Investment Harmonization:
The state of play and its potential impacts

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Abstract

This paper argues that the preoccupation of the proponents of the Caribbean Community (CARICOM) Investment regime with the creation of a new class of corporate entity having exclusive rights to benefit from investment harmonization in the single market based on the application of an 'ownership and control' test does not serve to facilitate business.

For member states whose domestic investment regimes impose neither qualitative nor quantitative restrictions on investment flows, the effective discrimination of extra-regional investment is to create a structure for economic integration unnecessarily constrained by the accessibility, availability and cost of regional capital.

More fundamentally, perhaps, such legislated bias will significantly dilute the early dividend Barbados and other parties to the single market can expect to realise from their energetic and enthusiastic response to the 1989 Grand Anse Declaration. In such circumstances where accommodation seemingly cannot be made for the pre-existing competitive advantagesestablished by member states through their ability to attract foreign investment, the political will needed to support the 'work in progress' that fairly describes a 'single market' will be short-lived, reducing the exercise to a mere footnote in the annals of the Caribbean historical experience.

Attempts to carve-out an economic space within the exclusive purview of CARICOM-source investment is also inconsistent with the brand of 'open regionalism' embraced by the framers of CARICOM as the best approach to realized sustained wealth generation for its member states. CARICOM has recognised that the sustainability of economic integration in a globalised world economy is itself a function of the strength of the region's 'internationalisation', namely, the form and substance of its third State free trade agreements.

As a result, CARICOM has accelerated the pace at which it initiates, negotiates and concludes bilateral arrangements with investment provisions even as it works on the deepening of its intraregional infrastructure. The expectation being that the value added of the regional bloc to member states is itself dependent on the 'regionalisation' of the international investment flows to the region, attracted either through the collective bargaining of the CARICOM or through the efforts of the member states.

Experience has shown that liberalisation and harmonisation of investment regimes can give rise to the expression of monopolistic tendencies among private sector players. The appropriate policy response to attempts to the re-establishment of barriers to trade otherwise dismantled at the national level, is through a robust regionally managed and nationally reinforced regime of competition law and policy.

By their nature competition regimes take a pro-consumer policy perspective that takes into account the public good and social welfare. This ensures that the advantages of liberalization and harmonization within the CARICOM contribute directly to the general public through consumers.

Well crafted and effectively managed competition regimes are entirely consistent with 'open regionalism' and is the preferred tool to check the effects of its operation on regional enterprises. This can provide a basis for evaluating the economic benefit to CARICOM of the entry of foreign investment on competitive grounds rather that the proposed discriminatory test of 'ownership and control'.

In the final analysis, the agreement that defines CARICOM's harmonized investment regime is a powerful marketing tool for a region that is not a natural recipient of global investment flows. Crafting unwarranted limitations on the source of investment sends the wrong signals to regional and extra-regional investors.

At the very least the harmonization exercise being undertaken by CARICOM should make it abundantly clear that a single market of fifteen million people can manifest sufficient agility, flexibility and creativity to attract and retain investment in ways that other large more cumbersome regional machineries cannot. This should be the enviable hallmark of CARICOM style 'open regionalism'.

I. Introduction

An incorrect approach to investment harmonization in the Caribbean Community (CARICOM) single market will lead to a significant dilution of the early dividend Barbados expects to realize from its energetic and enthusiastic response to the 1989 Grand Anse Declaration.

Like other jurisdictions with antecedents in international business and financial services who have nonetheless embraced the ideal of a seamless regional economic space. Barbados' strategy for defining and exploiting its comparative advantage rests on two planks.

First, it continues to attract and support export-oriented foreign direct investment in the form of reinvested earnings, debt or equity to drive the creation and expansion of its export-oriented clientele into the single market and beyond.

Second, through its growing network of bilateral investment and double taxation agreements, coupled with its incentivized legal vehicles designed to capture foreign investment flows, Barbados continues to position itself as an important international business centre and regional staging point for intra and extra-regional investment flows.

The importance of this national development strategy is reinforced by Barbados' acceptance of 'free trade' and as a consequence 'open regionalism' in matters of tax, trade and investment policy. It is precisely Barbados' ability to act as a magnet for investment flows by interposing itself in the global flows using tax efficient entities and other value added services that is to be a central feature of Barbados' contribution to the single market. EU, ASEAN, MERCOSUR and PACIFIC Rim experience has shown that to be viable and sustainable, regional economic strategy must reinforce and support national economic priorities.

In a real sense regionalism must do 'no harm' to hard won, pre-existing member state comparative advantage. This is especially so when the importance of crystallizing regional business and financial services hubs to channel and add value to investment whether such originated from within or outside of the regional space has been convincingly demonstrated.

Important regional centers like Singapore, the Philippines, Mauritius, Finland, Luxembourg and Brazil provide relevant case-studies on how the pursuit of regionalism positively reinforces national 'internationalisation' strategies.

Absent this symbiosis, political, social and economic will for the 'work in progress' that fairly describes a 'single market and single economy' will be short-lived in reducing the exercise to a mere footnote in the annals of the Caribbean historical experience alongside the story of the un-realised Federation.

II. The CARICOM Harmonisation Policy

At the ninth meeting of the CARICOM Council for Finance and Planning (COFAP) A Proposal on investment policy harmonisation and coordination in the Caribbean Community (the Proposal) was submitted for consideration by the Economic Intelligence and Policy Unit of CARICOM Secretariat.

In its overview of the investment policy environment in the CARICOM, the Proposal outlines the main positive elements of that regime to include inter alia, private enterprise driven economies with the protection of private sector rights, the progressive elimination of discriminatory treatment of foreign investment and the absence of legal limits on financial remittances abroad. It stated further that the deficiencies in the investment policy environment were compounded by the fact that the CARICOM region had lost further market share of global foreign direct investment flows since 1996. As a result CARICOM states would need to adopt plans and strategies in a timely manner to offset these negative trends and position the CARICOM economy to "fully benefit from new opportunities opening up in the global market place and neigbouring markets".
The objectives of the harmonised investment policy framework would include, inter alia, the aligning of private investment to a single CARICOM space, that is, the making of the treatment of private investments uniform/similar throughout the CARICOM; achieving an increased flow of intra-area and extra-area investments; and improving the competitiveness of existing companies to benefit from future accession to the FTAA.

Recommended reforms based on a comparative analysis of best practices of the investment policy regimes of Chile, Costa Rica, Dominican Republic, Ireland and Mauritius were considered and divided into national level and institutional reforms at the regional level. National initiatives submitted included the adoption of well-publicised, unequivocal Government commitments and guarantees to the private sector which projects a positive image about the investment climate. Such guarantees and commitments embracing the right to freely organise a company and its business activity, a commitment to open regionalism and regional integration and the recognition of the benefits of an open multilateral trading system. In addition, it was recommended that

member states should promote and attract more private sector investment in infrastructure sectors via privatization, management contracts, long-term concessions, or build-operate transfer (BOT) contracts.

The objective being, to remove infrastructure constraints, improve reliability of public services and meet large capital requirements without increasing government debt servicing nor diverting tax revenue from social services and infrastructure sectors.

Finally, the document also determined that a key strategy for attracting more private investment should be a shift in policy emphasis from investment incentives to pro-active,targeted investment promotion abroad....[for].. attracting private investors.

Regional institutional reform priorities included the development of a regional website promoting CARICOM as an attractive investment location, the identification and promotion of investment opportunities with national and regional impact and the adoption of a CARICOM Investment Code.

The CARICOM Investment Code

It is proposed that the Code would reflect the guarantees and commitments to be undertaken by regional governments in the pursuit of increased investment to the region.

The usual areas found in most bilateral and regional investment agreements were addressed by the document including scope and coverage, definitions of investment and investor, national and MFN treatment, minimum standards of treatment, performance requirements and incentives, senior management and Board of Directors, transfers, expropriation, compensation, dispute settlement and environment, health and labour issues.

It is curious that even with the exposition of the key ingredients for a successful sustainable CARICOM investment regime and the recommendations posited by the drafters of the document, they would seek to undermine the very fabric of the harmonisation policy through their treatment of the term ‘investor’ which seeks to fetter access by the region of extra regional investment flows by discriminating between foreign source and regionally sourced capital.

In one sentence the drafters advise that the "definition of the term investor should be in accordance with Chapter 3 of the Revised Treaty of Chaguaramas. Moreover, the document advocates the differentiation between extra-regional and intra-regional investments such that the broad, asset based definition of investment should encompass all forms of investment including foreign direct investment and portfolio and intangible assets including intellectual property. When applied to extra-regional investments, the definition should exclude certain types of portfolio and intangible assets.

In light of the highly competitive hemispheric and global market for freely mobile capital flows it seems ill-advised to recommend that a regional with declining market share for such investment 'cherry pick' the types of investment it seeks to attract and retain. It seems further ill-conceived to differentiate between extra-regional and intra-regional investment flows especially as you advocate the intimacy between regionalism and globalization.

Finally and perhaps most importantly as the next section will discuss it seems unthinkable to add another layer of complexity and therefore create institutional bias against corporate investment vehicles based on unwarranted criteria of 'ownership and control' by CARICOM nationals in circumstances where member states have not seen fit to impose such fetters on the accessibility of capital in their domestic markets.

III. The Definition of 'Investor'

Chapter Three of the 1973 Revised Treaty of Chaguaramas (the Treaty) is titled "Establishment, Services and Capital and movement of Community Nationals. Article 32 of this chapter is the only place where there exists a definition to which the Proposal could seek to assimilate to the term 'investor'. This conclusion is also premised on the previous circulation by the CARICOM Secretariat to member states of a draft CARICOM Agreement on Investment (the CAI) which defined 'investor' in terms of a 'national' with specific reference to Chapter 3, Article 32 on Prohibitions on new restrictions on the right of establishment.

Article 32 (5) states:

"For the purposes of this Chapter:

(a) a person shall be regarded as a national of a Member State if such person –

(i) is a citizen of that State;

(ii) has a connection with that State of a kind which entitles him to be regarded as belonging to or, if it be so expressed, as being a native or resident of the State for the purposes of the laws thereof relating to immigration; or

(iii) is a company or other legal entity constituted in the Member State in conformity with the laws thereof and which that State regards as belonging to it, provided that such company or other legal entity has been formed for gainful purposes and has its registered office and central administration, and carries on substantial activity, within the Community and which is substantially owned and effectively controlled by persons mentioned in sub-paragraphs (i) and (ii) of this paragraph;

(b) "economic enterprises" includes any type of organisation for the production of or trade in goods or the provision of services (other than a non-profit organisation) owned or controlled by any person or entity mentioned in subparagraph (a) of this paragraph;

(c) a company or other legal entity is:

(i) substantially owned if more than 50 per cent of the equity interest therein is beneficially owned by nationals mentioned in subparagraph (a) (i) or (ii) of this paragraph;

(ii) effectively controlled if nationals mentioned in sub-paragraph (a) of this paragraph have the power to name a majority of its directors or otherwise legally to direct its actions."

Given previous incarnations of the CAI therefore where the term 'investor' was defined according to this aforementioned provisions and the recommendation in the Proposal that the term 'investor' should accord with Chapter 3 of the revised treaty it would appear that as stated before the Proposal does not attempt an explanation as to the rationale for lifted a definition of national from Chapter 3 which is clearly stated to be for the purposes of that chapter dealing with establishment, services, capital and the movement of community persons. Moreover, the genesis of the Investment harmonization proposal is not to be found in Chapter 3 such that a rationale for the use of the term national could be imputed but is instead derived from Article 68. This article, entitled Community Investment Policy is found in Part 3 (Common Supportive Measures) of Chapter 4 of the revised treaty which deals with Policies for sectoral development.

Article 68 states:

"COTED in collaboration with COFAP and COHSOD shall establish a Community Investment Policy which shall include sound national macro-economic policies, a harmonized system of

investment incentives, stable industrial relations, appropriate financial institutions and arrangements, supportive legal and social infrastructure and modernization of the role of public authorities."

Moreover, in Article 1 of the revised treaty it states that unless the context otherwise requires the term means "a national within the meaning of paragraph 5(a) of Article 32".

Not only is this not a definition of the term 'investor' as required according to the drafting technique of the CARICOM Investment Code, this presentation argues that the investment regime desired by the CARICOM is one in which the context requires a definition of national other than found in article 32(5).

The test of 'ownership and control'

The intent of the CARICOM and by extension the single market is not to give rise to a supranational state. It is an association or community of like-minded sovereign member states proximately located desirous of achieving inter alia, sustained economic development based on international competitiveness, co-ordinated economic and foreign policies, functional co-operation and enhanced trade and economic relations with third States; establishing conditions which would facilitate access by their nationals to the collective resources of the Region on a non-discriminatory basis; a fully integrated and liberalised internal market that will create favourable conditions for sustained, market-led production of goods and services on an internationally competitive basis; cooperation and joint action in developing trade relations with third States and in establishing appropriate regulatory and administrative procedures and services which are essential for the development of the international and intraregional trade of Member States.

Indeed, to reinforce this basic premise of the collective of member states, when the CARICOM concludes CARICOM –Third State agreements on behalf of or in the name of the individual members of the CARICOM, there is no supra-national government machinery such that the existence of the individual member states ceases to exist in their own right. It seems then unacceptable for an investment agreement to impose extra eligibility criteria for corporate nationals of member states based on 'ownership and control tests' not otherwise found in the laws of member states governing the conferment of 'nationality (better described as residency) on corporate entities.

To qualify for benefits under the CARICOM Investment Code, it is not sufficient that the company or other legal entity is constituted in the Member State in conformity with the laws thereof and which that State regards as belonging to it. It will fail the definition of 'investor' if more than 50 per cent of the equity interest therein is not beneficially owned by a person who is a citizen of the member state in which the company or legal entity is a national or by a person who has a connection with the state in which the company or legal entity of a kind which entitles him to be regarded as belonging to or, if it be so expressed, as being a native or resident of that State for the purposes of the laws thereof relating to immigration. Further, the definition of corporate 'investor' is not satisfied if in addition to the ownership requirement the company or other legal entity is not effectively controlled by nationals, that is a person who is a citizen of the member state in which the company or legal entity is a national or a person who has a connection with the state in which the company or legal entity of a kind which entitles him to be regarded as belonging to or, if it be so expressed, as being a native or resident of that State for the purposes of the laws thereof relating to immigration or have the power to name a majority of its directors or otherwise legally to direct its actions.

Simply put, the Proposal countenanced by this definition of 'investor' suggests the creation of an investment regime that is not designed for the corporate entity nationals of member states however owned or controlled once in accordance with the laws of the member states. Rather is defined as a set of regional benefits accessible only to a new class of CARICOM corporation or other legal entity.

IV. Applying the Test – Potential Implications

The thesis of this discourse is not to suggest that strategies to cause the consolidation of CARICOM source investment into mature pan-Caribbean enterprises are without merit.

In fact the experience of the European Union demonstrates that the fashioning of such corporate entities should be a natural by-product of a deeper economic culture amongst proximate nations. Further it is submitted that the clustering of such corporate entities without regard to the nationality or ethnicity of the capital inputs is an indication of the success of the integration methodology.

Rather, it is argued the treatment of the term 'investor' will serve to disenfranchise national entities otherwise poised to take advantage of a harmonised investment regime for want of

satisfaction of twin criteria that bear no relationship to their home state laws and that are out of step with the broader ambition of the CARICOM single market.

To fix the start of the single market at January 1, 2006 is perhaps to misunderstand and simple business strategy. The planning horizon of sophisticated businesses, of which there are many in the region, may span half a decade or more. Evidence of this can be found in the unprecedented levels of merger and acquisition activity in advance of the removal of all impediments to the creation of a single market by the fore-runner jurisdictions. Indeed, some commentators point to the amended 1973 CARICOM Tax Treaty as the catalyst for such corporate maneuverings. The text of the tax treaty and its employment by business concerns most notably in Barbados, Jamaica and Trinidad demonstrates the tri-partite relationship between tax, trade and investment and the availability of relief that can be afforded in circumstances characterised by variable rates of with-holding taxes.

While the methodology used to access tax treaty benefits may be as varied as the tax topology of the region, they invariably include the expansion and re-organisation of the home company in other CARICOM (and sometimes non-CARICOM) member states.

This strategy is fueled by investment either in the form of reinvested earnings, debt or equity capital. Depending on the resources of the home company such investment may or may not be locally or regionally sources especially in a global investment climate characterised by technology –backed monetary flows. The resulting reorganized company structure may represent an ownership/control demographic that bears little or no relationship to the ‘nationality’ of the parent or home company or its CARICOM subsidiaries, branches or permanent establishments. Indeed, this should be the certain hope of the mature regional economic space.

To fashion a harmonised system for investment providing for its protection and promotion that excludes this new form of CARICOM commercial enterprise goes against the letter and spirit of the revised treaty. While it may be agreed that this may not the intention of the proponents of the Proposal, a key determinant of the successful application of the regime is that the rules must be clear and certain. That Article 32(5) does not fit that description has less to do with the actual words and phrases used and more to do with the inherent dangers in drafting legislation that arises when provisions are lifted wholesale from one context and superimposed onto another without due regard being had to the practical implications of the same.

Undeniably the creation of a seamless economic space is a mammoth exercise in legal harmonization and market re-regulation. Before the end of the initial phase of the CARICOM version of a single market it is estimated that more than 2,500 separate pieces of national legislation requiring scrutiny and amendment. The scope of the task by no means permits the dilution of the core benefits on the altar of expediency. Tax, trade and investment harmonisation are the pillars upon which any serious regional economic trading bloc rests.

Discrete legislative activity under each head cannot disregard the symbiotic relation that can and must exist amongst the three. Moreover, this region's movement is intimately tied to the internationalist agenda of both the member states of the CARICOM and the Caribbean Community as a collective. As such it cannot be artificially distilled through the use of quota restrictions on ownership and control of the very vehicles that will drive investment expansion in the region.

If allowed to stand, the definition of 'investor' will not only lead to the curtailment of third state investment but will stymie the growth of regional based companies requiring investment capital under competitive world market conditions and at world market prices.

The above-mentioned can be illustrated with specific reference to the likely interface between the application of the ownership and control test and the accessibility or otherwise of the CARICOM investment regime by CARICOM based companies compared to those based outside of the region under CARICOM-third state free trade agreements.

CARICOM has negotiated a Free Trade Agreement with the Dominican Republic (DR) and this is to form the basis of an expanded CARIFORUM-EU dialogue on an Economic Partnership Agreement. The investment provisions provide the usual panoply of investment guarantees, protections and mutually reinforcing promotion.

Article I of the CARICOM-DR FTA establishes the free trade area between the CARICOM, comprising Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago and the Dominican Republic. Its objective as expressed in Article II is to , inter alia, liberalise the movement of capital between the Parties, and the promotion and protection of investments aimed at taking advantage of the opportunities offered by the markets

of the Parties, and the strengthening of their competitiveness. To this end, Annex III defines an investor to mean:

(i) any natural person possessing the citizenship of a Party in accordance with its laws; and
(ii) any corporation, company, association, partnership, or other organization, legally constituted under the laws of a Party whether or not organized for pecuniary gain, or privately, or governmentally owned or controlled.

For companies and other legal entities in both parties, eligibility is automatic and based on the domestic legislation operative in the member states of the CARICOM contracting party and the DR without any reference to a Community value-added criteria of 'ownership and control'. This is the correct approach and also finds expression the CARICOM-Cuba FTA, CARICOM-Costa Rica FTA, CARICOM-Columbia FTA and will no doubt also be a feature of CARICOM-US, CARICOM-Canada, CARICOM-Mercosur and CARIFORUM-EU EPA where such agreements have investment chapters.

Under the laws of the CARICOM member states, the DR and the EU, there is no prescription on the source of the investment supporting the corporate structure, that is there is no requirements as 'ownership' or 'control' of the corporate entity for it to be a beneficiary of the treaties because the test is that which obtains at the member state level.

As a matter of necessity member states do not preclude any investment source in the set up and operation of its corporate entities. With the growth of developed and developing countries intimately tied to its ability to attract investment it would seem incompatible to limit the sources of such corporate investment.

The anomaly thereby created is that a Barbadian company for example that happens to be majority owned by a Canadian company which may have found its origins in Barbados' antecedents in international business and financial services, but seeing the opportunity for adding value to its operation in Barbados by exploiting new market access opportunities in the CARICOM single market would be prevented from so doing because the single market is not being designed for the movement of that type of CARICOM based investor.

However, a wholly owned foreign investment can gain access to the single market via a CARICOM –Third State free trade agreement in circumstances, as to can member state companies, but the member state companies would not benefit from the enhanced regime of the single market but from the less advantageous regime that is part of the CARICOM Third State arrangement. In fact it may well be that member state companies not qualifying for want of satisfying the 'ownership and control ' tests may seek access to the CARICOM single market by redomiciling outside of the region in order to gain access to the region via a third party contract. It would seem to make nonsense of the efforts of member states to attract investment if the same investment an-unable to access the market as a member state entity was forced to create a branch or subsidiary in every CARICOM member state to avail themselves of the single market when the harmonization exercise is designed to remove that very impediment to the free movement of goods, capital, labour and capital.

V. An alternative approach

The concept of a Community value-added of 'ownership and control' to define eligible corporate entities to harmonised regimes in the region is not confined to investment. It also appears in the 1987 Agreement for the establishment of a regime for CARICOM enterprises. This agreement predates both the 1989 Grand Anse Declaration and the Amended Treaty of Chaguaramas but does have its grounding in the provisions of the Common Market Annex to the 1973 CARICOM Treaty and in particular Article 44 on "Ownership and Control of Regional Resources";

The preamble to this agreement is instructive and sets the tone for the delineation of 'CARICOM enterprise. It reads as follows:

Cognisant of the urgent need to develop economic activities in the Common Market on the basis of joint enterprises between national investors (as hereinafter defined in Article 1);

Conscious of the continuing need to develop and give further scope for national and regional entrepreneurship, management and technological capacity in the production of goods and services on a regional basis for both the regional and extra regional markets;

Mindful of the need to pool human, financial and natural resources of the Region for the implementation of high priority regional projects designed to benefit the people of the Region;

Emphasising the need for the creation of machinery whereby the movement of investment capital between Member States, particularly from the More Developed Countries to the Less Developed Countries may be expeditiously effected in the interests of the development of the Region;

Aware of the crucial role which the private sector, on its own or in partnership with the Region's public sector or suitable foreign investors, can play in the economic development of the Region;

Unsurprisingly perhaps then the agreement goes on to define a CARICOM enterprise as a "regionally owned and controlled" company. "Regionally owned and controlled" company is further described as follows:

"... is one in which in the opinion of the Authority nationals of at least two Member States exercise management and control by beneficially owning shares carrying between them directly or indirectly -

(a) the right to exercise more than one-half of the voting power in that company; and

(b) the right to receive more than one-half of any dividends that might be paid by that company; and

(c) the right to receive more than one-half of any capital distribution in the event of the winding-up or of a reduction in share capital of that company; or such greater proportion than is specified in paragraph (a) to (c) above as the Council may, from time to time, determine in relation to any sector of the regional economy.

This qualification sits on the definition of a 'company' as a company incorporated under the general statutes of any Member State relating to the formation of such a legal company.

Conversely the 1994 agreement among the governments of the member states of the Caribbean community for the Avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, profits or gains and capital gains and for the encouragement of regional trade and investment defines eligibility for treaty benefits of corporate entities without the addition of 'ownership and control' criteria. It therefore defines a national in the following terms: the word "national" means -

(i) a citizen of a Member State; or

(ii) a person who has a connection with that State of a kind which entitles that person to be regarded as belonging to or, if it be so expressed, as being a native, resident or belonger of the State for the purposes of such laws thereof relating to immigration as are for the time being in force; or

(iii) a company or other legal person deriving its status as such from the laws in force in a Member State or constituted in the Member State in conformity with the law thereof that such State regards as belonging to it.

The foregoing examples coupled with the treatment of national under CARICOM-Third State agreements points to a glaring inconsistency in the treatment of the type of corporate entity entitled to benefit from the various levels of harmonization of tax, trade and investment currently underway in the CARICOM single market.

This may not be surprising given the very real concerns that attend the liberalization of an economic space to private sector players that may seek to re-establish barriers to trade, previously and assiduously removed through deliberate government cooperation. Indeed, the preoccupation with ensuring the benefits of the region are realized by regionally controlled and owned corporate players is an attempt to mitigate against the type of neocolonialism that has pervaded the literature with respect to the pace of globalization and its effect on open small island economies.

However, to treat to this problem by means of the imposition of a secondary criteria for the conferment of single market benefits to otherwise entitled companies and other legal entities which fall to be construed as 'nationals' under the law of member states to the CARICOM is outside the ambit the legislative harmonization exercise. In fact the denial of treaty benefits to any national of a CARICOM member state can be argued to be 'ultra vires' the Treaty.

How then does a regional group seek to maximise the policy space available to it to reregulate the liberalised market in the interest of its regional ambitions even as it recognises the inescapable linkages with the extra-regional economy?

The CARICOM brand of regionalism with its inward and outward orientation can be fairly described as "open regionalism". This features as a process of deeper integration to strengthen regional economic self-reliance while maintaining a commitment to a free market orientation. As far back as 1997 the United Nations Council for Trade and Development noted that "the culture of FDI liberalisation that has grown world-wide and has become pervasive needs to be complemented by an equally world-wide and pervasive culture of competition, which needs to recognise competing objectives". As such a robust competition policy and law regime have come to be viewed as the proper mechanism by which to effect the appropriate balance between regionalism and internationalism in relation to the operation of private sector players.

An appropriately crafted and effectively enforced competition regime will help to promote the growth of small and medium-sized CARICOM enterprises and allow them to compete with their

larger rivals. The liberalisation and harmonisation of investment based on fair competition will enable local small and medium firms to develop their economic strengths, upgrade their technological production processes and improve managerial systems and commercial skills, in order to compete with foreign investment.

Competition law will ensure that firms, both local and foreign, are prevented from engaging in restrictive business practices, abusing a dominant position or forming a cartel or any other type of unfair practice that might damage other firms. It would also encourage foreign investment to be made on a "green field" basis that could contribute to the regional economy.

CARICOM member states are committed to an "open door" policy in respect of investment liberalisation and harmonisation and should therefore allow regional competition law, which is consistent with liberalisation, to play an important role in protecting domestic firms.

In so doing CARICOM can reconcile a positive approach to foreign investment, justified by a lack of regulatory control, with control over any undesirable market and social effects of FDI through laws that apply to foreign and domestic firms alike, notably competition law, merger and acquisition control regulation, and anti-monopoly control.

Competition law is compatible with "open regionalism" because it is neutral and nondiscriminatory. Moreover, the development of a regional competition law and policy that enhances fair competition among firms doing business in the region might also provide a basis for evaluating the economic benefit to CARICOM of entry by a foreign investor on competitive grounds rather than by means of the discriminatory criteria as proposed in the CARICOM Investment Code.

In this way, regional competition laws and policies would play a multifunctional role by encouraging the free flow of trade and investment, the monitoring of the conduct of firms, and evaluating the economic role or potential dominance of extra-CARICOM transnational corporations (TNCs) in the region.

Unlike the assumptions of neo-liberalism, competition regimes accept the important role of government in regulating the behaviour of firms in the market place, even where ‘free trade ‘ principles are embraced. Such an orientation is also more compatible with the new approach of

positive integration ideology. Moreover, competition law takes a pro-consumer policy perspective in that it seeks to realise the public good and social welfare. This ensures that the advantages of harmonization within the CARICOM resulting from economic integration would contribute directly to general public wealth through consumers.

VI. Conclusion

This paper posits that proposed CARICOM-value-added in the form of an 'ownership and control' test used to define member state corporate actors entitled to the guarantees and protection offered under a harmonised investment regime in the single market is ill-founded.

Such 'investor' screening is needlessly discriminatory and is an unjustifiable fetter on the ability of member states to determine the character of its corporate citizenry. To tie the deepening of the region's economic space to the availability of regional source investment is to ignore the process of 'open regionalism' that is a sine qua non of modern integrationist movements.

Moreover, in so doing its brings into direct conflict pre-established comparative advantages fashioned by member states with antecedents in international business and financial services who have created elaborate networks of tax and bilateral investment agreements to harness regional and extra-regional investment flows. The continued viability of such regional business and investment hubs are important gateways for investment flows into and through any regional economic space as the experiences of Singapore, the Philippines, Mauritius, Ireland and Luxembourg continue to demonstrate.

Finally, the appropriate policy response to well grounded concerns that a liberalize investment market coupled with comprehensive harmonization of the CARICOM investment regime may lead to the marginalization of regionally owned, controlled and operated enterprises should be addressed through nationally implemented and regionally reinforced competition law and policy. Such a regime is a necessary corollary to a process of systematic open regionalism and will service to promote the liberalization of trade and investment, encourage free and fair competition among firms in the CARICOM by monitoring behaviour of firms doing business in the region, and perhaps most importantly it will strike a competitive balance between intra- and extra-CARICOM investors.

A well constructed investment harmonization document is a powerful promotion and marketing tool for a regional that is not a natural recipient of investment flows. Crafting unwarranted limitations on the source of the investment does not send the right signals to regional nor extra-regional investors. It does not say that the CARICOM single market is open for business.

At the very least the harmonization exercise being undertaken by the CARICOM should make it abundantly clear that a single market of fifteen million can demonstrate sufficient agility and flexibility to attract, retain and where appropriate deploy investment in a way that other large more cumbersome regional machinery cannot. This should be the hallmark of the Caribbean form of ‘open regionalism’

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1999 Norman Girvan - Globalisation, Fragmentation and Integration: A Caribbean perspective

2005 Dr. Selwyn R. Cudjoe - Making strides: Taking the Caribbean Worldwide

2005 Edwin Carrington, Secretary General, CARICOM Inward Investment Opportunities in the Caribbean for EU Investors

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2005 Ram & McRae - Business Page – CARICOM seeks to encourage intra-regional investment

2004 Dr. Lawan Thanadsillapakul - The Harmonisation of ASEAN Competition laws and policy from and Economic Integration Perspective Agreement establishing the Free Trade Area between the Caribbean Community and the Dominican Republic

1987- Agreement for the establishment of CARICOM Enterprises

1994 - Agreement among the Governments of the member states of the Caribbean Community for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, profits or gains and capital gains and for the encouragement of regional trade and investment

2004 - Draft Caribbean Community Agreement on Investment

2004 - Agreement between the Caribbean Community (CARICOM) and the Government of the republic of Costa Rica - Agreement on Reciprocal Promotion and Protection of Investments between CARICOM and Cuba

1973- Agreement on the Harmonisation of Fiscal Incentives to Industry- CARIFTA

2001- Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy

1979 Trade and Economic co-operation agreement between the Government of Canada and the Governments of the member states of the Caribbean Common Market.