that ISDS is beneficial and often necessary); *with*, Simon Lester, *Brady-Lighthizer ISDS Exchange, International Economic Law and Policy Blog*, (2018) https://worldtradelaw.typepad.com/ielpblog/2018/03/brady-lighthizer-isds-exchange.html (arguing that ISDS poses a sovereignty problem).

[127] Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17), paras. 263 and 264. https://documents-dds-ny.un.org/doc/UNDOC/GEN/V17/058/89/PDF/V1705889.pdf?OpenElement

solutions to be recommended to the Commission.[128] WGIII is currently in the third phase, developing proposed solutions.[129]

Despite identification of both procedural and substantive concerns with the ISDS system, WGIII limited its scope to questions of procedure, claiming that its mandate was to consider reforms "regarding ISDS" which it interpreted to exclude substantive rights and obligations provided by IIAs.[130] The approach of WGIII is nominally broad, and includes proposals for holistic reform (such as the establishment of a multilateral court).[131] Whether broad reform results from WGIII is yet to be determined, and many of the proposals currently under consideration address narrow concerns.[132]

The implementation of WGIII proposals will be at the discretion of each country, drafts that make it to the commission will just be model reforms. However, there are active proposals regarding multilateral adoption of reforms that could create the potential to update multiple agreements at once, avoiding an otherwise complex renegotiation process.[133]And despite other limitations, agreements resulting from WGIII are likely to be widely adopted.[134]

The following chart summarizes WGIII proposals in terms of their elements of the reforms; concerns addressed; and main implications for CARICOM.

[128] Id.

[129] *See* Working Group III (Investor-State Dispute Settlement Reform) Forty-second session, *Annotated provisional agenda*, A/CN.9/WG.III/WP.211* available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V21/090/40/PDF/V2109040.pdf?OpenElement.

[130] *But see*, Submission from South Africa to the United Nations, UN Doc A/CN.9/WG.III/WP.176 (17 July 2019) para 20 (arguing that "the 'Working Group would not be fully discharging its mandate if discussions on the substantive reforms were excluded'").

[131] See, Possible reform of investor-State dispute settlement (ISDS) Note by the Secretariat, Addendum, A/CN.9/WG.III/WP.166/Add.1

[132] See *id*.

[133] See, *Possible reform of investor-State dispute settlement (ISDS) Note by the Secretariat, Addendum*, A/CN.9/WG.III/WP.166/Add.1

[134] Reforms are proceeding on a consensus basis, making it highly probable that at least the voting members of UNCITRAL will adopt reforms.

Possible reforms	*Elements of the reforms*	*Concerns addressed*	*Main implications for CARICOM*
A. Tribunals, ad hoc and standing multilateral mechanisms			
(i) Multilateral advisory centre	Functions could include: assistance in organizing the defense; support during dispute settlement proceedings; advisory services; alternative dispute resolution (ADR); as well as capacity-building and sharing of best practices	Cost of proceedings, correctness and consistency of decision, access to justice, and enhancing transparency.[135]	Potential capacity building and sharing institutional knowledge, and lowering costs for legal advice.
(ii) stand-alone review or appellate mechanism	Review of decisions prior to issuance of awards; appellate mechanism tasked with a review of awards and decisions	Inconsistency and incorrectness of decisions	Potentially increased complexity and costs of legal proceedings.
(iii) standing first instance and appeal investment court with full-time judges			
B. Arbitrators and adjudicators appointment methods and ethics			
(i) ISDS tribunal member's selection, appointment, and challenge			
(ii) Code of conduct			
C. Treaty Parties' involvement and control mechanisms on treaty interpretation			
(i) Enhancing treaty Parties' control over their			

[135]UNCITRAL, Possible reform of investor -state dispute settlement (ISDS), Note by the Secretariat , Advisory Centre, A/CN.9/WG.III/WP.212. para. 4 , wp_212_advisory_centre_final_for_submission.pdf (un.org).

instruments			
(ii) Strengthening the involvement of State authorities			

Possible reforms	*Elements of the reforms*	*Concerns addressed*	*Main implications for CARICOM*
D. Dispute prevention and mitigation			
(i) Strengthening of dispute settlement mechanisms other than arbitration (ombudsman, mediation)			
(ii) Exhaustion of local remedies			
(iii) Procedure to address frivolous claims, including early dismissal			
(iv) Multiple proceedings, reflective loss and counterclaims by respondent States			
E. Cost management and related procedures			
(i) Expedited procedures			
(ii) Principles/guidelines on allocation of cost and security for cost			
(iii) Other streamlined procedures and tools to manage costs			

Possible reforms	*Elements of the reforms*	*Concerns addressed*	*Main implications for CARICOM*
F. Third party funding			

Multilateral advisory centre

The WG III expressed support for the establishment of an advisory centre that would address concerns such as the cost of ISDS proceedings, correctness and consistency of decision, access to justice, and enhancing the transparency of ISDS.[136]

The initial draft of 'the establishment of an advisory centre' includes - the scope and purpose of the centre (provision 1); pre-dispute and dispute avoidance services (provision 2 (a)); mediation and other alternative dispute resolution (ADR) services (provision 2(b)); representation and assistance services in ISDS (provision 2 (c)); legal and policy advisory services (provision 2(d)); capacity building and sharing of best practices (provision 2(e)); prioritization of services and flexibility (provision 3), beneficiaries of services and order of priority (provision 4)), membership (provision 5), and location (provision 6).[137]

The center would enhance capacity building and sharing the best practices for States. [138]
The advisory centre would provide legal advice on investment laws before and during a dispute. It is also suggested that the centre would lower cost for legal advice and provide advocacy support particularly for developing and least developed countries and small and medium-sized enterprises (SMEs).[139]

Stand-alone review or appellate mechanism

The initial draft on 'appellate mechanism' was released and comments have been made as of 15 May 2022. The WG III aims that the possible appellate mechanism would clarify and elaborate any delegation of final position without prejudice.[140]

The initial draft states the scope of appeal (provision 1), grounds for appeal and standard of review (provision 2), timeline (provision 3), suspensive effect of appeal (provision 4), decisions by the appellate tribunal (provision 5), duration of the appellate proceedings (provision 6), post - decision remedies (provision 7), rules of procedure and evidence (provision 8), early dismissal mechanism (draft provision 9), security for costs (provision 10).

For the possible models for appellate mechanism, the initial draft addresses (a) appellate mechanism for application by treaty parties, parties to an investment contract, disputing parties

[136]UNCITRAL, Possible reform of investor -state dispute settlement (ISDS), Note by the Secretariat , Advisory Centre, A/CN.9/WG.III/WP.212. para. 4 , wp_212_advisory_centre_final_for_submission.pdf (un.org).
[137]A/CN.9/WG.III/WP wp_212_advisory_centre_final_for_submission.pdf. (un.org)https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/draft_wp_advisory_centre_for_comment.docx.
[138] A/CN.9/WG.III/WP.166, V1908195.pdf (un.org).
[139] A/CN.9/WG.III/WP.174, Submission from the Government of Turkey. V1906801.pdf (un.org).
[140]UNCITRAL, Note by the Secretariat, Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism, para.1. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_wp_-_appeal_14_december_for_the_website.pdf.

or institutions - (i) treaty -specific appellate mechanism[141] (ii) ad hoc appellate mechanism[142] (iii) institutional appellate mechanism.[143] The draft also addresses a permanent plurilateral appellate body - (i) as a standalone appellate body, complementing the current arbitration regime[144](ii) as a second tier in a multilateral investment court.[145]

It is expected that the appeal mechanism would increase consistency of awards and enhance predictability of the law while correcting erroneous decisions of the tribunal of first instance.[146] An appeal mechanism allows the selection of the same decision-makers at a first level and continuously at a higher level.[147] The continuity in the composition of adjudicators at a different level would help to achieve consistency and predictability.[148] Regarding the cost of procedure, the appeal mechanism can avoid review by domestic courts[149]and have more certainly on how dispute settlement proceedings will be funded.[150]

Some scholars argue that an appeal mechanism would simply add additional procedures and could increase time and cost.[151] Further, higher level decisions could prolong the period of uncertainty of proceedings.[152] To avoid this, the scope of appeal could be limited to errors of treaty interpretation.[153] WGIII noted that different views were expressed on whether a decision by an appellate tribunal should be subject to confirmation of some review by the States to the relevant investment treaty.[154] The Geneva Center for International Dispute Settlement (CIDS) report in 2016 suggested opt-in convention models like Mauritius Convention for the reform of ISDS.[155] The opt - in convention model allows Parties to IIAs to express their consent to submit disputes arising under their existing IIAs. [156]

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[141] *Id*. at para. 70.
[142] *Id.* at para. 71.
[143] *Id*. at para. 72.
[144] *Id*. at para. 74.
[145] *Id*. at para. 75.
[146] Christian Tams, *An Appealing Option? A Debate about an ICSID Appellate Structure*,Essays in Transnational Economic Law, No,57 (2006).
[147] Alan M. Anderson, *The investor-state dispute settlement system : reform,replace or status quo ?* 143 (Ben Beaumeont ed.),Wolters Kluwer (2020).
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id*. at 148.
[152] Gabriel Bottini , *Reform of the Investor-State Arbitration Regime : The Appeal Proposal, Reshaping the Investor-State Dispute Settlement System*, Journey for the 21st Century 471 (Jean E. Kalicki Anna Joubin-Bret et al. eds.) 471, Nijhoff International Investment Law Series. (2015).
[153] Query whether the scope of appeals could be properly limited; consider the disagreements over the WTO Appellate Body's scope of review. See Margie-Lys Jaime, *An Appellate Body in Treaty-based Investment Arbitration: Redefining the Investor-state Dispute Settlement Mechanism*, 21 Spanish Arb. Rev. 101 (2014).
[154] *Id.*
[155] Gabrielle Kaufmann-Kohler and Michele Potestà, *Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap*, para. 21 (3 June 2016).
[156] *Id*. at para. 75.

Standing first instance and appeal investment court with full-time judges

A multilateral investment tribunal would provide a first instance forum and appellate court for investment disputes. Creating such a court would require a statute to determine its functioning.[157] Like many other proposed reforms, the proposed court is meant to address issues of inconsistency, incorrectness, and conflicts of interest that exist in the ISDS system.

Initial draft on the 'pertinent elements of selected permanent international courts and tribunals' has been released.[158] The draft covers functioning and governance, jurisdiction, representation, procedure for nomination, selection and appointment, terms of office, conditions of service, code of conduct, case assignment, appeals and conditions of appeals, applicable law, and enforcement of decisions of different institutions.

A multilateral investment tribunal could improve independence and impartiality and prevent double-hatting.[159] Moreover, the full-time judges could be selected to reflect a certain balance with respect to geographical distribution, legal systems representation, nationality, or gender. Investment disputes in CARICOM courts already have multiple levels of appeal and review.[160]

ISDS tribunal members selection, appointment, and challenge

The WG III has addressed concerns related to ; (i) the lack of independence and impartiality of ISDS tribunal members (ii) the lack of adequacy, effectiveness and transparency (iii) the lack of diversity constituting ISDS tribunals. [161]

Comments on the initial draft on 'initial draft on selection and appointment of ISDS tribunal members' has been made. The draft consists of - establishment of tribunal (provision 1) ; jurisdiction (provision 2) ; governance structure (provision 3) ; number of tribunal members and adjustments (provision 4) ; ad hoc tribunal members (provision 5) ; nomination of candidates (provision 6) ; selection of Panel (provision 7) ; appointment (provision 8) ; terms of office, renewal and removal (provision 9) ; conditions of services (provision 10) ; assignment of cases (provision 11).[162] The WG III also considers establishment of a standing multilateral body to contextualize the draft provision to provide the guidelines for further consideration of this reform.[163]

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[157] *Id.* at para. 4.

[158] UNCITRAL, Possible reform of investor- state dispute settlement (ISDS), pertinent element of selected permanent international court and tribunal. para.1, 030222_pertinent_elements_of_selected_international_courts_final.pdf (un.org).

[159] Alan M. Anderson, *The investor-state dispute settlement system : reform,replace or status quo ?* 152 (Ben Beaumeont ed.),Wolters Kluwer (2020).

[160] Nonexhaustive list levels include; domestic first instance, domestic appellate courts, regional appellate courts, and UK Privy Council.

[161] UNCITRAL, Note by the Secretariat, Possible reform of investor-State dispute settlement (ISDS), Standing multilateral mechanism : Selection and appointment of ISDS tribunal members and related matters, para. 4. UNCITRAL WP - Selection and appointment - GK MP rev. 12.08 (sent).

[162] *Id.*

[163] *Id.* at para. 59.

Impact on CARICOM

Heavy reliance on a small number of arbitrators from investor States who may not understand the host country's underlying development needs or policy has been criticized in the ISDS mechanism. Arbitrators have a lack of diversity and are frequently viewed as 'male, pale, and stale' from wealthy, capital-exporting economies.[164] Moreover, arbitrators are often biased in favor of the party who selected them to secure future appointments.[165] Arbitrators may be tempted to provide favorable decisions for investors because their salaries are based on the number of cases they decide.[166] Geographical, linguistic diversity, equitable representation of different legal systems and cultures is necessary in the ISDS system.[167] To make a more balanced decision, different perspectives from different cultures and levels of economic development are needed.[168]

CARICOM States may agree with allocating seats to different geographically defined groups of States to retain control over appointment. Although the UNCITRAL initial draft suggests the same fixed term of office period to arbitrators from all States, CARICOM States may insist that the Panels from developing countries have longer office terms at least for the first few years. Currently many arbitrators come from small interrelated groups of individuals in developed countries. To enhance the geographical diversity of Panel members, a longer term for arbitrators from developing countries can be an option to fill the gap.

Code of conduct

The Code of Conduct for arbitrators attempts to address issues of inconsistency and conflicts of interest. The Code of Conduct can be an effective tool to regulate duties and behavior of arbitrators, as well as develop a legal standard and enforcement mechanisms. The initial draft has been prepared based on a comprehensive review of the standards that are found in codes of conduct in investment treaties, arbitration rules applicable to ISDS, and codes of conduct of international courts.[169]

The CARICOM States may support the initial draft of the Code of Conduct. The initial draft of Code of Conduct regulates behaviors of arbitrators, adjudicators and possible other persons

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[164] Chiara Giorgetti, *Who Decides Who Decides in International Investment Arbitration*, University of Pennsylvania Journal of International Law (2014) Vol 35 431, 458.

[165] Catherine A. Rogers, *The Politics of International Investment Arbitrators* (2013) Santa Clara Journal of International Law 223,226.

[166] Chrispas Nyombi, Baiju Vasani and Lindsay Reimschussel, *The EU's Proposed Investment Court : A New Coat of Paint Doesn't Fix Old Problems,* 11.

[167] Note by the Secretariat, Possible reform of ISDS, Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters, para.23.030222_pertinent_elements_of_selected_international_courts_final.pdf (un.org).

[168] A/CN.9/1004/Add.1, para. 101.

[169]UNCITRAL, Note by the Secretariat, Possible reform of investor - State dispute settlement (ISDS), Draft Code of Conduct (A/CN.9/WG.III/WP.209) https://documents-dds-ny.un.org/doc/UNDOC/LTD/V21/068/11/PDF/V2106811.pdf?OpenElement.

involved in ISDS.[170] The CARICOM States may also support the Code of Conduct for third-party funders.[171] The initial draft of the third party funding (TPF) suggests that the Code of Conduct should include provisions to regulate TPF such as disclosure of TPF information, transparency requirements, restrictions of the TPF, its control and the number of claims, and due diligence on claims in order to prevent the funding of frivolous claims.[172]

Enhancing treaty parties's control over their instruments and strengthening the involvement of State authorities[173]

This vague and broad group of proposals includes; guidelines of arbitral tribunals on the meaning of certain terms, standards of adopting binding interpretations of investment treaty obligations, and establishing joint committees on treaty interpretations. incorrectness of decisions and inconsistent interpretation of investment treaty provisions. Reform proposals again aim to address concerns of lack of consistency, coherence, predictability, and correctness of decisions by ISDS tribunals.[174]

One reform suggestion is the development of a joint interpretation of treaty provisions by Parties to bind on ISDS tribunals (Costa Rica, Chile, Israel, Japan, Mexico, Peru).[175] It is also suggested that treaty Parties could jointly determine the law and principles of interpretation to be used by ISDS tribunals (Thailand).[176] Submissions also argue that the non-disputing Party to the treaty should be given the possibility to participate in the proceedings of treaty interpretation (the EU, Ecuador, Chile, Israel, Japan, Mexico, Peru).[177]Arbitral tribunals could be required to consult State authorities on the interpretation incase of doubt (Costa Rica).[178] Another suggestion is that a treaty interpretation mechanism should be provided in the form of a model treaty provision that could be made part of an amended version of the UNCITRAL Arbitration Rules, or of a multilateral standing mechanism (Chile, Israel, Japan, Mexico, and Peru).[179] Parties may retain their power to clarify the meaning of the treaty through authoritative interpretation.[180]

This reform option attempts to create better control by States over the interpretation of their

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[170] UNCITRAL, Note by the Secretariat, Possible reform of investor - state dispute settlement (ISDS) Addendum, Tabular presentation of reform option. https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/CN.9/WG.III/WP.166/Add.1&Lang=E.

[171] See also F. Third party funding (TPF) in this paper.

[172] UNCITRAL, Possible reform of investor - State dispute settlement (ISDS), Draft Provisions for Third Party Funding. para. 14, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/210506_tpf_initial_draft_for_comments.docx.

[173] Proposals grouped together given their similar justifications mechanisms.

[174] UNCITRAL, Note by the Secretariat, Possible reform of investor-State dispute settlement (ISDS), Interpretation of investment treaties by treaty Parties (A/CN.9/WG.III.WP.191) para. 29, https://documents-dds-ny.un.org/doc/UNDOC/LTD/V20/004/03/PDF/V2000403.pdf?OpenElement.

[175] *Id.* at para. 8.

[176] *Id*. at para. 9.

[177] *Id*. at para. 10.

[178] *Id.* at para. 10.

[179] *Id*. at para. 12.

[180] *Id*. at para.15.

treaties, and States can also address their concerns of lack of consistency, coherence, predictability, and correctness of decisions to the ISDS tribunals. Thus, CARICOM States may consider to agree on this reform option made by WG III.

Strengthening of dispute settlement mechanisms other than arbitration (ombudsman, mediation)

Mediation is considered as offering a high degree of flexibility and autonomy to the disputing parties and allowing the preservation of long-term relationships through appropriate measures, so it averts disputes and avoids intensification of conflicts.[181] The possible models suggested by the draft provision 1 for a clause on mediation in investment treaties are (a) no clause on mediation - to leave the decision as to whether to use mediation fully in the hands of the disputing parties ; (b) availability of mediation (option 1) - mediation would be expressly mentioned in the investment treaty as a possible means for resolving disputes ; (c) undertaking to commence mediation (option 2) - the use of mediation requires commencement of the disputing parties. Compared to option 1, option 2 would go a step further as it provides for an undertaking of the disputing parties to attend at least the first meeting set up by the mediator. ; (d) Mandatory Mediation (option 3) - mandatory mediation guarantees that the disputing parties would engage in mediation and it would provide a clear policy basis to do so. However, it implies a long period for mediation to ensure that the parties would follow a comprehensive procedure with the assistance of the mediator. The draft also includes - consideration on timeframe (provision 2); application of rules on mediation (provision 3) ; written notice for mediation (provision 4) ; without prejudice provision (provision 5) ; confidentiality and transparency (provision 6) ; and settlement agreement (provision 7).

Mediation is less time and cost intensive than arbitration, and it offers a high degree of flexibility and autonomy to the disputing parties, allowing the preservation of long-term relationships through appropriate measures.[182]

ADR methods, including mediation, ombudsman, consultation, conciliation and any other amicable settlement mechanism could alleviate concerns about costs and duration of arbitration and prevent the escalation of disputes to arbitration.[183]

Recommendations

The Secretariat's Note addresses the 'cooling - off ' period before the period. According to the UNCTAD Paper 'Investor-State Disputes: Prevention and Alternatives to Arbitration', the "time frame of three to six months usually allocated" for the purpose of cooling off periods "is rather short". [184] If the cooling off period is combined with a constant dialogue with investors, it is

[181] UNCITAL, Note by the Secretariat, Possible reform of investor-State dispute settlement (ISDS) Mediation and other forms of alternative dispute resolution (ADR), para. 5, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/draft_clauses_on_mediation.pdf.

[182] A/CN.9/1044, para. 27.

[183] *Id.* at 354.

[184] UNCTAD, Investor - State Disputes : Prevention and Alternatives to Arbitration (2010) diaeia200911_en.pdf (unctad.org).

suggested that six months may be sufficient. [185] Therefore, this reform option would promote early settlement of disputes.

The initial draft of ' provision 1 introduces three options of availability of mediation; Option 1 – Reference to mediation as an available means for solving disputes, Option 2 – Reference to an undertaking to commence mediation, Option 3 – Mandatory mediation.[186] CARICOM States may support Option 1 or 2 because mandatory mediation (Option 3) could result in additional burdens to the states to fulfill mandatory mediation requirements. Mediation also shall remain available to the parties at any time before and during the cooling off period for better flexibility to the States.

Exhaustion of local remedies

Exhaustion of local remedies requires claimant-investors to bring their claim to the domestic authority first. Requiring local remedies allows ISDS to act as a complement rather than a substitute to domestic legal systems. This could create positive feedback that incentivizes improvements in the domestic legal system.[187] It could also result in the early settlement of disputes.

CARICOM parties may explicitly state that exhaustion of local remedies is a 'condition of consent' (ICSID article 26). CARICOM Parties may do so via treaty provision, titled ' condition and limitations on consent of each party.'(US Model BIT 2012 ; US - Korea FTA). However, adoption of exhaustion of local remedies may result in multiple proceedings.[188]

Procedure to address frivolous claims, including early dismissal

The absence of a mechanism to address frivolous or unmeritorious cases has resulted in excess costs of ISDS.[189] The proposals to address this attempt to dismiss frivolous claims at an early stage of the proceedings by providing an expedited process to address unfounded or frivolous claims.[190] A number of institutional arbitration rules (For example, CIETAC Investment Arbitration Rules, Article 26; SIAC Investment Arbitration Rules, Rule 26; 2017 SCC Arbitration Rules, Article 39; HKIAC Administered Arbitration Rules, Article 43)[191] and recent investment treaties have provisions to address unmeritorious claims.[192] Claims with lack of legal merits to be dismissed early in the process before parties unnecessarily consume the parties'

[185] *Id.*

[186] UNCITRAL, Possible reform of investor -State dispute settlement (ISDS), Mediation and other forms of alternative dispute resolution (ADR) paras. 16-36. draft_clauses_on_mediation.pdf (un.org).

[187] UNCITRAL, Note by the Secretariat, Possible reform for investor - State dispute settlement (ISDS)(A/CN.9/WG.III/WP.166) para.44, V1908195.pdf (un.org).

[188] See also D(iv) multiple proceedings, reflective loss and counterclaims by respondent States in this paper.

[189] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS), Note by the Secretariat, Security for cost and frivolous claims (A/CN.9/WG.III/WP.192) para. 19, https://documents-dds-ny.un.org/doc/UNDOC/LTD/V20/003/85/PDF/V2000385.pdf?OpenElement.

[190] *Id.*

[191] *Id.* at para. 22.

[192] *Id.*

resources.[193] ICSID Arbitration Rule 41(5) provides an expedited procedure to dispose of unmeritorious claims at the preliminary stage of a proceeding.[194]

CARICOM States may consider supporting adoption of similar provisions to reduce duration and cost of the proceedings. Tribunal members who determine whether the claim is frivolous or not must be different members from the original proceedings in order to avoid bias or conflict of interest.

Multiple proceedings

Multiple proceedings usually result from two situations - (i) different entities within the same corporation bring a case to the same State for the same interests (ii) a State has an impact on a number of investors which are not related. For example, a change of a State's policy may lead to multiple proceedings by different investors because it may affect a whole range of contracts obtaining a stabilization clause concluded with different investors.[195] Multiple proceedings give rise to many concerns, includings: increased cost and duration of proceedings;[196] impaired judicial economy; distorted the balance or rights and interests of relevant stakeholders;[197] undermined predictability.[198]

There are various existing mechanisms to prevent multiple proceedings at state level. The definitions of the terms 'investor' and 'investment' in investment treaties can protect host States. Some investment treaties include provisions that prohibit the abuse of process to allow arbitral tribunals to dismiss abusive claims and thus encourage investors to agree to a single forum for the resolution. Consolidation, coordination or concentration mechanisms can be included in the investment treaties.

Other possible reforms suggested to avoid multiple proceedings include: providing the level of indirect ownership required for an investor to acquire standing under an investment treaty; prohibiting claims by investors where the company itself is pursuing a remedy in a different judicial forum; permitting a submission of a claim by an investor only if the investor and the local company withdraw any pending claim and waive their rights to seek remedy before other forums; and limiting forum selection options to claims that have not yet been asserted elsewhere.

[193] *Id*. at para. 23.
[194] *Id*.
[195] *Id*. at para. 6 ; also A/CN.9/970, para. 25.
[196] UNCITRAL, Note by the Secretariat, Possible reform of investor -State dispute settlement (ISDS), Multiple proceedings and counterclaims. https://documents-dds-ny.un.org/doc/UNDOC/LTD/V20/006/03/PDF/V2000603.pdf?OpenElement.
[197] *Id.*
[198] *Id.*

Waiver provisions have also been proposed. Waivers require an investor to "waive its rights to initiate or continue local litigation before it can file for treaty arbitration."[199] Unlike fork-in-the road, the waiver provision does not exclude the prior proceedings before the domestic courts of the respondent States from later investment arbitration proceedings.[200] However, waiver provisions prohibit investors who initiate subsequent investment arbitration proceedings from continuing ongoing domestic proceedings or returning to local courts.[201]

Reflective loss and Shareholder claims

Treaty provision on shareholder claims based on reflective loss can result in multiple proceedings (par 11).[202] Some investment treaties have provisions that set out the level of indirect ownership that is required for a shareholder to prevent multiple proceedings (par 11).[203]

UNCITRAL WG III aims to limit the sharehor claims and reflective loss to avoid multiple proceedings.

The scope of investment protection for shareholders should ensure the two questions - (1) do shares qualify as investments (2) do shareholders qualify as investors under IIAs? [204] CARICOM should include clear legal definitions for 'shares' and ' shareholders' to avoid multiple proceedings in their treaties. For example, China-Germany BIT (2005) includes the legal definition of 'share' but it limits the treaty's scope of application on the basis of the shareholder's influence in the management of the company;[205]

> For the avoidance of doubt, the Contracting Parties agree that investments as defined in Article 1 are those made for the purpose of establishing lasting economic relations in connection with an enterprise, especially those which allow to exercise effective influence in its management (China-Germany BIT, Article 1(a)).

Regarding the definition of 'shareholders', the treaty should address shareholder's rights and standing, specially minority shareholders. For example, Article 13(8) of China - Mexico BIT (2008) addresses "the Contracting Parties recognize that under this Article [i,eArbitration : Scope and Standing and Time Periods"], minority non controlling investors have standing to submit only a claim for direct loss or damages to their own legal interest as investors. [206]

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[199] A typical waiver provision can be found in article 1121 of NAFTA. See Lukas Vanhonaeker, *Shareholder's Claims for Reflective Loss in International Investment Law.* 232 (Cambridge International Trade and Economic now (2020); Dugan, Wallace, Rubins and Sabahi, *Investor - State Arbitration*, 369 (Oxford University Press)(2008).
[200] *Id.*
[201] .
[202] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS), Note by the Secretariat, Security for cst and frivolous claims, para. 11 (A/CN.9/WG.III/WP.192) V2000385.pdf (un.org).
[203] *Id.* at para. 11.
[204] Lukas Vanhonaeker, *Shareholder's Claims for Reflective Loss in International Investment Law.* 93 (Cambridge International Trade and Economic now (2020).
[205] *Id*. at 97.
[206] *Id.* at 99.

Counterclaims by respondent States

The respondent States usually cannot bring a counterclaim against the investor under the treaty.[207] There have been only a few ISDS cases that filed counterclaims.[208] [209] ISDS does not contain reciprocal obligations for investors, and allowing counterclaims by the respondent States would be a useful tool for rebalancing the asymmetric nature of IIAs.[210] It is not clear yet to what degree the WG III would allow to discuss counterclaims. There are suggestions to focus only on procedural elements of ISDS, or expand scope of counterclaim to substantive discussion concerning human rights, the environment, and compliance with domestic law, etc. [211]

Impact on CARICOM

Counterclaims can reduce uncertainty, promote fairness and rule of law, and ensure a balance between respondent States and claimant investors. [212] It would also reduce duration and cost of the proceedings as well. [213]

Recommendation

The CARICOM States may bring counterclaims not only for the procedural matter, but also for investor's breach of its obligations under the treaty, investor's conduct resulting in the violation of, and non-compliance with domestic laws and regulations.[214]
Environmental issues are especially important to CARICOM States, and the environmental obligations of the claimant investors can be enforced by the counterclaims. CARICOM States may engage in treaty practice that expressly allows counterclaims based on applicable law clauses in IIAs. Regarding environmental issues, CARICOM may consider ;

> "a. whether counterclaims can be can be based on host-State domestic environmental laws and regulations
> b. whether to what extent human rights obligations can be imposed on investors
> c. whether there is a general right to a healthy environment

[207] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS), Note by the Secretariat, Multiple proceedings and counterclaims. para.39 (A/CN.9/WG.III/WP.193) V2000603.pdf (un.org).
[208] *Id.* at para. 37.
[209] For example, Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1 (7 December 2011), Award, paras. 859–877; Antoine Goetz & Others and S.A. Affinage des Metaux v. Republic of Burundi, ICSID Case No. ARB/01/2 (21 June 2012), Award, paras. 267–287; Hesham T. M. Al Warraq v. Republic of Indonesia (15 December 2014), Award, paras. 655–672; Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic , ICSID Case No. ARB/07/26 (8 December 2016), Award, paras. 1110–1221; Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/15 (22 August 2016), Award, paras. 618–629; Oxus Gold plc v. Republic of Uzbekistan (17 December 2015), Award, paras. 906–959; Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5 (7 February 2017), Decision on Counterclaims; Perenco Ecuador Ltd. v. The Republic of Ecuador, ICSID Case No. ARB/08/6.
[210] *Id*. at para 39.
[211] *Id.* at paras. 34 and 34.
[212] *Id.* at para. 38.
[213] *Id.*
[214] *Id*. at para. 35.

d. whether, and to what extent transnational public policy can be sud in ISDS proceedings" [215]

Another important environmental issue that the CARICOM may concern is the situations where the foreign investors are protected by the corporate veil from liability for environmental damages caused by its investment in a host state. [216] To pierce the corporate veil, CARICOM states may consider bringing counterclaims.[217]

Expedited procedures

Issue

The cost and duration of ISDS proceeding is high.[218]

Impact on CARICOM

This reform option may apply to smaller claims and non-conflict cases in order to reduce the duration and costs of ISDS and deal with claims more efficiently.[219]

Recommendation

The CARICOM States may support this reform option to streamline the ISDS procedure. The expedited procedures are more deeply discussed under UNCITRAL WG II. Draft provisions on expedited arbitration have been published in May 2021 under WG II. [220]

Principles / Guidelines on allocation of cost and security for cost

Issue

The cost and duration of ISDS proceeding is high.

Impact of CARICOM

The guideline on allocation of costs and security for cost is also related to the third-party funding.

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[215] Ted Gleason, *Examining host-State counterclaims for environmental damage in investor-State dispute settlement from human rights and transnational public policy perspective* (2020), Examining host-State counterclaims for environmental damage in investor-State dispute settlement from human rights and transnational public policy perspectives - PMC (nih.gov).

[216] *Id.*

[217] *Id.*

[218] A/CN.9/964, paras. 116 and 118 A/CN.9/964 (undocs.org).

[219] A/CN.9/WG.III/WP.166, para. 53 *V1908195.pdf (un.org).

[220] UNCITRAL, Draft provision on expected arbitration, Note by the Secretariat, Compilation of comments on the application of the UNCITRAL Rules on Transparency in Treaty based Investor-State Arbitration to expedited arbitration (A/CN.9/WG.II/WP.217), A/CN.9/WG.II/WP.217 (undocs.org).

Recommendations

There is no clear guideline on allocation of costs and security for cost to CARICOM States, so CARICOM States may support this reform option for improving ISDS legal mechanisms. Losing parties to the dispute bears all the costs. It is suggested in a WG III Submission to establish a cost -sharing mechanism between the investor and the States including loser-pays rule.[221]

It is also noted that security for cost is ordered in very exceptional circumstances . When a respondent State has a reasonable apprehension that its legal costs will not be paid by the investor if the State is successful, States may request for security for costs to the Tribunal.[222] However, UNCITRAL practices have shown that security for cost is permitted to States at a very high standard.[223] For example, in *Guarachi v. Bolivia*, the respondent requested security for cost because the Claimant investor had no real assets and the investor relied upon the existence of third-party funding. However, the arbitral tribunal rejected the request because that the reasons invoked by Bolivia were insufficient for demonstrating that the investor would not cover an adverse cost award. The tribunal also noted that an "order for posting of security for costs remains a very rare and exceptional measure."[224] In *SAS v. Bolivia* requested for security for costs in the amount of USD 2.5 million since the investor was a Bermuda shell company with no assets or economic activity. The tribunal rejected the request and underlined that " In relation to the necessity and the urgency of the measure, investment arbitration tribunals considering requests for security for costs have emphasized that they may only exercise this power where there are extreme and exceptional circumstances that prove a high real economic risk for the respondent and / or that there is bad faith on the part from whom the security for cost is requested." [225] The tribunal further state that "In sum, the general position of investment tribunals in cases deciding on security for costs is that the lack of assets, the impossibility to show available economic resources, or the existence or economic risk or difficulties that affect the finances of a company are not per se reasons or justifications sufficient to warrant security for costs." [226]The ISDS tribunals usually have very restricted views and in fact there are only a few ISDS cases in which security for costs has been granted. [227]

It is suggested to the WG III that availability of security for cost might assist in the early dismissal of frivolous claims. [228]The security for cost can prevent initiating meriteless, abusive and frivolous claims. Moreover, there has been a Submission that security for costs should be a mandatory requirement in cases funded by third parties. [229]

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[221] A/CN.9/WG.III/WP.166, para. 57

[222] Security for costs - Wikipedia.

[223] Johan Sidklev, Bruno Gustafsson (March 27, 2020),UNCITRAL Working Group III: Security for Costs – An Inefficient Mechanism to Avert Frivolous Claims in ISDS - Kluwer Arbitration Blog.

[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] A/CN.9/964, paras. 128–133; see also A/CN.9/935, para. 92.

[229] A/CN.9/WG.III/WP.176, Submission from the Government of South Africa,A/CN.9/WG.III/WP.176 (undocs.org).

Other streamlined procedures and tools to manage costs

Regarding duration, the reform option introduces implementation of a stricter timeline.[230]Regarding cost, the reform would require parties and the tribunal to establish a fixed / acceptable budget for the proceedings.[231] It also would require adopting a ceiling for overall proceeding costs and counsel's fee.[232] This reform option would be a guideline for timeframes and reducing costs. Thus, CARICOM may support this reform.

[230] UNCITRAL, Note by the Secretariat, Possible reform of investor - state dispute settlement (ISDS) Addendum, Tabular presentation of reform option. https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/CN.9/WG.III/WP.166/Add.1&Lang=E.
[231] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Note by the Secretariat, para. 60 (A/CN.9/WG.III/WP.166) V1908195.pdf (un.org).
[232] *Id.*

Third party funding (TPF)

The UNCITRAL WG III addresses concerns related to the definition , to the use or regulation of the third party funding (TPF) in ISDS.[233]The concerns mentioned during the deliberation of the Working Group were - conflicts of interest of arbitrators arising out of TPF; influence of TPF on decision on cost allocation (incurrence of costs and potential shift of burden of proof); relevance of TPF for decision on security for costs; protection of privileged information disclosed to a third -party funders and extent to which the third party funder is bound by confidentiality obligations ; control of third-party funders over the arbitration process and negative impact on amicable resolution of disputes ; increase of the number of ISDS cases and frivolous claims ; promotion of investment ; imbalance created by the practice of third-party funding as respondent States generally do not have access to it.[234] The restricted list model permits TPF unless (a) the funding is provided on a non-recourse basis in exchange for a success fee and other form of monetary remuneration or reimbursement dependent on the countcome of a proceeding (b) the expected return to be paid to be paid to the third-party funder exceeds a reasonable amount (c) the number of third party party cases exceeds a reasonable number. [235]

The initial draft for TPF has been commented by 30 July 2021. The provision 1 of the draft set forth definitions for 'proceeding', 'third-party funder', 'funded party', and 'third party funding.'[236]The initial draft also provides several TPF models to regulate the TPF in ISDS, such as 'prohibition model' (Draft provision 2), 'restriction models' (Draft provision 3 - 'access to justice model' ; Draft provision 4 - 'sustainable development model' ; Draft provision 5 - 'restriction list model').[237] Draft provision 2 provides four different options to implement the prohibition medel.[238]Among the restriction models, 'access to justice model' allows TPF if the funding is necessary for the claimant to bring its claims, specially, micro, small and medium-sized enterprises (MSNES).[239] 'Sustainable development model' allows TPF only if claimant's investment meets pre-defined sustainable development requirements of the resplendent States.[240] Draft provision 6 states legal consequences and possible sanctions. The tribunal may (a) order the carminat to terminate the third-party funding agreement and / or return funding received (b) suspend or terminate the proceeding (c) conser the non-compliance in allocating the costs of the proceedings. [241]

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[233] UNCITRAL, Note by the Secretariat, Possible reform of investor-state dispute settlement (ISDS) Third-party funding -possible solutions, pg. 2 - 3 (A/CN.9/WG.III/WP.172). https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/083/90/PDF/V1908390.pdf?OpenElement.

[234] *Id.*

[235]UNCITRAL, Possible reform of investor - State dispute settlement (ISDS), Draft provision on third - party funding, para. 26. Third-party funding | United Nations Commission On International Trade Law

[236] *Id.*

[237] *Id.*

[238] Draft Provisions 2 (prohibition model)
Option A - a general provision prohibiting third-party funding / Option B- condition for the submission of a claim / Option C - Requirement for the consent / Option D - Denial of benefits.

[239] *Id.*at para. 18.

[240] *Id.*at para. 22.

[241] *Id.*at para. 31.

Draft provision 7 section 1 set forth mandatory disclosure of the following information - (a) the name and address of the third party funder (b) the name and address of the beneficial owner of the third-party funder and any natural or legal person with decision-making authority for or on behalf of the third party funder ; and (c) the funding agreement of the terms thereof. [242]Draft provision 7 section 2 also sets forth additional information that the tribunal may require to the third party - (a) whether the third - party funder agreed to cover the costs of an adverse cost award ; (b)the expected return amount of third-party funder ; (c) any rights of the third-party funder to control or influence the management of the claim, the proceedings and to termite the funding arrangement ; (d) number of cases that the third-party funder and the legal counsel or firm representing the funded party ; and (f) any other information deemed necessary by the tribunal.[243]

Daft provision 8 clarifies that third-party funders should not be considered as an investor. [244] Draft provision 9 addresses security for costs that a tribunal should or may order the indeed party to provide security for costs.[245] Draft provision 10 clarifies that the expenses related to the third party funding should not be included in the costs of proceedings and cannot be allocated to the other party.[246]

Impact on CARICOM

TPF is a growing trend in ISDS. Usually, TPF funders are hedge funds or finance firms and agree to an investor's litigation fees in exchange for a percentage of the arbitral award.[247] TPF can be advantageous from smaller investors who lack the resources to raise a claim shifting their financial liability for costs to the funder, but it has been criticized that the tribunals issue cost orders only against the claimant if investors do not succeed their claims, also it may bring miscellaneous ISDS claims.[248]

Arbitral tribunals have adopted inconsistent approaches to the disclosure information of TPF. For example, In RSM v. Saint Lucia, the tribunal ordered the claimant to disclose the source of its funding and identify the funder at the request of Saint Lucia. The RSM v. Saint Lucia is also the first known case where the claimant was ordered to post security for costs. If a claimant is perceived to be nearly insolvent and unable to pay an adverse cost award, the respondent State can request a security - for - cost order. If the tribunal approves, the claimant is required to pay a sum of the money in advance of the final award. Security for cost was already discussed in this paper (see also, E (ii) Principles / Guidelines on allocation of cost and security for cost in this paper).

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[242] *Id*.at para .37.
[243] *Id*.at para. 50
[244] *Id*. at para. 50
[245] *Id*. at para.51-52.
[246] *Id*. at para. 55.
[247] The Monitor, *Third-Party funding of investor-state disputes : At what cost ?(*April 16, 2021) Third-party funding of investor–state disputes: At what… | The Monitor (monitormag.ca).
[248]*Id*.

Recommendations

Among the regulation models suggested in the initial draft, CARICOM States should consider to choose 'sustainable development model, which TPF is only allowed if its investment meets pre-defined sustainable development requirements of the respondent State. To promote foreign investment, TPF should be allowed, but it must be regulated to abate the structural imbalance in ISDS between States and investors.

As proposed in the initial draft provision 7, CARICOM States should agree that the funded party should disclose TPF information including name of funders, funding agreement, funding amount, and expected return amount so states can decide whether the TPF is permissible or not.[249] Also, reserving security for costs should be mandatory before the trial, and the respondent State should be the one who determines the amount of security for costs, not the investors, to redeem the amount.

Regarding allocation of cost, expenses related to or arising from third-party funding (including the return paid to the third-party funder) shall not be included in the costs of the proceedings, unless determined otherwise by the tribunal, as it is proposed by provision 10.[250]

Assessment of damages and compensation

Several submissions received from the Government addressed the issue of damages and the determination of compensation. [251] There are concerns for inconsistency and unpredictability of awards on damages.[252]

CARICOM

Regarding assessment of damages and compensation, the UNCITRAL WG III has addressed the issue of expropriation. Many CARICOM ISDS cases arose by (in)direct expropriation (e.g., Indirect expropriation - British Caribbean Bank v. Belize (2010), Dunkeld v. Belize (II) (2010), Allard v. Barbados (2010), F-W Oil v. Trinidad & Tobago (2001), RSM v. Grenada / Direct Expropriations - Dunkeld v. Belize (I) (2009)).

CARICOM may support this reform option to establish guidelines or treaty standards for calculation of damages and calculations. To prevent excessive compensation, CARICOM may add treaty provisions that are suggested by WG III such as ;

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[249] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Draft provision on third-party funding, paras. 38-49. Third-party funding | United Nations Commission On International Trade Law.
[250] *Id.* at 55-59.
[251] The following Submissions refer to damages: A/CN.9/WG.III/WP.156, Submission from the Government of Indonesia; A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States; A/CN.9/WG.III/WP.173, Submission from the Government of Colombia; A/CN.9/WG.III/WP.175, Submission from the Government of Ecuador; A/CN.9/WG.III/WP.176, Submission from the Government of South Africa, A/CN.9/WG.III/WP.182, Submission from the Governments of Chile, Israel, Japan, Mexico and Peru, A/CN.9/WG.III/WP.199, Submission from the Government of Burkina Faso.
[252] UNCITRAL, Possible reform of investor - State dispute settlement (ISDS) Note by Secretariat, Assessment of damages and compensation, para. 8, assessment_of_damages_and_compensation_0.pdf (un.org).

(i) excluding certain types of compensation, such as compensation for punitive damages
(ii) prescribing limitations on the compensation that may be awarded, by providing that the compensation awarded shall not be greater than the loss suffered by the investor and should be reduced by any prior compensation already provided.
(iii) limiting the compensation if the investment did not materialize
(iv) requiring that the breach has a sufficiently close nexus to the harm
(v) providing for a number of mediation factors in the calculation of compensation.[253]

Regarding environmental issues, it is suggested in a number of studies that it provides better safeguards for the government when carve-out of environmental measures that do not constitute indirect expropriation and detailed provisions on what government measures rise to the level of indirect expropriation.[254]

[253] *Id.* at para. 23.
[254] Firger and Gerrard, 2012; Beharry and Kurizky, 2015; UNCTAD, 2015; Tietje and Baetens, 2014; UN Environment and IISD, 2016; OECD, 2004.

RECOMMENDATIONS

The following reform recommendations are presented in two steps. First, three categories of approaches and steps to implementation are described, followed by their perceived advantages and disadvantages. Second, reforms to substantive investment protection provisions are recommended regardless of approach.

Each of the three approaches denote conceptual categories with their own rationale. And while several reform options fit under multiple approaches, the conceptual categories are useful for selecting integral and complementary reforms from the menu. For example, an option to amend IIAs to remove ISDS provisions could be complemented by the option to adopt a regional agreement granting the CCJ original jurisdiction over disputes with foreign investors. Conversely, some reform options may be ineffective unless coupled with another reform. For example, withdrawing from ICSID may be fruitless unless coupled with amending or terminating IIAs that provide for ISDS under other fora.

The following page depicts a schematic of reform options across the three approaches (regionalization, redomestication, mitigation) and levels of implementation (national, community, international). The chart is designed to visualize complements and overlaps; it is not exhaustive of all options.

Reform Options by Recommended Approach and Level of Implementation

<table>
<tr><th></th><th><u>Regionalization</u></th><th><u>Redomestication</u></th><th><u>Mitigation</u></th></tr>
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A. Regionalization Approach

Regionalization as an approach generally covers reforms designed to have investment disputes settled under regional law by a regional forum. While there are many ways of implementing this approach, two effective versions are recommended here.

Regionalization Version 1 includes: first, eliminating investment protections and arbitration from IIAs; and second, adopting substantive investment protections in a regional investment code subject to the original jurisdiction of the CCJ.

Eliminating investment protections and ISDS provisions from IIAs can be achieved (in descending order of desirability) through a multilateral instrument, renegotiation with treaty partners, consensual termination, and unilateral termination. A multilateral reform could be possible through the UNCITRAL WGIII process, as they are considering a framework for allowing members to update IIAs simultaneously. Absent the multilateral tool, renegotiations with treaty partners would allow members to keep treaty provisions that they deem desirable (such as facilitation measures) while eliminating others. Consensual termination would be effective and could eliminate risk of survival clauses. Where consensual termination is not possible, members could unilaterally terminate agreements. Finally, a member could withdraw from the ICSID treaty. This step is not necessary if IIAs with arbitration are eliminated. A member may want to remain in ICSID to allow for arbitration under specific contracts.

Adopting substantive investment protections in a regional investment code would require the consensus of all CARICOM members. Adopting the code as an amendment to the RTC would automatically grant the CCJ original jurisdiction over its interpretation. Alternatively, if consensus cannot be achieved, three or more CARICOM members could pursue adoption of a regional code under the Enhanced Cooperation Protocol. Using this protocol would still require the support of two-thirds of CARICOM members.

Regionalization Version 2 includes: first, eliminating investment protections and arbitration IIAs; second, adopting or amending national legislation on investment protections; and third, amending national constitutions to adopt the CCJ as the court of last resort (for members that have not already done so).

Eliminating protections and arbitration in IIAs would follow the same process as version 1.

Adopting or amending national legislation on investment protections would depend on the member. As noted in the assessment, most members do not have national investment laws, and would have to create them. For those with investment laws, they would amend them to limit substantive protections (by changing standards, applying protections only to certain sectors, etc.).

Amending national constitutions to adopt the CCJ as the court of last resort would only be necessary if the member has not already done so. This step would be key to regionalizing investment disputes because many CARICOM members that have not adopted the CCJ still have the United Kingdom Judicial Committee of the Privy Council as their highest appellate court, effectively allowing investment disputes to be taken out of the country.

Advantages to regional approaches to investment disputes are numerous, and include:

- Greater facilitation of capital market integration resulting from harmonized laws. This advantage would be most realized by adoption of substantive regional law on investment.
- Improved rule of law resulting from greater consistency, predictability, transparency, and accountability. This advantage would be realized to a greater extent through use of a regional court rather than just regional arbitration.
- Increased access to justice resulting from large reductions in costs to all parties. This advantage is almost certain, but the degree of cost reduction could depend on the forum.
- Enhanced regional legal capacity resulting from feedback loops. This advantage would arise from the development of common law and growth in expertise of local counsel (as compared with current ISDS where the number of firms involved is quite limited).

Disadvantages associated with adopting a regional approach could include:

- Loss of certain investment facilitation measures resulting from termination of IIAs that contain both ISDS and investment facilitation provisions. This is a small to negligible issue for CARICOM members as virtually all of their IIAs do not contain facilitation provisions. Further, termination of IIAs can be avoided where renegotiation is possible.
- Temporary complications in dispute settlement resulting from survival clauses. Most IIAs have clauses that allow investors to bring a claim to arbitration up to 20 years after termination. This could result in multiple related proceedings, and unpredictable exposure to liability. This issue could be avoided through mutual, rather than unilateral, termination of IIAs. Where that is not possible, exposure to multiple proceedings could be avoided by adopting a provision in the regional code that requires an investor to waive their right to arbitration as a precondition for bringing a claim in regional court.
- Decreased involvement of local and domestic courts resulting from original jurisdiction of the regional institution. This disadvantage would arise if a regional approach was adopted that allowed investors to bring claims directly to a regional body without first seeking local remedies. This issue could be avoided by only granting the regional court appellate jurisdiction over investment disputes, forcing investors to bring claims locally.

B. Redomestication

Redomestication as an approach rejects ISDS in favor of domestic dispute settlement.

- Substantively, redomestication would involve domestic courts adjudicating treaty provisions, contract provisions, and national investment laws.
- Procedurally, this approach would follow the rules of the domestic court system. For members that have adopted the Caribbean Court of Justice (CCJ) as their highest court of appeal, this approach is effectively a version of regionalization.
- Steps to implement redomestication would likely include: amending or reforming IIAs by eliminating ISDS provisions to require domestic dispute settlement; adopting or updating a national investment

Implementing a regional approach

Renegotiation and/or amendment of BIT's to remove ISDS procedures will take time and resources, especially for the CARICOM members with more treaties to revise (e.g., Jamaica, Trinidad & Tobago..). This challenge may be mounted with a Multilateral Instrument on ISDS Reform; such an option is being considered at WGIII. However, this solution likely requires both IIA signatories to be parties to the new agreement, and for the multilateral instrument to contain a "withdrawal of consent" or "termination of ISDS" provision. Further dimming prospects of such an outcome is the apparent intent of most WGIII participants to reform ISDS rather than abandon it in favor of domestic institutions.

Second, if the CARICOM members pursuing Re-Domestication are unable to secure favorable renegotiations, the best option may be to unilaterally terminate agreements with ISDS provisions to eliminate the exposure. This path leaves members with the difficult decision and agreement for its other provisions or to give up any perceived benefit by tearing it up.

Third, if CARICOM members decide that unilateral termination is necessary or desirable in some circumstances, they may still be liable for a period of time under the "survival clause" of a BIT that extends its protections for current investments by up to twenty years. Such a scenario could be avoided by amending the agreement before termination, but such a scenario seems unlikely given that termination is mostly likely to be used on agreements with parties that are unwilling to renegotiate.

Fourth, regional investment law may not be politically feasible, given current sentiments. The CARICOM Investment Code has yet to be adopted, despite numerous attempts and negotiations. The integration benefits from Re-Domestication will not be achieved if CARICOM members pursue distinct and conflicting national investment codes rather than a harmonized regional code.

Fifth, a regional investment dispute settlement would require broad support for either establishment of a new institution or extension of the jurisdiction of a current body. Establishing a new institution would be potentially costly, and likely prolonged, given the current pace of CARICOM integration. And while the CCJ presents as an existing viable candidate, it has been criticized and eschewed by some CARICOM members.

- Implementation

· a consistent legal system is more attractive to foreign investors.

· *Third*, Re-Domestication provides more flexibility in achieving long-term SDGs. IIAs rely on amendment or renegotiation to be updated, while domestic law can usually be updated through legislative acts and interpreted through case law. This will allow more policy space for CARICOM members to continue to adapt their regional and national investment strategies as conditions (e.g., COVID-19) demand.

· *Fourth*, Re-Domestication has the potential to provide better access to justice through lower costs for both investors and states. Similar to the way in which the CCJ has provided more access to the appellate judicial system than the JCPC has, in part through more affordable proceedings, here, cost-friendly proceedings would both make dispute settlement a viable option for smaller investors and reduce public spending on defense counsel.

Alongside the compelling advantages of **Option A**, the authors have identified the following serious and potentially prohibitive political hurdles to implementation:

In the event that **Option A** is not feasible, the authors recommend **Option B: Redomestication**. **Option B** will likely contribute to regional integration less than **Option A**. However, it is still to be preferred over the status quo for the following reasons:

First, the reforms to substantive investor protections in the Mitigation approach reduce the number of potential claims that can be brought by investors. Even with the maintenance of ISDS provisions, more exhaustive definitions, removal of MFN clauses, clarified standards on provisions like FET and Expropriation should limit the types and number of claims that can be brought.

Second, flexibility for states to enact public policy can be expanded by the inclusion of certain enumerated exceptions either by justification (GATT Article XX style) or by sensitive sector carveout. Inclusion of such provisions is common in new IIAs and is not particularly controversial. The similar, but anterior tool of investment screening can also be used to deter and avoid potentially problematic FDI.

Third, other procedural reforms to the ISDS provisions of IIAs will shift power back towards the state and potentially reduce costs through options like; requiring exhaustion of local remedies, restrictions on third-party funding, counterclaims, and limits on damages for reflective loss.

Fourth, the more limited reform efforts of **Option B** may be necessary or desirable as interim measures, where expedient, while more major changes like those in **Option A** are explored and/or implemented.

- Redomestication is recommended as either an alternative or precursor to regional integration. It is not as politically complex and would eliminate some present obstacles

to regional harmonization, while still realizing benefits of cost reduction and improved consistency over the current system

Implementation

C. Mitigation

- Mitigation maintains the ISDS system and focuses on discrete problems and abuses.
- Substantively, mitigation involves a similar construction of the ISDS system, arbitrating investment protections under treaties.
- Procedurally, mitigation involves a more restricted range of options, such as reform to selection of arbitrators, a code of conduct for arbitrators, restrictions on third-party funding, and enhanced dispute prevention procedures.
- Steps to implement these reforms would take place almost entirely at the international level through amending and renegotiating IIAs. UNCITRAL WGIII is exploring an option for multilateral implementation of some reforms.
- This approach is considered inferior to options A and B because it does not clearly serve regional integration goals and may pose an obstacle to later regional harmonization if it results in different members adopting more disparate international obligations. However, this approach still has the potential to be a substantial improvement over the status quo by reducing costs and enhancing state involvement.

The Mitigation approach of **Option B**, whether as a longer or interim move, is subject to its own difficulties and drawbacks, including the following:

First, the renegotiations and revisions to modify substantive standards are, as of now, not on the table at any multilateral level. In this respect, **Option B** and **Option A** face the same difficulty in their reliance on persuadable treaty partners.

Second, if treaty partners prove unwilling to renegotiate substantive standards, the Mitigation approach is either forced to upgrade to the harder line termination recommended under **Option A** or to be reduced to only procedural reforms. While procedural reforms can shift procedural power, they cannot address fundamental criticisms related to issues such as MFN and FET.

Third, pursuit of substantive and procedural reform through renegotiations and revisions may reduce inconsistencies, but are unlikely to eliminate them. *Au contraire*, such efforts may
Implementation

Reforms to Substantive Standards

Regardless of the chosen approach to ISDS reform, updating substantive investor protections is necessary. The recommendations here are focused on key provisions including: definition of investment, most favored nation treatment, fair and equitable treatment, and the right to regulate.

Investment Definition

The more limited and closely defined the definition of an investment, the less possibility there is for an ambiguity that could lead to jurisdictional issues in an arbitration. A non-exhaustive definition is problematic because it leaves open the possibility that any 'asset' whatsoever may be considered an investment by an arbitral tribunal. For example, the SADC Model BIT offers states three possible definitions of an investment, ranging from more investor to more state friendly.[255] The most investor friendly definition of an investment the SADC Model BIT offers is an open-ended definition of an investment similar to the non-exhaustive definitions discussed above.[256] By contrast the most state-friendly definition instead focuses the definition of an investment on traditional enterprises and capital-intensive ventures.[257] By focusing the definition of investment on capital-intensive enterprises, the definition, 1) encourages the commitment of capital, which presumably the state seeks for its own development; and 2) decreases the probability an investment claim will arise before the investor itself has committed significant capital and/or suffered losses within the host state.

Nonetheless, SADC model language could have further clarified the definition of an investment in the Trinidad and Tobago — US BIT and decreased the likelihood that F-W Oil would have brought its claim in the first place. Specifically, the SADC Model BIT proposes that all investment treaties have a so-called *Salini* Test, namely language that:

> "In order to qualify as an investment under this Agreement, an asset must have the characteristics of an investment, such as the [substantial] commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and a significance for the Host State's development."[258]

This test helps to ensure that even non-traditional investments have a clear relationship to the host-state's development. The test is named after a well-known ICSID case, Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I].[259] In the case, the claimants, Italian construction firms who contracted to build certain roads in Morocco, brought claims against Morocco for reimbursement of cost overruns.[260] Morocco then failed to persuade the tribunal that the alleged claims amounted solely to contractual disputes with contracting government ministry, in part because the definition of an investment under Article I of the Bilateral Investment Treaty between Italy and Morocco (1990) was extremely broad, allowing as an investment: "c) …rights to any contractual benefit having an economic value" and "e) any right of an economic nature conferred by law, or by contract…"[261]

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[255] SADC Model Bilateral Investment Treaty Template with Commentary, pgs. 8-11 (July 2012).
[256] *Id.* at pgs. 10-11.
[257] *Id.* at pgs. 9, 12-13.
[258] *Id.* at pg. 13.
[259] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I], ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 31, 2001).
[260] Id. at ¶ 5.
[261] *Id.* at ¶ 44–6.

The *Salini* test language as proposed by SADC would have strongly suggested to F-W Oil that its claims did not relate to an investment. Although FWO might have argued that the tender offer gave it an expectation of profit, F-W Oil could not show that it had made a substantial commitment of capital or other resources or had taken a significant assumption of risk, given the tender offer essentially amounted to an agreement to come to an agreement.[262]

Of note, in addition to listing standard examples of an investment in its definition, the model Pan-African Investment Code, published by the African Union, adopts the *Salini* test almost verbatim. Specifically:

> "In order to qualify as an investment under this Code, the investment must have the following characteristics: the substantial business activity according to Paragraph 1, commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and a significant contribution to the host State's economic development. For avoidance of doubt, establishment, acquisition and expansion under this Code only apply to the post-establishment phase."[263]

Most Favored Nation

MFN provisions that lack exceptions are problematic because they open the possibility for investors to claim rights and protections granted by BITs a CARICOM member has signed with other nations but that are not granted under the BIT which the investor's own state has signed with the CARICOM member. The emerging solution to avoid such investor claims is to explicitly word the MFN clause such that it does not apply to ISDS rights and protections in other BITs.[264] For example, in the Canadian Model BIT (2021), the MFN clause reads in part: "Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute 'treatment', and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations."[265] The SADC Model BIT Art. 4.4 likewise offers similar language:

> "Notwithstanding any other provision of this Agreement, the provisions of this Article shall not apply to concessions, advantages, exemptions or other measures that may result from: (a) a bilateral investment treaty or free trade agreement [that entered into force prior to this agreement]; or (b) any multilateral or regional agreement relating to

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[262] F-W Oil v Trinidad & Tobago, ICSID Case No. ARB/01/14, Award ¶ 182 (Mar. 3, 2006).

[263] Draft Pan-African Investment Code, Art. 4.4, https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf, (Dec. 2016).

[264] Excluding ISDS provisions in other BITs from MFN protection is the official policy position of the Jamaican government. Omar Chedda, *Jamaica's Perspective on Reform of the Global Investment Regime*, South Centre Investment Policy Brief, no. 232 , Dec. 2021, at 7. Available from https://www.southcentre.int/wp-content/uploads/2021/12/SV232-211210.pdf.

[265] Model Foreign Investment Promotion and Protection Agreement, art. 6.7, Government of Canada (2021), https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng.

> investment or economic integration in which a State Party is participating or may participate."[266]

This approach is also adopted by the African Union's Pan-African Investment Code, specifically,

> "For greater certainty, the "treatment"... does not include dispute settlement procedures provided for in other treaties. Substantive obligations in other treaties, do not in themselves constitute "treatment," and thus cannot give rise to a breach of this Article."[267]

In addition, because MFN clauses may impede states' ability to regulate their economic activities, states should provide explicit exceptions to their MFN clause for any critical areas. This may include narrow carve outs for tax treaties, as discussed above, or may even include broader carve outs for measures concerning public health, national security, the environment, etc.[268]

For states who have in force both recent and decades old bilateral investment treaties that may confer different rights and protections, the language of the SADC, Canadian, and African Union model BITS should be considered moving forward.

Fair and Equitable Treatment

For BITs that provide FET, like the T&T–Mexico BIT, SADC, option 1, art. 5.2. qualifies the definition of FET, "For greater certainty, paragraph 5.1 requires the demonstration of an act or actions by the government that are an outrage, in bad faith, a wilful neglect of duty or an insufficiency so far short of international standards that every reasonable and impartial person would readily recognize its insufficiency."[269]

Alternatively, SADC provides the elimination and replacement of FET with "Fair Administrative Treatment." Fair Administrative Treatment guarantees that "The State Parties shall ensure that their administrative, legislative, and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural [justice][due process] to investors of the other State Party or their investments…" option 2, art. 5.1.[270] The rest of the article then provides further refinements of the meaning of fair administrative treatment such as right to notice (5.2) and right to appeals of decisions (5.3).[271] The Canada Model BIT (2021) takes the latter approach, guaranteeing only treatment according to customary international law that is only violated under limited circumstances such as if there is a denial of justice or due process in judicial and

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[266] SADC Model Bilateral Investment Treaty Template with Commentary, pgs. 20-21 (July 2012).
[267] Draft Pan-African Investment Code, Art. 7.4, https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf, (Dec. 2016).
[268] See Draft Pan-African Investment Code, Art. 8., https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf, (Dec. 2016).
[269] SADC Model Bilateral Investment Treaty Template with Commentary, pg. 23 (July 2012).
[270] *Id.*
[271] *Id.*

administrative proceedings.[272] The article further establishes that breaches of other provisions of the BIT or other international agreements, as well as breaches of domestic law, do not constitute a violation of the minimum standard of treatment.[273]

As has been noted, CARICOM members have faced relatively few arbitrations, of which half were resolved in favor of the state. Nonetheless, BITs that do not define or qualify FET leave the definition of FET's extent to the presiding arbitration tribunal. Investment treaties are a tension between bestowing investors sufficient rights and protections from State action (legislative, judicial, or otherwise) to encourage investment and providing the State sufficient regulatory freedom to provide for the welfare of its people. States seeking to limit the possibility for broad interpretations of FET that consider violative State actions and to increase their ability to regulate without incurring liability should consider qualifying their definition of FET or replacing FET with something similar to Fair Administrative Treatment.

Right to Regulate

Older BITs, such as those signed by CARICOM members with the United Kingdom, do not provide for any explicit right of the State to regulate in a fashion that is not violative of the BIT's investor protections. Newer treaties and models include language that guarantees the State's right to carry out basic regulatory functions without being in violation of one of the Treaty's investor protections. For example, the SADC Model BIT Art. 20.1 offers:

> "20.1. In accordance with customary international law and other general principles of international law, the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives.
>
> 20.2. Except where the rights of a Host State are expressly stated as an exception to the obligations of this Agreement, a Host State's pursuit of its rights to regulate shall be understood as embodied within a balance of the rights and obligations of Investors and Investments and Host States, as set out in this Agreement.
>
> 20.3. For greater certainty, non-discriminatory measures taken by a State Party to comply with its international obligations under other treaties shall not constitute a breach of this Agreement."[274]

The SADC commentary then explains, "This article confirms that the treaty does not alter the Host State's basic right to regulate…. The broader goal is restated in paragraph 20.2, again ensuring that some of the predilections of arbitrators to view investment treaties purely as

[272] Model Foreign Investment Promotion and Protection Agreement, art. 5.1, Government of Canada (2021), https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng.
[273] *Id.* at art. 5.2-5.3.
[274] SADC Model Bilateral Investment Treaty Template with Commentary, pgs. 39-40 (July 2012).

investor rights would be untenable under the present approach." SADC offers a model for those states that seek to safeguard the regulatory actions they take.