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The Institutional and Policy Framework for Foreign Investment in the Eastern Caribbean, Puerto Rico, and the United States Virgin Islands

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The Institutional and Policy Framework for Foreign Investment in the Eastern Caribbean, Puerto Rico, and the United States Virgin Islands

*T. Modibo Ocran**

ABSTRACT

This Article provides an overview, based in part on the author's field survey, of the investment laws and policies of the Eastern Caribbean subregion. The island states of the Eastern Caribbean offer foreign investors unique opportunities. Among the reasons that these states should attract investment is the close relation between the two two neighboring islands, Puerto Rico and the United States Virgin Islands, and the United States; this relation offers the Eastern Caribbean states ready access to the U.S. market. The author examines these relations and the institutional frameworks for investment employed by the various states. The Article raises questions about the value of providing investments and maintains that other factors, such as the level of worker training and the existence of necessary infrastructure, are also significant.

The Article concludes that most Eastern Caribbean states would be well served by centrally locating their investment centers in divisions of existing governmental ministries. Through these investment centers, the states should tap into the technological knowledge of the private sector, focus on long-term investment priorities, and prepare to manage large-scale investment. Moreover, these states should examine their investment codes to ensure their clarity to foreign

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Acknowledgment is due to the United Nations Development Programme (UNDP) and the Organisation of Eastern Caribbean States (OECS) for affording me the opportunity in 1992 to serve as one of the consultants who conducted a broader study on their behalf on trade and investment relations between the OECS and both Puerto Rico and the United States Virgin Islands. This paper is an offshoot of a field investigation carried out in 1992.

Acknowledgment is also due to the Brennan Summer Research Awards Committee of the University of Akron School of Law, which enabled me to complete the secondary research and to prepare this paper for publication.

investors. The author also concludes that the states of the Eastern Caribbean should continue to offer comprehensive incentive packages because different investors are attracted by different types of incentives.

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I. INTRODUCTION: THE CARIBBEAN AS A FOCUS OF FOREIGN INVESTMENT

Although less developed states generally attract the lowest flow of foreign investment capital from the traditional capital exporting states,[1] the Latin American and Caribbean region as a whole has attracted an appreciable amount of foreign investment

1. Globally, the total inflow of foreign direct investment (FDI) in 1990 amounted to $184 billion, consisting of $152 billion to developed states and $32 billion to developing states. U.N. WORLD INVESTMENT REPORT, 1992, at 14, Table 1.1, U.N. Doc. ST/CTC/130, U.N. Sales No. E.92.II.A.19 (1992) (providing all dollar amounts in U.S. dollars unless otherwise stated). The global average inflow of FDI from 1986 to 1990 was $150 billion. Only $26 billion, or 17%, went to developing states. *Id.* at 23, Table 1.5.

relative to other areas of the developing world.[2] While the inflow of foreign investment to the Caribbean region is rather unevenly distributed,[3] the states within the Eastern Caribbean subregion—which includes Antigua and Barbuda, Dominica, Grenada, St. Kitts-Nevis, St. Lucia, St. Vincent, the British Virgin Islands, and Montserrat—appeal to investors for several reasons. First, the states of the Eastern Caribbean subregion offer unique opportunities for a Caribbean-based investor who seeks better access to the markets of the United States or the European Community. Second, the "twin-plant" vehicle, which entails collaboration between an Eastern Caribbean state and either Puerto Rico or the United States Virgin Islands, offers another investment opportunity.[4] The twin-plant concept results in the establishment of two related companies; one plant is located in a Caribbean country with low labor costs, and a "twin" plant is established in the United States, or one of its territories, where the more capital-intensive part of the operation can be accomplished. The twin plant vehicle maximizes the abundant labor and raw materials of the Eastern Caribbean states by taking advantage of the unique relationship of Puerto Rico and the U. S. Virgin Islands to the United States.

For example, the twin plant could be located in Puerto Rico.[5] Products manufactured in Puerto Rico are regarded as having been made in the United States and therefore enter the United States mainland market without quotas or the payment of

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2. Of the $26 billion FDI to developing states described *supra* note 1, $9 billion dollars (6%) went to Latin America and the Caribbean. By comparison, $3 billion (2%) went to Africa and $.5 billion (.4%) to West Asia. *Id.*

3. For example, in 1990 the long-term capital inflows for Dominica was $16 million. In 1991, Grenada had $13 million of long-term capital investment, St. Kitts-Nevis had $48 million long-term capital investment, St. Vincent and the Grenadines had $13 million long-term capital investments, and Trinidad and Tobago has $46 million of long-term capital investment. WORLD BANK, TRENDS IN DEVELOPING ECONOMIES 374-83 (1993).

4. IMPROVING TRADE AND INVESTMENT RELATIONS BETWEEN OECS AND US VIRGIN ISLANDS, AND BETWEEN OECS AND PUERTO RICO (1993) (unpublished consultants' study done for Organization of Eastern Caribbean States (OECS) Secretariat, Antigua and United Nations Development Program (UNDP) Regional Office, on file with the author). A collaboration agreement on this topic was actually signed between Puerto Rico and OECS in 1991. *See* Agreement Between the Governments of the OECS Member Countries and the Commonwealth of Puerto Rico Concerning Trade, Investment and Functional Cooperation, 1991 (on file with the author). FOMEXPORT, ECONOMIC DEVELOPMENT ADMINISTRATION OF PUERTO RICO, TRADE RELATIONS BETWEEN PUERTO RICO AND THE OECS (1991); COMMERCE BETWEEN PUERTO RICO AND THE OECS MEMBER STATES BY PRODUCTS, FISCAL YEAR 1991 (1992); STATE DEP'T OF THE COMMONWEALTH OF PUERTO RICO, PUERTO RICO'S CARIBBEAN DEVELOPMENT PROGRAM (1992).

5. *See* Ron H. Flax-Davidson, *Tax-Exempt Investment for the Caribbean Basin Initiative Region*, 25 INT'L L. 1021, 1022 (1991).

duties.[6] Similarly, although the U.S. Virgin Islands is technically a separate customs zone from the United States, goods originating from the U.S. Virgin Islands nonetheless offer easy access to the United States market. There is a fertile opportunity for a corporation based in Puerto Rico to "source" its materials from a state of the Organization of Eastern Caribbean States (OECS)[7] and to add enough value to the product in its own locale to render its entry into the U.S. market duty-free.

Since 1985, seven twin plants have been established in states of the OECS.[8] A total of fifty-eight twin plants have been established in the Caribbean and Central American region as a whole.[9] These projects represent an investment of roughly $5.75 million, approximately eight percent of the $71.2 million invested in the region.[10] The following table describes the twin plants in the Eastern Caribbean region:

6. Puerto Rico is neither a state of the United States, nor an independent, sovereign state. At present, Puerto Rico is a "commonwealth," which makes Puerto Rico's relationship with the United States at once interesting and ambiguous. The U.S. Virgin Islands is a territory and not a state of the United States.

7. The OECS was established June 4, 1981. Its members include: Antigua-Barbuda, Dominica, Grenada, Montserrat, St. Kitts-Nevis, St. Lucia, and St. Vincent and the Grenadines. Treaty Establishing the Organization of Eastern Caribbean States, June 18, 1981, 20 I.L.M. 1166 (entered into force July 4, 1981).

8. These plants have been established under the Puerto Rican Caribbean Development Program,

9. *See* Table I for a list of twin-plant projects.

10. Commonwealth of Puerto Rico, Puerto Rico's Caribbean Development Program (1992) (unpaginated).

TABLE I[11]

LIST OF TWIN PLANTS, JUNE 1992

State/Company	Jobs	Investment (U.S. dollars)	Industry
Dominica			
ABC Container	50	$2,100,000	Paper and allied products
Grenada			
Abbot Labs	50	$1,118,000	Chemicals and allied products
Johnson & Johnson	40	$ 484,000	Chemicals and allied products
Schering Plough	50	$1,000,000	Chemicals and allied products
Sterl-Tech Inc.	50	$ 500,000	Textile Products
St. Kitts-Nevis			
Hubbell, Inc.	12	$ 50,000	Electric and electronic products
Lutron	64	$ 500,000	Electric and electronic products

The U.S. Virgin Islands has a separate customs territory from the United States. Thus, the U.S. Virgin Islands is not considered a part of the United States insofar as the United States Generalized System of Preferences (GSP) for imports are concerned, nor is it a beneficiary of United States GSP. However, the U.S. Virgin Islands is considered a "GSP developing state beneficiary" of other states' GSP insofar as its exports are concerned. For example, the U.S. Virgin Islands maintains that status for exports to Japan, Canada, and the European Community. Therefore, the U.S. Virgin Islands could be a manufacturing location for a United States mainland corporation, Puerto Rican corporation, or OECS corporation and have its products qualify for entry into these non-United States markets under their GSP programs.[12]

Accordingly, a potentially important area of investment within the Eastern Caribbean subregion lies in the creation of production-sharing or joint enterprises between an OECS state

11. *Id.*

12. Additionally, a U.S. Virgin Islands corporation that opens a facility in the OECS area can add enough value in those states to qualify for entry into the European Community market under the European Economic Community/African, Pacific and Caribbean Convention. *See* discussion *infra* note 165.

and either Puerto Rico or the U.S. Virgin Islands. Joint enterprises provide investors with a unique package of benefits by pulling together the resources of the whole region. These enterprises combine the comparative advantages of one production locale, for example Puerto Rico or the U.S. Virgin Islands, with those of one or more OECS members. By investing in such enterprises, manufacturers and investors will gain a competitive edge in the international marketplace by simultaneously reducing product costs and providing a facility for the manufacture of high-quality products. The process of identifying potentially attractive projects should take into account the availability of raw materials, financial requirements, the level of technology involved, and the complexity of the operation in terms of the processes required.

In broad terms, all of the OECS states offer similar opportunities in agricultural production, light manufacturing, financial services, tourism, and data processing. Specifically, the main areas of investment interest in each country are as follows:

TABLE II

MAIN AREAS OF INVESTMENT IN THE STATES OF THE OECS

Antigua and Barbuda:	Tourism and tourism services, financial services, and data processing;
Dominica:	Agriculture, agro-processing, and data processing;
Grenada:	Tourism, agriculture, agro-processing, clothing and other light manufacturing assembly, and data processing;
St. Kitts-Nevis:	Tourism, clothing, electrical and electronic assembly, and data processing;
St. Lucia:	Tourism and tourism services, data processing, agriculture and agro-processing, clothing and other light manufacturing assembly;
St. Vincent:	Tourism, agriculture, agro-processing, data processing, clothing, and electronics;
British Virgin Islands:	Tourism and financial services;
Montserrat:	Financial services, handicraft, agro-processing (fish), and health care services.

While this list is not exhaustive, it generally corresponds to a survey done on the best prospects for investment in the OECS.[13] The list also corresponds with the detailed investment opportunities promoted by the Eastern Caribbean Investment Promotion Service (ECIPS).[14]

The identification of investment opportunities leads to a search for the means by which these opportunities may be realized. This search involves an analysis of the institutions required for the particular investment objective, the modalities for investment promotion, and the sources of investment financing. Equally relevant is an understanding of the essential elements of an appropriate investment climate.[15]

This Article proceeds on the assumption that the legal, regulatory, and administrative practices of investee states could either impair or improve their attractiveness as investment locations, as well as reduce or augment the efficiency of private sector activities. Therefore, analyzing the regulatory framework and seeking improvements therein is important to reducing the costs to the private sector, thereby enabling the Eastern Caribbean subregion to compete more effectively both at home and in the international marketplace.

Part II of this Article comparatively analyzes the legal and regulatory framework for establishing foreign investment facilities in the states of the Eastern Caribbean, the U.S. Virgin Islands, and Puerto Rico. Part III provides a similar comparison of the fiscal, industrial, and trade incentives available for foreign investment. Each part concludes with critical insights aimed at improving the opportunities for foreign investment in these areas.

II. GENERAL INVESTMENT POLICIES, STRATEGIES AND ENTRY CONDITIONS

Some of the OECS states have investment legislation that is analogous to the investment statutes or codes of other states. The general purposes of such codes are: 1) to have a basic document defining the policy of a particular government with respect to permissible types and areas of investment; 2) to delineate the mechanism through which investments are channeled or

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13. *See* U.S. DEPT. OF COMMERCE, 1990 CARIBBEAN BASIN INVESTMENT SURVEY (1990).

14. EASTERN CARIBBEAN INVESTMENT PROMOTION SERVICE, INVESTMENT PROMOTION MATERIALS (1992).

15. For a discussion of these essential elements, see IBRAHIM F.I. SHIHATA, MIGA AND FOREIGN INVESTMENT 7-15 (1988).

administered, including the executive authority responsible for examining and supervising them; and 3) to set forth the conditions of entry or establishment of investment, as well as the rights and privileges of the investor. The investment code thus serves as a basic structure of legal relationships between the investor and the investee state. The investment code is not intended to embody all laws related to investments. Rather, it merely aims to integrate the main legal provisions concerning investments. However, from the standpoint of a potential investor, the code serves as a starting reference point by providing the basic policy and legislative framework for investing in the state.

A. *General Economic Goals and Policies*

Investment statutes occasionally express a state's national economic policies, including its policy toward foreign investment. The statute might set forth, for example, the main patterns of productive activity in the economy and the role of private enterprise, state ownership, and cooperative enterprise, or a combination of these factors. Typically, the statutes refer to what the governments perceive as priority areas in the economy and, based upon these priority areas, the types of economic benefits or incentives that the government will bestow on investors that invest in priority areas.

A broader perspective of investment policy is found in non-legislative sources, such as policy documents from the state executive and government ministries responsible for finance and economic development. Indeed, in the states that do not have investment codes or statutes, these government documents represent the only sources of a state's investment policy. This section of the Article briefly outlines the general trends in the investment policies of a number of Caribbean states.[16]

Dominica

Dominica generally appears to embrace an open-door policy with respect to investment. The Dominican government places emphasis on attracting labor-intensive industries to facilitate full employment and to spur economic growth.[17] The broad array of development opportunities sought by the Dominica Investment

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16. The following discussion is primarily based on government documents, investment statutes, and personal interviews conducted by the author with government officials in the respective countries.

17. DOMINICA NAT'L DEV. CORP., INVESTMENT PROMOTION MATERIALS (1992) [hereinafter DOMINICAN INVESTMENT PROMOTION MATERIALS] (unpaginated).

Promotion Agency, the government agency in charge of promoting foreign investment, includes: agro-business (for example, exotic fruit production and processing, winter vegetable production and processing, floriculture, aquaculture, herbs, spices, and commercial plants); natural resources (including forestry products such as furniture, prefabricated buildings, boats, veneer, lumber, and plywood); minerals (such as pumice, clay, and limestone); water for export; light manufacturing (for example, clothing assembly, electronic assembly, handicrafts, toys, sporting goods, and small appliances); service industries (such as data processing, export processing, insurance, real estate, construction, transportation, and communications); and the tourism industry (including hotels and resorts, restaurants and clubs, scuba diving, fishing and boating, and mountain climbing).[18]

St. Vincent and the Grenadines

In St. Vincent and the Grenadines, a policy document prepared in July 1992 by the Ministry of Agriculture, Industry, and Labor[19] clarifies the state's commitment to economic development through the implementation of sound policies based on a long-term assessment of its resource base and its capacity to take advantage of available opportunities at this stage of its economic development. The government of St. Vincent and the Grenadines is committed to a strategy of generating employment through export-led industrial development. In this respect, the government recognizes that the development of a vibrant tourism sector is critical to its overall strategy. The policies and strategies of St. Vincent and the Grenadines are aimed at attaining self-sustained and balanced growth, diversification of the productive base of the economy, and more equitable redistribution of the benefits of socio-economic development. The role of the private sector, particularly foreign capital, as a vehicle for growth is heavily emphasized in the policy document. In a legal sense, the policy document prepared by the Ministry of Agriculture, Industry, and Labor appears to take the place of an investment statute or code, which the state does not have at this time.

Antigua

In Antigua, the government is committed to reducing state-sponsored development and increasing private sector

18. *Id.*
19. *See* ST. VINCENT'S MINISTRY OF AGRIC., INDUS. AND LABOR, INVESTMENT CODE (1992) [hereinafter ST. VINCENT INVESTMENT CODE].

development. Its goal is to move the government away from its traditional, catalytic role of providing equity financing for projects to more of a regulatory role.[20] The trend toward privatization in Antigua goes beyond a mere desire to promote foreign investment. The government also seeks to reduce the public debt and to increase efficiency in production. However, privatization will not completely eliminate the role of government in Antigua's economy. The government will likely maintain some input in the hotel industry, such as building hotel facilities and then contracting them out to international management.

Grenada

Similarly, in Grenada the government seeks foreign and local investment in order to develop a diverse, but balanced, economy built on the country's resources. To enhance the development and growth of Grenada, its government seeks to maintain an open economy dependent upon the external forces of international business and finance.[21] In sum, the economic objectives and strategies of the OECS states are generally geared toward developing an outward-oriented private sector and making the private sector as competitive as possible in the international marketplace.

United States Virgin Islands and Puerto Rico

The U.S. Virgin Islands and Puerto Rico are part of the United States economy for all practical purposes and, therefore, pursue the same overall economic philosophy as the United States. However, they are peculiarly situated because they are comparatively small economies in the general Caribbean area and seek to attract foreign investment on the basis of their unique characteristics.[22]

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20. *See* INDUSTRIAL DEVELOPMENT BOARD OF ANTIGUA AND BARBUDA, ANTIGUA AND BARBUDA INVESTMENT GUIDE, 13-21 (1992) [hereinafter ANTIGUA AND BARBUDA INVESTMENT GUIDE].

21. *See generally* GRENADA INDUS. DEV. CORP., FACT SHEETS NOS. 1-6 (1991) [hereinafter GRENADA FACT SHEETS] (discussing living conditions, Fiscal Incentives Act of 1974, labor availability, marketing and trade agreements, utilities, transportation, and Grenada's economic potential); GRENADA INDUS. DEV. CORP., THE ISLE OF SPICE: A BUSINESS OPPORTUNITY IS READY AND WAITING FOR YOU IN GRENADA (1992).

22. *See* U.S. VIRGIN ISLANDS INDUS. DEV. COMM'N, THE BEST INVESTMENT DEAL UNDER THE AMERICAN FLAG: U.S. VIRGIN ISLANDS, at 1 (1992) [hereinafter THE BEST INVESTMENT DEAL] (stating "pure and simple, in the USVI, businesses can enjoy all of the benefits . . . of an offshore location, while operating with the security of a U.S.-mainland facility"); *see also* JOHN R. STEWART, JR., PUERTO RICO'S ECONOMIC

1. Investment Strategies and Entry Conditions

Discussions of the role and treatment of foreign investment generally trigger a fundamental policy debate regarding the advantages and disadvantages of an open-door policy versus a regulatory approach. This debate is as much an ideological and political issue as it is a matter of practicality.[23] The degree of regulation depends largely on the political and ideological orientation of the state concerned, as well as its economic circumstances. Generally, developed states have regulated foreign investment to some extent.[24] However, with respect to developed western states, actual regulation of particular foreign investment projects outside their strategic defense areas tends to be isolated rather than evidence of a more comprehensive regulatory approach.

In contrast to developed states, developing states historically have tended to adopt the regulatory approach, which involves a greater degree of screening incoming foreign investment projects. Investment statutes of developing states generally define the areas of the economy in which foreign investment is permitted.[25] Although the spread of privatization and structural adjustment programs has allowed foreign investment gradually to enter previously closed industries and sectors, developing states still restrict or prohibit outright foreign investment in certain sectors or subsectors of their economies. Stiff sanctions may be imposed on indigenous persons acting as "fronts" for foreign investors. Even in areas where foreign investment is permitted, the

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POLICY AND PERFORMANCE IN THE EMERGING GLOBAL ECONOMY (1992) (unpublished manuscript, on file with the author).

23. There is a whole spectrum of ideological positions on this subject, from Rostow's dynamic theory of production to the exponents of the dependency theory. *See generally* James C.W. Ahiakpor, *The Success and Failure of Dependency Theory: The Experience of Ghana*, 39 INT'L ORG. 535, 537 (1985); J. CARLSON, THE LIMITS TO STRUCTURAL CHANGE: A COMPARATIVE STUDY OF FOREIGN DIRECT INVESTMENT IN LIBERIA AND GHANA, 1950-1971 at 13 (1981); A.G. FRANK, CAPITALISM AND UNDERDEVELOPMENT IN LATIN AMERICA (1969).

24. *See generally* Harvey E. Bale, Jr., *The United States Policy Toward Foreign Direct Investment*, 18 VAND. J. TRANSNAT'L L. 199-222 (1985).

25. U.N. CENTRE ON TRANSNAT'L CORP. (UNCTC), TRANSNATIONAL CORPORATIONS IN WORLD DEVELOPMENT, 3RD SURVEY, at 77-78, U.N. Doc. ST/CTC/46, U.N. Sales No. E.83.II.A.14 (1983). *See also* U.N. DEP'T OF ECONOMIC AND SOCIAL DEV. WORLD INVESTMENT REPORT 1992: TRANSNATIONAL CORPORATION AS ENGINES OF GROWTH at 275-80, U.N. Doc. No. St/CTC/180, U.N. Sales No. E.92. II.A.19 (1992); UNCTAD, WORLD INVESTMENT REPORT 1993: TRANSNATIONAL CORPORATIONS AND INTEGRATED INTERNATIONAL PRODUCTION, Executive Summary, at 11, U.N. Doc. No. ST/CTC/156, U.N. Sales No. E.93II.A.14 (1993) (noting the spread of privatization in the developing world); RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS 742-58 (2d ed. 1992); JOHN H. BARTON & BART S. FISHER, INTERNATIONAL TRADE AND INVESTMENT 857-58 (1956).

government may impose limitations on ownership or management. For example, there may be compulsory private indigenous participation in varying percentages, depending on the level of participation or the amount of capital invested in the industry. Moreover, legislative stipulations about the minimum percentage of foreign capital that the investor must bring into the state may exist. In addition, there may be stipulations about the percentage of indigenous labor that must be employed, and at what levels specialized, technical, or managerial indigenous laborers must be employed. The investment statute may include other limitations on expatriate employment and establish a special tax or other fiscal burden to discourage expatriate employment.

Compared to the investment statutes of other developing states, those of the OECS states are liberal with regard to foreign investment. Nonetheless, the OECS states apparently accept the basic regulatory approach to foreign investment—a policy that seems justified by the stage of the region's economic development and the vulnerability of its individual states to abuse by purveyors of questionable investment projects.

St. Vincent and the Grenadines

The government of St. Vincent and the Grenadines has declared a policy to develop joint venture enterprises with foreign investors to the greatest extent possible, with an eye toward encouraging participation of local entrepreneurs in productive investments. The government particularly seeks to attract foreign investors "acquainted with the requirements of the market place," namely, those who have the required technologies at their command and whose business interests do not conflict with existing laws and national goals.[26] Because the government of St. Vincent and the Grenadines is committed to the free market system, it does not encourage monopolies or purely state-owned enterprises.[27]

The government emphasizes the establishment of industries that will develop significant foreign exchange, generate employment, increase domestic income, and contribute to the development of the technological and productive base of the state. The government is also particularly interested in foreign investments which ensure that labor regulations and work practices are consistent with international norms and standards. These general principles constitute the state equivalent of general

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26. ST. VINCENT'S INVESTMENT CODE, *supra* note 19, at 5.
27. *Id.*

entry conditions. The government of St. Vincent and the Grenadines therefore envisages the following areas as the most favored for foreign investment: manufacturing, especially in new, labor-intensive enterprises; agro-industries, focusing on processing of agricultural products; tourism, including hotel development and yacht charter facilities; and service industries, such as tele-informatics, data processing, and secretarial services.

Even though St. Vincent and the Grenadines has an open economy, the government, as a matter of policy rather than as a matter of law, perceives only a very limited role for foreign investments in certain sectors of the economy.[28] These areas include mass communications media, auditing and accounting, repair services other than automobile repair, and entertainment. The government expects that nationals will be given primary consideration in these businesses. In exceptional circumstances, however, foreign investment may be granted permission to invest in these areas. However, some areas of the economy are strictly reserved for nationals. These are normally the small-scale investments such as internal transport, automobile repair, quarrying, printing, advertising, services (such as hairstyling, shoe repair, catering, and tailoring), restaurants (excluding ethnic and specialty restaurants), internal distribution (except for highly sophisticated equipment and manufacturing), and handicraft and agricultural products meant exclusively for the local market. However, St. Vincent clearly does not have a rule precluding foreign investors from providing one hundred percent of the equity in any enterprise, except for those areas in which foreign investment is generally discouraged. Thus, the possibility of wholly-owned subsidiaries is clearly envisaged, particularly in enterprises that provide products for export to hard currency markets. Nevertheless, joint ventures are particularly encouraged.

St. Kitts-Nevis

The government of St. Kitts-Nevis does not appear to have articulated an elaborate policy on investments and industrial objectives for foreign investment. However, government documentation indicates that priority will be given to investors that are interested in certain aspects of agro-business,

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28. *Id.* at 11.

manufacturing, and tourism.[29] In agriculture and agro-based industries, the projects that will be highly promoted include: rum distilling, use of sugar byproducts, confectionery manufacture, fruit and vegetable preservation and processing, floriculture, production of fruits and vegetables for export, dairying, beef cattle production, small ruminant production, aquaculture, mariculture, deep sea fishing, and fish processing. Generous incentives are available to agro-based industries under the Fiscal Incentives Act.[30]

In the area of manufacturing, the current emphasis on industrial development seems to be moving toward light manufacturing of electronics, garments, and other products (previously the emphasis in industrial development was on sugar refining). For this reason, the government of St. Kitts-Nevis is currently promoting investment in export-oriented, labor-intensive, and domestic-based resource industries. The industries in which the government is promoting investment include data processing, electronic components (such as transformers, transducers, semiconducters, integrated circuits, and LCD displays), electronic calculators and watches, electrical fixtures and appliances, precision instruments (scientific measuring instruments), plastic products (for example, injection molding extrusions, blow-molding, PVC pipes), PVC lounge furniture, screen printing (of textiles and paper), jewelry, cosmetics, textiles (such as knitwear garments and lingerie), boat building (such as catamaran sailing kits and fiberglass or steel vessels), packaging toys, sporting goods, footwear, wind-power generating sets, moped assembly, nail and wiring drawing, rattan furniture, and solar energy projects. Investment in these manufacturing industries qualifies for tax concessions and other incentives under the Fiscal Incentives Act. A traditional non-manufacturing area in which investment is promoted is the hotel industry. Investors in the tourism industry also qualify for various types of concessions under the Hotels Aid Ordinance, as well as the Income Tax Ordinance.[31]

British Virgin Islands

The primary focus of foreign investment in the British Virgin Islands continues to be tourism, which represents about seventy percent of the capital inflow into the economy. However, the

29. ST. CHRIS. (KITTS) & NEVIS MINISTRY OF TRADE AND INDUS., BASSETERRE, INVESTING IN ST. KITTS AND NEVIS (1992) [hereinafter INVESTING IN ST. KITTS AND NEVIS].

30. *See infra* part III.B.

31. *Id.*

British Virgin Island's economy has been structurally diversified into construction, communications, and light manufacturing over the past five years.[32] These economic sectors are essentially linked to the tourism and financial sectors, the investment areas stressed by the government. Foreign investors are now being encouraged to invest in relatively new areas such as food processing, fish processing, motion picture and television production, beverage production, yachting construction and services, production of construction materials (such as windows, doors, and cement), construction and management of hotels and marinas, manufacture of perfume and cosmetics, manufacture of textiles and souvenir items, and data entry.

Montserrat

Montserrat, like the other states in the OECS, promotes foreign investment in particular areas of its economy. Montserrat seeks investment in spring water bottling, high technology, agricultural production (in similar areas as the other OECS states), tourist accommodation, light manufacturing, service industries, off-shore services (such as ship registration), insurance companies, and international business corporations. Montserrat also would like to serve as a tropical location for film and video production.[33]

Antigua

Antigua has also drafted a general policy, not backed by statute, of encouraging nationals to invest in certain areas and discouraging foreign investment in other areas.[34] The preferred areas for investment by nationals include tailoring, restaurants, and construction. This list is far from exhaustive as these areas are determined project-by-project and do not fall into any definitive categories. The basic issue is whether it is better to segregate the projects by sectors rather than by areas of investment. While some states take the latter approach, others employ both approaches.[35] Like the other OECS states, Antigua has a heavy emphasis on tourism, which is its largest industry.

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32. Interview with officials of the British Virgin Islands Investment Promotion Department and officials of the Tourism Department in Tortala, British Virgin Islands (Aug., 1992) [hereinafter British Virgin Islands Interview].

33. MONTSERRAT MINISTRY OF FINANCE, MONTSERRAT: BUSINESS INFORMATION (1992) (unpaginated) [hereinafter MONTSERRAT: BUSINESS INFORMATION].

34. *See generally* ANTIGUA AND BARBUDA INVESTMENT GUIDE, *supra* note 20 (encouraging foreign investment in manufacturing, banking, and tourism).

35. *See, e.g.,* Ghana Investment Decree, Professional National Defense Council Law 116 (1985).

However, there is a movement towards diversification. Antigua seeks to diversify light manufacturing and agro-business linked with tourism. In agriculture, a strong emphasis is placed on production for the export market. The government of Antigua also encourages investors interested in the fishing industry and other forms of marine development.

St. Lucia

In St. Lucia, the government emphasizes data entry as one area of potential investment. The government has targeted this industry as a priority area and has earmarked generous incentives for this particular business, including the establishment of an office park for data entry services, as a form of industrial estate by the National Development Corporation.[36]

The St. Lucia government pursues a program of agricultural diversification into nontraditional areas such as the development of fruits and exotic crops, cut flowers and foliage, root and timber crops, vegetables, and peanuts.[37] The St. Lucia government continues to emphasize tourism by attempting to attract visitors from major European markets in addition to its traditional tourist market, the United States. In the area of manufacturing, the government emphasizes diversification away from goods that are used in local and Caribbean markets (such as soap, coconut oil, and beverages) into a much wider range of products largely for export to international markets (such as clothing, electronic components, sporting goods, plastic, soft toys, costume jewelry, handicraft, and foot products).[38]

Grenada

Grenada emphasizes production for the regional export markets.[39] Similar to other Caribbean islands, Grenada emphasizes the following areas of agriculture: cut flowers; indoor and outdoor plants; exotic fruits and vegetables; winter crops; fish, shrimp, and crab farming; dried tropical fruits; fruit juices and jams; herbs and medicinal plants; and spices and cocoa. In tourism, Grenada seeks to promote new or renovated hotels and guest houses, health spas, sports, and entertainment. In light

36. *See* ST. LUCIA NAT'L DEV. CORP., INVESTING IN ST. LUCIA (1991) [hereinafter INVESTING IN ST. LUCIA]. *See* discussion *infra* notes 127-28 and accompanying text regarding industrial estates.

37. *Id.* at 1-2.

38. *Id.* at 4-5.

39. *See generally* FACT SHEETS NOS. 1-6, *supra* note 21; THE ISLE OF SPICE, *supra* note 21.

manufacturing, it seeks producers of sporting goods, wooden furniture and toys, health care products, costume jewelry, artificial flowers, hobby kits, and eyeglasses. Grenada is also interested in manufacturing television and computer parts, as well as assembling radios, phonographs, and office equipment. The government of Grenada is primarily concerned with attracting investment not only to expand employment and exports, but also to enhance the state's technological base and upgrade skills both at the factory and management level. Thus, investors who can provide these added benefits are particularly welcome in Grenada. Investors may own one hundred percent of a venture or establish joint ventures with local partners.

United States Virgin Islands and Puerto Rico

Because the U.S. Virgin Islands is a small island economy with few natural resources, the government continues to emphasize creating facilities for export trade and services, such as tourism. The government is committed to attracting investment in these areas and will promote growth primarily in export trade and services to generate income and employment.[40] Puerto Rico is also heavily committed to the same areas of investment. In addition, Puerto Rico seeks to become the focal point of foreign and mainland United States investment in the general Caribbean region.[41]

2. Scope of Legal Protection for Foreign Investment

One event in the investment process that foreign investors fear most, and which tends to dampen the investment climate, is nationalization. Although incidents of nationalization have become rare, states must provide for it in case it happens. Nationalization is an aspect of expropriation[42] because it results in the acquisition of other people's assets by the state.

There is a virtual absence of nationalization in the Eastern Caribbean subregion. In addition, the subregion accepts the

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40. U.S. VIRGIN ISLANDS, INDUST. DEV. COMM'N, BUSINESS GUIDE 13, 49-50 (1992) [hereinafter U.S. V.I. BUSINESS GUIDE]; Interview with officials of U.S. Virgin Islands Industrial Development Corporation (1992).

41. *See* STEWART, *supra* note 22.

42. T. Modibo Ocran, *Bilateral Investment Protection Treaties*, 8 N.Y.L. SCH. J. INT'L & COMP. L. 401, 410-14 (1987); T. Modibo Ocran, *Interregional Codes of Conduct for Transnational Corporations*, CONN. J. INT'L L. 121, 146-48 (1986). For a general discussion of the legal protection for foreign investment, see BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 833-60 (1991); *see also* NOYES E. LEECH ET AL., THE INTERNATIONAL LEGAL SYSTEM 1166-74 (3d ed. 1988); FOLSOM ET AL., *supra* note 23, at 742-58; BARTON & FISHER, *supra* note 23, at 857-58.

principle of compensation when nationalization is necessary. Very few of the investment statutes or codes analyzed in this Article articulate a specific means of compensation. These issues are normally left to the applicable law or to the adjudicatory body in the event of a dispute. In Antigua, Grenada, and most of the other OECS member states, investors are constitutionally protected from confiscation and arbitrary seizure of property.[43] In addition, the government of most OECS states have entered into investment protection treaties with foreign governments to guarantee these protections at the level of international law.[44]

B. *The Institutional Structure for Approving Foreign Investment Projects and Granting Incentives*

Each OECS state has established an entity that grants incentives to investors. Likewise, the U.S. Virgin Islands and Puerto Rico have similar institutions to encourage investment. The following paragraphs describe the specific agency responsible for investment approvals in the various states of the Eastern Caribbean subregion.

Dominica

Dominica has a one-stop agency for investment information, coordination, and project approval. This agency is the Dominica National Development Corporation (Dominica NDC). The Dominica NDC provides data and investment information, identifies business opportunities, arranges key contacts, handles the application for approval, and acts as a central clearinghouse for obtaining all necessary permits and licenses from other government ministries, agencies, and departments after approval has been given. Thus, the Dominica NDC has primary responsibility for the success of an investment from the initial contact with the foreign investor to the operational level. It does not, however, have the power to grant approvals for all aspects of

43. *See, e.g.,* ANT. & BARB. CONST., art. IX, § 1; GREN. CONST., art. VI, § 1.

44. *See, e.g.,* Treaty Concerning the Reciprocal Encouragement and Protection of Investment, May 2, 1986, U.S.-Gren., S. TREATY DOC. NO. 25, 99th Cong., 2d Sess. (1986); Treaty Concerning the Encouragement and Reciprocal Protection of Investments, March 25, 1986, St. Vincent-F.R.G., 1987 Bundesgesetzblatt II (BGB1. II), at 778 (F.R.G.), *reprinted in* ICSID INVESTMENT PROMOTION AND PROTECTION TREATIES, at 3; Agreement for the Protection of Investments, Jan. 18, 1983, St. Lucia-U.K., No. 25 (1983), 8872 & comm. d, *reprinted in* ICSID INVESTMENT PROMOTION AND PROTECTION TREATIES; *see also* PATRICK ROBINSON, GUIDELINES FOR MEMBER STATES OF THE ORGANIZATION OF EASTERN CARIBBEAN STATES IN NEGOTIATING BILATERAL INVESTMENT PROTECTION TREATIES (1990) (unpublished manuscript, on file with the author).

a project's operations. Certain responsibilities remain with the respective government ministries and departments for particular investment areas, such as land acquisition and immigration.

St. Vincent and the Grenadines

In St. Vincent and the Grenadines, two government institutions are of vital importance for the screening and approval of investments. These institutions are the Development Corporation (Devco) and the Ministry of Agriculture, Industry, and Labor. Even though Devco has been described as a one-stop shop for promoting local and foreign investment, it does not have the powers of approval normally associated with one-stop investment centers in other parts of the world. Essentially, Devco appears to be a coordinating and monitoring center within the government machinery for investments.[45] Devco was established in 1970 and its prescribed role is actually broader than the promotion of foreign investment. It also functions as a development bank, through which it provides loans to the manufacturing, tourism, and agricultural sectors of the economy of St. Vincent and the Grenadines. In addition, Devco develops, constructs, and manages industrial estates as part of the incentives and promotional measures offered by the government to foreign investors. The actual approval of foreign investment applications and fiscal incentives is handled by the Ministry of Agriculture, Industry, and Labor, which processes the investment applications in conjunction with Devco. Devco's basic role in the application process is to assess proposals and to make the necessary recommendations for approval and fiscal incentives to the Ministry.

In St. Vincent and the Grenadines, there is a separate ministry in charge of applications for investments in hotel development: the Ministry of Trade and Consumer Affairs. This Ministry's powers are conferred by the Hotel Aid Act.[46] Under the Hotel Aid Act, all applications for the construction, expansion, or improvement of a hotel, guest house, or apartment are submitted to the Ministry, which makes recommendations and forwards them to the Cabinet of St. Vincent and the Grenadines for approval.

45. *See* DEVCO, ST. VINCENT AND THE GRENADINES (1992) (unpaginated).
46. Hotel Aid Act, 1988 Act No. 16 (St. Vincent).

St. Kitts-Nevis

The screening function in St. Kitts is performed by the Ministry of Trade and Industry.[47] The ministry assists during the research gathering phase, provides investment information and other data, identifies investment opportunities, arranges on-site consultations, and processes applications for approval of projects and fiscal incentives.

British Virgin Islands, Montserrat, and Antigua

The government agency that handles investment applications in the British Virgin Islands is the Investment Promotion Department of the Chief Minister's office.[48] In Montserrat, the Economic Development Unit of the Ministry of Finance is the main coordinating agency within the government for screening and accepting applications for foreign investment.[49] In Antigua, the Industrial Development Board functions as a focal point of foreign investment and reports directly to the Cabinet.[50]

St. Lucia

In St. Lucia, the National Development Corporation (St. Lucia NDC) is the agency that acts as the investor's main link to government ministries. However, it is little more than a coordinating unit because the major decisions on the approval and granting of incentives appear to be vested in the government ministries. For example, the Ministry of Trade of St. Lucia is responsible for granting fiscal incentives, while the St. Lucia NDC is concerned primarily with the discussion of projects with investors, identification of suitable plant locations, and the building and allocation of factory space within its industrial estates.[51]

Grenada

In 1985, Grenada established the Industrial Development Corporation (Grenada IDC) as a statutory corporation. The main functions of the Grenada IDC include stimulating, facilitating, and assisting the establishment and development of industry in Grenada. The Grenada IDC functions as a one-stop contact point for overseas investors and helps them to obtain clearance from

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47. *See* INVESTING IN ST. KITTS AND NEVIS, *supra* note 29.
48. *See* British Virgin Islands Interview, *supra* note 32.
49. *See* MONTSERRAT BUSINESS INFORMATION, *supra* note 34 (unpaginated).
50. *See* ANTIGUA AND BARBUDA INVESTMENT GUIDE, *supra* note 20, at 23.
51. *See* INVESTING IN ST. LUCIA, *supra* note 36, at 5-6.

other government agencies by providing advice and assistance on matters such as environmental considerations, land, utilities, and work permits.[52]

United States Virgin Islands

The status of the U.S. Virgin Islands as an unincorporated territory of the United States puts it in a qualitatively different category from the other OECS members as far as the rules for establishment of foreign businesses are concerned. While the U.S. Virgin Islands has an elected governor in charge of internal affairs and a local legislature, most United States laws governing businesses apply in the Virgin Islands. There is also a United States district court that has jurisdiction in all cases arising under the United States Constitution, treaties, and federal laws, and original jurisdiction in all cases in which exclusive jurisdiction has not been conferred upon the lower courts of the U.S. Virgin Islands.[53]

One result of this government structure is that, as is the case with the rest of the United States, there are very few rules concerning the establishment of foreign corporations within the U.S. Virgin Islands. In the United States, foreign corporations are registered and allowed to do business like any domestic corporation except in very special areas such as defense, real estate, and banking.[54] Even though the United States has a presidential commission that is supposed to monitor foreign investment in a general sense, it is not like the screening agencies that are generally encountered in the Third World or in the Eastern Caribbean states. Business and commerce in the U.S. Virgin Islands are regulated by the Uniform Commercial Code,[55] and many other aspects of doing business are similar to those found in a state or municipality of the United States.

Thus, with respect to any foreign investment in the U.S. Virgin Islands, one can establish and register a corporation by filing its articles of incorporation with the Lieutenant Governor's office in accordance with the local legislation.[56] A person establishing a corporation in the U.S. Virgin Islands must also pay appropriate filing fees. In addition, domestic and foreign corporations and other business associations must apply for and obtain a business license from the Department of Licensing and

52. *See* GRENADA FACT SHEETS, *supra* note 21.
53. *See* THE BEST INVESTMENT DEAL, *supra* note 22 (unpaginated).
54. *See* Bale, *supra* note 24.
55. *See* V.I. CODE ANN. tit. 11a § 1-101 *et. seq.* (1994).
56. General Corporation Law, V.I. CODE ANN. tit. XIII, § 3 (1992).

Consumer Affairs. Thus, apart from the agencies for the registration and issuance of business licenses, there is no screening agency reviewing incoming foreign investment in the U.S. Virgin Islands. However, the Industrial Development Commission (IDC) grants incentives for businesses based on need. The IDC, organized under Title 29 of the U.S. Virgin Islands Code, is the closest thing to a screening agency in the other OECS states. The main purpose of the IDC is to promote growth, development, and diversification of the U.S. Virgin Islands economy by granting incentives.[57] To qualify for incentives, the investor must be an actual investor in the enterprise for which industrial development benefits are sought, and may not be merely a contractor, subcontractor, or other person or corporation acting as an agent.

Puerto Rico

As in the case of the U.S. Virgin Islands, the rules for foreign investment in Puerto Rico correspond to the rules of the United States in general. That is, there are very few special procedural requirements for foreign investments beyond the registration and licensing of corporations that is generally required under United States law. Thus, in Puerto Rico there is no screening agency that must approve foreign investment except to the extent that a foreign corporation, like a domestic corporation, seeks tax and other incentives under the Puerto Rico Industrial and Tax Incentives Act of 1987.[58] For investors that seek these incentives, the Office of Industrial Tax Exemption is the government agency that processes applications for final approval by the Governor of Puerto Rico.

British Virgin Islands

For the investor seeking to qualify in the British Virgin Islands as an investor in "pioneer services and enterprises" for the purpose of benefiting from certain tax and other fiscal incentives, there are special procedures.[59] "Pioneer enterprises" essentially are the areas of the economy that the government wants to emphasize, such as construction, communications, and light manufacturing. Tourism and related hotel services are also

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57. The IDC has offices in New York, Washington D.C., Chicago, Los Angeles, and Miami.

58. Industrial Incentive Act, 13 L.P.R.A. § 255 et seq. (1991).

59. Pioneer Services and Enterprises Ordinance, (1966) (B.V.I.).

pioneer industries but are covered under a separate statute, the Hotels Aid Ordinance.[60]

Under the Pioneer Services and Enterprises Ordinance,[61] the state's Administrator in Council may confer pioneer investor status on any investor that applies for recognition if the Administrator in Council is satisfied that the services or enterprises will generate products that are in great demand in the British Virgin Islands. The application should specify the locality in which the investor proposes to establish the service or industry and the date that the investor plans to begin production of the pioneer product or goods in marketable quantities. Recognition as a pioneer investor qualifies an investor for the incentives listed in the Ordinance. A pioneer investor corporation may lose its status if it fails or neglects to commence construction of the pioneer enterprise before the construction date, unless it satisfies the Administrator in Council that its inability to begin production resulted from circumstances beyond its control and that there is a reasonable prospect of starting construction within a short period of time.[62] Under the Hotels Aid Ordinance, the Administrator in Council is the officer that grants licenses to hotel investors and developers to import building materials and hotel equipment into the British Virgin Islands.

1. Procedures and Criteria for Evaluation of Projects

Dominica

As part of Dominica's procedure for approval of a project, the Dominica National Development Corporation (NDC) and other Dominican ministries, agencies, and departments require information from all investors.[63] This information includes the name of the applicant; whether it is a natural person or a corporation; the applicant's country of origin; the nature of the business for which an application is being made; the type of products to be produced; the cost and source of inputs; the proposed locality of the business; the list of requirements from Dominica for start-up, including requirements for land, factory space, water, and electricity; intended structure of ownership and directorship; expected start-up date; the amount of capital to be invested; the amount of equity capital envisaged; the amount of cash required from local banks; the anticipated physical output

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60. Hotels Aid Ordinance, No. 1 (1967) (B.V.I.).

61. Pioneer Services and Enterprises Ordinance, *supra* note 59.

62. *Id.* § 8-1. Reference to the Council is a reference to the Executive Council which has the governor as chairman.

63. *See* Dominica Investment Promotion Materials, *supra* note 17.

and sales; specific markets and respective shares of such markets; and the number of persons expected to be employed in the first few years.[64] There is no stated period of time within which a decision on approval or denial of a project must be reached or communicated to the applicant.[65] This approach is typical in the Eastern Caribbean subregion.

St. Vincent and the Grenadines

In St. Vincent and the Grenadines, the application for approval of a project is subject to certain general criteria once the papers are submitted to Devco and the Ministry of Agriculture, Industry, and Labor. The basic criterion is that projects that will make the greatest net contribution to the economy are preferred. A number of factors are applied to a proposed project in order to determine whether and how much it will contribute to the economy of St. Vincent and the Grenadines.[66] For example, the extent of local value added is a basic factor that is considered.[67] The government agencies also consider the amount of employment that the proposed project will generate and the viability of the enterprise. Viability factors include the amount of capital investment, the sources of funding, the rate of return on investment, the marketability of products, the technical and managerial capabilities of management, and all other factors that will increase the viability of the project. The government of St. Vincent and the Grenadines favors projects that will use indigenous input—such as local raw materials—as a way of linking the project to other sectors of the economy. The ability of the project to increase foreign exchange earnings, particularly by manufacturing for the market beyond the Eastern Caribbean Common Market, constitutes a very positive factor because of the net inflow of foreign exchange. As an additional factor, the government considers the depth of processing involved. Thus, simple assembly-type industries proposed by foreign investors are not encouraged in St. Vincent and the Grenadines unless accompanied by a transfer of suitable technology and excellent employment opportunities. Environmental considerations also

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64. *Id.*

65. *Id.*

66. *See* ST. VINCENT'S INVESTMENT CODE, *supra* note 19.

67. "Local value added" is determined by the value of the finished or intermediate goods minus the following items: 1) the cost of imported raw materials, components, parts, fuels, and services; 2) wages and salaries paid to foreign nationals; 3) profits and dividends, interest, management charges, and other income payments to nonresidents both natural and corporate; and 4) depreciation of imports of plant machinery and equipment.

may be considered. Industries whose operations may prove hazardous to human and animal health or destructive to plant life and the general environment are not encouraged. The government also considers whether the project will impart new and improved adaptable technology and technical skills to the local work force.

St. Kitts

In contrast to St. Vincent and the Grenadines, St. Kitts does not have elaborate criteria for project approval. However, an examination of the application forms indicates the factors that will be considered before approving a project or granting fiscal incentives.[68] In addition to considering whether the proposed project is in an area of priority investment, the relevant St. Kitts ministry will also consider the applicant's proposed program for training local personnel, the capability of the management of the proposed factory in the particular line of production, as well as the availability of capital (both equity and debt) to the foreign investor.

British Virgin Islands

To do business in the British Virgin Islands, a prospective investor must first obtain and complete a trade license application from the designated department. The investor also must provide a number of other documents, including a financial statement and a comprehensive summary of the investment proposal.[69]

Montserrat and Grenada

The policy of the Montserrat government is to encourage projects that not only would provide employment, but also would enhance the export-earning or foreign exchange-savings capability of the state.[70] Potential investors seeking approval for their project as well as an incentive package would submit their investment proposals to the board, which does a technical appraisal and makes recommendations to the Cabinet. The Cabinet approves the project and grants specific incentives. Similarly, in Grenada, all foreign individuals or firms wishing to

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68. These forms, prepared in accordance with the requirements of the Fiscal Incentives Act, were furnished by the Ministry of Trade and Industry.
69. *See supra* text accompanying note 32.
70. MONTSERRAT: BUSINESS INFORMATION, *supra* note 33.

invest in Grenada must submit applications to the Grenada IDC for processing.[71]

United States Virgin Islands and Puerto Rico

In the U.S. Virgin Islands, a seven-member commission reviews all applications submitted to the Industrial Development Commission (IDC) for approval and benefits. When the commission receives a completed application, a public hearing is held, after which the IDC recommends either approval or denial of the project. Such applications are made subject to the governor's approval. Upon approval, the investor and the IDC enter into a contract or certificate of approval setting forth tax benefits and the period of duration.[72]

Corporations seeking tax exemptions under Puerto Rico's Tax Incentives Act must submit a proposal to the Office of Industrial Tax Exemption (the Office) by filing certain applications. The Office's director may then hold public or administrative hearings and require applicants to present evidence to justify the requested exemption.[73] Once the exemptions are granted, a decree in the nature of a contract is signed between the recipient and Puerto Rico. The contract includes the terms and conditions set forth and agreed upon by the Office. In determining whether to approve the exemptions, the Office considers variables such as the possible creation of jobs, which would facilitate the social and economic development of the state, as well as the circumstances related to each particular project. A business granted such tax exemptions must commence commercial operations within a year of the date the tax exemption contract is signed, unless the commencement date is extended at the request of the business for just cause.

2. Post-Approval Licenses and Additional Establishment Procedures Required in Certain States

St. Vincent and the Grenadines

In St. Vincent and the Grenadines, the investor, after obtaining the basic approval for the project, must go through a separate procedure for obtaining the land required for the project. The holding of land by foreigners is governed by the Aliens Land Holding Regulations. These regulations require the investor to

71. *See* GRENADA FACT SHEETS, *supra* note 21.

72. *See* U.S. V. I. BUSINESS GUIDE, *supra* note 40, at 50. The tax benefits last from ten to fifteen years, depending on the location of the business. *Id.*

73. Industrial Incentives Act, *supra* note 58, 13 L.P.R.A. § 255i.

obtain a license from the government through an application made to the Ministry of Foreign Affairs. The type of procedure imposed depends on the size of the land. The procedures for acquiring more than one acre are more detailed than if the investor seeks less than one acre of land. If more than one acre is desired, the investor must submit a development plan for the whole area, including its physical and architectural aspects, as well as details on finance and the projected labor force.[74]

Antigua and Grenada

In Antigua, once an investment proposal is approved, officers of the Industrial Development Board work closely with the investor to help the investor obtain all necessary permits for the start-up of a factory.[75] Like some of the other islands, Grenada has an Alien Land Holding Act, which requires foreign investors or persons wishing to buy real property in Grenada to apply to the government for a license.[76]

3. Monitoring Approved Projects and Incentives Granted

While there is no harmonized or uniform investment code for the OECS member states, there is a Uniform Fiscal Incentives Act (Uniform Act), which seeks to implement treaty provisions contained in the Agreement Establishing the Eastern Caribbean Common Market (CARICOM or Common Market). Under the Uniform Act, discussed more fully in Part III, a number of provisions empower the government of an individual state to monitor the performance of an enterprise that has been granted incentives for the production of an approved product. For example, an approved enterprise that imports goods from outside the CARICOM area, or purchases within the common market any articles for which exemptions for custom duties have been granted, is required to keep a record of such articles and to permit the controller of customs of a particular state to inspect the records and to have access to the factory or warehouse for purposes of examining the articles at any reasonable time.[77]

OECS states monitor approved projects and grant incentives in various ways. As already noted, there is a restriction on the sale or disposal of articles that have been purchased duty-free in St. Lucia.[78] When the foreign company behind an approved

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74. *See* ST. VINCENT INVESTMENT GUIDE, *supra* note 19.
75. *See* ANTIGUA AND BARBUDA INVESTMENT GUIDE, *supra* note 20.
76. *See* GRENADA FACT SHEETS, *supra* note 21.
77. Fiscal Incentives Act, No. 15, § XIII (1974) (St. Lucia).
78. *Id.* § IX.

project fails to commence construction of a factory on the day agreed upon, the Cabinet of St. Lucia may issue a notice requiring either the commencement of the construction within thirty days or proof by the company that the failure or neglect is attributable to a cause beyond its control and that there is a reasonable prospect that construction will begin within a reasonable period of time.[79] In addition, a factory that has been approved in St. Lucia for a particular product cannot be used for the manufacture of anything other than the approved product within ten years of the date of its approved status, unless the enterprise ceases as an approved enterprise and all funds owed to the controller of customs have been paid.[80]

The responsible minister is empowered to appraise the performance of the approved enterprise for the purpose of determining whether any change in its classification is necessary three years after production commenced, and thereafter at intervals of two years until the cessation of all benefits under the Act.[81] The transfer of the status of an approved enterprise to another enterprise can be done only by the Cabinet through a published notice. The Cabinet will transfer this status only if the approved enterprise has merged with or is taken over by another enterprise or when, in their opinion, it is equitable in the public interest to do so.

In Montserrat, the government reserves the right to review the performance of the investor after permission to commence a project has been granted. The first review is conducted three years after the day production began, and subsequent reviews take place at two-year intervals until the expiration of the tax or other fiscal incentives.

Every business enjoying benefits in Puerto Rico is required to file an annual income tax return with the Secretary of the Treasury of Puerto Rico. This tax return is separate from any other return that must be filed in order to comply with the income tax act in force.[82] Exempted businesses are also required to keep accounting records related to their operations in Puerto Rico separate from other accounts and to file duly completed reports and surveys that might be needed for the preparation of general statistics and economic studies. The economic development administrator may request these documents from time to time.

Every beneficiary of a Puerto Rican tax incentive is expected to carry out its exempt operations substantially as stated in its

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79. *Id.* § XVII.
80. *Id.* § XVIII.
81. *Id.* § XIX.
82. Industrial Incentives Act, *supra* note 73, 13 L.P.R.A. § 255j.

application, except when amendments have been authorized by the governor. Any party who makes false or fraudulent statements regarding a tax exemption application or grant is deemed guilty of a felony and, upon conviction, is punishable by a fine of not more than ten thousand dollars or imprisonment for a term of not more than five years or both, at the discretion of the court.[83]

C. *A Critical Assessment*

A comparative study of investment authorities and agencies in several regions of the world shows that there are three basic types: the centralized and authoritative full one-stop center; the one-stop project approval agency that also functions as a coordinating agency within the government machinery; and the simple information coordinating agency. A centralized and authoritative agency, a "one-stop shop," may not necessarily have all-encompassing authority. Furthermore, the term does not mean the same thing throughout the Eastern Caribbean subregion. In some cases, the so-called one-stop shop may be better described as a corridor leading to a multi-roomed investment screening suite. The following table provides an overview of the various types of agencies used by the states of the Eastern Caribbean region, Puerto Rico, and the United States Virgin Islands.

83. *Id.* § IX, DD & G.

TABLE III
CARIBBEAN INVESTMENT SCREENING AUTHORITIES[84]

State (institution)		Type of Institution	Scope of Activity
1.	Dominica (NDC)	Quasi-Centralized	Establishment & Incentives
2.	St. Vincent & The Grenadines (Devco)	Coordinating	--
3.	St. Kitts-Nevis (Ministry of Trade and Industry)	Quasi-Centralized	Establishment & Incentives
4.	St. Lucia (NDC)	Coordinating	--
5.	Grenada (IDC)	Quasi-Centralized	Establishment & Incentives
6.	Antigua (IDC)	Quasi-Centralized	Establishment & Incentives
7.	British Virgin Islands (Chief Minister's Office)	Quasi-Centralized	Establishment & Incentives
8.	Montserrat (Ministry of Finance)	Quasi-Centralized	Establishment & Incentives
9.	United States Virgin Islands (IDC)	Quasi-Centralized	Incentives
10.	Puerto Rico (Office of Industrial Tax Exemption and Fomento)	Quasi-Centralized	Incentives

In general, the investment agencies in the OECS states are committed to a one-stop approval and coordinating agency that is within the government machinery and is charged with various

84. A fully centralized agency is a one-stop shop with full powers to approve a project, to grant incentives, and to make other consequential approvals needed for operational aspects of the project (such as land acquisition, immigration, and labor permits).

A quasi-centralized agency is a one-stop shop vested with power to approve a project or to grant incentives, but the agency has little more than coordination functions regarding approvals for various operational aspects of the project (such as acquisition, immigration, and labor permits). Other government agencies retain these functions.

A coordinating agency is created for general investment promotion purposes, including the preparation and distribution of information on investment opportunities, regulations, and policies. A coordinating agency also assists applicants in obtaining establishment approval and incentives as well as other operational approvals within a bureaucracy with diffused centers of authority.

activities associated with investment promotion, including image-building and investment services. The agencies endeavor to present their state as a good place to invest, to generate investment in specific areas, and to encourage existing investors to reinvest in the state rather than move to new investment sites.

However, even the so-called centralized one-stop investment agencies cannot and should not exclusively handle all of the activities involving existing investment, promotion, and attraction of new foreign investment. In particular, the area of investment services (which includes the implementation of agreements reached with investors and assistance in the establishment of projects) demands participation of critical government executing agencies, such as the central bank and the authorities responsible for land acquisition, immigration and labor permits, company registration, and tax industrial licenses. Accordingly, the investment agency's most desirable role is to serve as a coordinator and liaison while carrying out some of the regulatory activities on its own. In this way, the government, through the screening agency, can tap all of the relevant talents and experience in the ministries while avoiding unnecessary duplication and institutional in-fighting. Indeed, the functions of the investment agency and the organizational structure of the government and its committees should reinforce the coordinating concept of the investment agency, while maintaining the advantages of a "one stop" unit.

The legal status of the investment screening agencies differs from state to state. In many states around the world, the investment screening agency is established as a corporate body with an autonomous existence and a separate legal personality from the ministries and other government agencies. There are, of course, advantages and disadvantages with the corporate body idea. The advantage of making the screening agency a corporate body is the relative autonomy and independence it provides the screening agency. Despite the fact that many states have investment screening agencies that are corporate bodies, it is not unheard of to have an investment body without a legal personality. Given the size of the economies of most of the OECS states and the size of their ministries and government agencies, most OECS states are well served by making their investment centers a division of ministries. No particularly great loss has been experienced because they were not made corporate bodies. Additionally, it is probably dysfunctional to maintain diffused centers of authority for investment screening in OECS states because the governmental bureaucracies in virtually all of these states are small.

It is very important that the screening agency's governing board has éstablished committees, comprised of members and non-members of the board, that are assigned specialized topics and tasks to aid the board in discharging its functions. The objective of this system is to reach beyond the membership of the technical secretariat and the governing board to tap the reserve of technical knowledge and experience within the government, the private sector, and the state as a whole. Private sector involvement in committees of screening agencies is already in place for most of the OECS states.

These committees should focus on three things. First, the committees should be concerned with the development of long-term investment policy for certain priority sectors of the economy and subsequent implementation or monitoring by the secretariat of the agency. Second, the committees should focus on the development of a long-term policy concerning certain subjects or issues (as distinct from priority sectors) that feature investment promotion and screening regardless of the economic sectors involved. For example, investment should be promoted in technology transfer and sources of investment finance. Third, the committees should systematically prepare for government negotiations with potential investors in complex, large-scale projects in order to build up a body of readily available technical knowledge and experience in negotiation style and techniques.

In the OECS states, the agencies themselves could institute committees on fisheries, agricultural investments, tourism investment, and manufacturing. The agency's committees should focus on areas such as investment promotion strategies, transfer of technology, and investment negotiations. The membership of the committees could consist of representatives from relevant ministries and agencies whose direct responsibilities deal with the particular committee's mission and other individuals that the board approves on the recommendation of the head of the secretariat. There is naturally a need for important technical skills in the secretariat of the agency. There is also a constant need to ensure the availability and training or retraining of the required personnel as part of the preparation for obtaining the most effective output from investment negotiations.

None of the statutes and regulations reviewed attempt to state a specific time period within which agencies must approve or reject an application for a foreign investment project. The absence of any specified approval period naturally causes uncertainty on the part of potential investors and may result in a state's loss of investment. Most of the delays tend to occur at the level of the investment authority's governing body. States often use the safe and elastic phrase "within a reasonable time" to

define the limits of the approval period. Some states outside the Eastern Caribbean subregion have attempted to resolve the problem of inordinate delay by inserting a time period accompanied by a "default clause." For example, some states provide that all decisions of the governing board must be communicated to the secretariat of the investment agency within six weeks of the submission of the technical recommendations to the secretariat; if no decision is communicated within six weeks, the recommendations of the secretariat (for approval or denial) are deemed to have been accepted by the governing board.[85]

To strengthen the output of the screening agencies, strong information systems need to be built as part of the secretariat. Such an information system will enable the center or agency to serve as a clearinghouse, a source for the private and public sectors of all information concerning investment activities of foreign corporations in each of the states. In particular, the following functions should be supported by an adequate information system: (1) investment promotion, (2) approval applications, (3) screening-appraisal procedure, (4) registration, and (5) monitoring or reporting. Regarding investment promotion, a constant flow of information should be maintained on all aspects of the local investment environment such as the workforce, wages and salaries, tariffs, the legal system, taxation, customs, land availability, infrastructure, education, housing, transportation, energy, and telecommunications. Information on identification of potential investment sites and the basic economic indicators is also needed. In addition, a register of local businesses should be organized by line of business, items of production, location, ownership, type of business, and capacity.

As part of the information on screening and appraisal, an information base on national and international sources should be established. The international sources should include a collection of business directories from all over the world, on-line access to international commercial databases, and access to United Nations databases via telex or fax. An information base for monitoring would require procedures established in close cooperation with other governmental institutions. A reporting system should also be created to support the agency's functions of proposing policy formulations and analyzing foreign investment in a particular state.

The investment appraisal process should continue to stress not only the eligibility of investments under their operative policies or statutes, but also matters such as the legitimacy of the

85. *See, e.g.*, Ghana Investment Decree, No. 42 (1974) (N.L.C.D.).

applicant and its principals overseas, the desirability of the project, the project's viability, and commercial or technological lock-in. The investment appraisal process should also consider the acceptability of any accompanying terms of management contracts, technical service contracts, transfer of technology payments, and payments for trademarks and patents. The application should adequately distill this information from potential investors.

An important issue often raised is the degree of "transparency" of the applicable investment code or statute and subsidiary legislation in the states that have adopted a regulatory approach to foreign investment. Commentators have expressed concern that in every scheme which regulates foreign investment, there is an "operational code" that runs in tandem with the legal code. Though neither written nor published, these operational codes are frequently more important for the prospective investor than that which is written or enacted.[86] This situation leads to great uncertainty and vests bureaucrats with the kind of discretion that easily leads to inefficiency or corruption, or both. The rules are left unclear in meaning and in scope of application. Worst of all, this practice makes it difficult to characterize in an objective manner who benefits from the "operational codes." One approach to avoiding undefined rules is to reduce regulatory provisions to the minimum level required to protect the Caribbean economy and society at this particular stage of development and to render those rules and regulations that must be kept in place as transparent as possible.

Furthermore, efforts should be made to remove legal and regulatory provisions that unduly discriminate against foreign investors. While there are strong arguments for facilitating the full participation of nationals in the investment process and for protecting them from possible exploitation from overseas companies, the ultimate objective should be to limit those areas of differentiation among the investment laws of the region to the minimum dictated by necessity.

There is always the need to carry out periodic reform of investment laws. In this area, the overall objectives should be: 1) to eliminate legal rules and administrative practices that unduly increase private sector costs and undermine the utility of incentive regimes; 2) to eliminate certain practices related to the tax system, such as lengthy approval procedures for investment applications or permits to carry out normal business activities; and 3) to continue to provide legal protection for foreign

86. *See* FOLSOM ET AL., *supra* note 25, at 762-68.

investment through constitutional provisions and international agreements dealing with nationalization, compensation, and international dispute settlement. Ideally, the OECS states should aim to produce a harmonized investment establishment statute, drafted in the spirit of the now-operative Fiscal Incentives Act.

III. FOREIGN INVESTMENT LAWS: A COMPARATIVE PERSPECTIVE ON FISCAL AND OTHER INCENTIVES

A. *Introduction*

Among the projects or industries receiving establishment approval from the local investment screening or coordinating agency, some seek additional fiscal and other industrial incentives. The availability of incentives depends on the nature of these industries and, in particular, whether they fall into priority sectors of the economy. These incentives may only apply to new investments and the expansion of existing ones. As already indicated, this type of incentive is designed to help an industry in the initial years of its operation when there are recognized hardships, such as unfair domestic or global competition from older or better-positioned enterprises. Economic incentives thus become a selective tool that the state can use to guide and control the flow of capital in certain predetermined areas.

The general criteria or qualifying standards for granting some or all of the designated incentives are invariably related to the economic objectives or industrial goals set forth in investment laws or policies, and the scope of the priority areas explicitly or implicitly described therein. The most important criteria viewed in relation to the project's specific contributions to the economy include: export promotion, diversification of the economy or trade patterns, rural development, use of local raw materials, extent of value-added manufacturing, job creation, training programs, possibilities for transfer of technology, contribution to a state's balance of payments, effective import substitution, and investment in stipulated sectors such as mining, agriculture, and tourism.

The range of incentives encountered in OECS states includes benefits such as corporate income tax holidays; capital allowances and other forms of tax-related depreciation; tax-free dividends to shareholders; tax deductions for research and development; exemption from property taxes; exemptions from many forms of indirect taxes; export incentives; repatriation or transfer of

capital; dividends and other forms of payments; external payments; and tax privileges for expatriate personnel.

The relevant investment statutes or fiscal incentives acts do more than enumerate the scope of fiscal and other economic incentives available and the criteria for their receipt. Often, the legislation subdivides incentives in such a way that only investments in certain areas can be granted some of the farther reaching incentives. In other words, there are investment statutes that create special fiscal regimes for different categories of enterprises.

B. *Fiscal Incentives*

A great deal of harmonization exists in the package of incentives in operation in the OECS states because of the Agreement Establishing the Eastern Caribbean Common Market (OECS Agreement).[87] Article XV of the OECS Agreement calls for the progressive harmonization of the fiscal policies of the member states. This provision is strengthened by two others: Article XIII, which refers to a common policy toward development planning and industrial development (including fiscal and other incentives to industry); and Article XIV, which calls for the coordination of monetary policy, such as the common treatment of non-resident capital. Based upon these treaty provisions, the secretariat of the OECS proposed a model Fiscal Incentives Act, which has been adopted as domestic law in nearly all of the OECS states.[88] It should be noted that the uniform Fiscal Incentives Act applies only to the manufacturing and processing industries, including deep-sea fishing and shrimping. It does not cover investments in agriculture and tourism, which come under a different regime of incentives under different statutes[89] of the Eastern Caribbean states.

Grenada has a Fiscal Incentives Act with provisions similar to those in the St. Lucia Act.[90] Grenada's Act, like the Fiscal Incentives Act of other OECS states, excludes agriculture and tourism from its purview.[91] Antigua and Barbuda follows the

87. Agreement Establishing the Organization of East Caribbean States, June 18, 1981, *reprinted in* 20 I.L.M. 116, 1184, 1189 (entered into force July 4, 1981). Member states include: Antigua-Barbuda, Dominica, Grenada, Montserrat, St. Kitts-Nevis, St. Lucia, and St. Vincent and the Grenadines.

88. For example, St. Lucia enacted this Act in 1974. *See* Fiscal Incentives Act, *supra* note 77.

89. *See infra* part III.C. for definition of "industry" under the Act.

90. GRENADA INDUS. DEV. CORP., INVESTMENT PROMOTION MATERIAL (1992) (on file with the author).

91. Fiscal Incentives Act (1974) (Grenada).

Uniform Act and enacted its own Fiscal Incentives Act in 1975; the terms of this Act are similar to the terms of St. Lucia's Act. Montserrat also has a similar Fiscal Incentives Ordinance.[92] St. Kitts-Nevis has adopted the uniform statute on fiscal incentives under local statute number 17 of 1974. A similar Act is also in force in St. Vincent and the Grenadines.

While there is a great deal of uniformity under the Uniform Act or its local equivalent, it is incorrect to assume that there is harmonization in all areas of investment law in the OECS states or in the CARICOM area in general. Moreover, there are some important differences in sectors other than manufacturing and industry. Nonetheless, it is clear that incentives packages generally are aimed at the industries or enterprises that have a high, local value-added content, make a generous contribution to foreign exchange earnings or savings, create quality employment, are export-oriented, or employ technology that has not been previously introduced into the state.

1. Criteria for Granting Incentives

In granting an approval for an enterprise or a product under the OECS uniform Fiscal Incentives Act, the relevant agency of the particular OECS state considers, among other things, the number of enterprises already manufacturing or about to manufacture the approved product, the capital of the enterprise, and the overall benefits of the enterprise to the economy.[93] Manufacturers of an approved product that want to benefit from the Incentives Act apply to the minister responsible for industries, whose officials perform a technical appraisal of the application and make recommendations to the Cabinet of the particular state. When approval is given, it is published in the *Gazette*. The order giving approval specifies the date of commencement of construction or production.

In the U.S. Virgin Islands, regulations made under the statute that created the Industrial Development Commission (IDC) provide a number of incentives for eligible types of investment activities.[94] The IDC undertakes its own appraisal based on certain criteria, assuming that a registered corporation has a project that needs or requires business incentives. Eligible types of activities include: tourism-related investments (particularly hotels and guest houses, transportation services,

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92. *See* MONTSERRAT BUSINESS INFORMATION, *supra* note 30 (unpaginated).

93. Fiscal Incentives Act, *supra* note 77, § 62.

94. Industrial Development Program, V.I. CODE ANN. tit. 29 § 701 *et. seq.* (1994).

and selected recreational facilities); production in agriculture and manufacturing (including the processing of raw materials, assembly operations, utilities, and mariculture); service businesses primarily providing service to customers located outside the U.S. Virgin Islands (such as international commercial distribution, trading services, and international public relations services); economic, scientific, or management consulting services; and optical and opthamological laboratories.

In addition, the IDC may grant benefits to other industries or businesses if it determines that the activity would benefit the U.S. Virgin Islands. For businesses to qualify for tax incentives, they must have invested at least fifty thousand dollars, exclusive of inventory, in an eligible business and must also plan to employ at least ten U.S. Virgin Islands residents on a full-time basis.[95]

2. Tax Holidays

Under the OECS uniform statute, there are five basic types of enterprises that qualify for different tax holidays: group one enterprises, group two enterprises, group three enterprises, enclave enterprises, and capital-intensive enterprises.[96] The differentiation is based essentially on the extent of value added to the product in the particular state.[97] Thus, group one enterprises, which must have fifty percent or more value added, attract a maximum tax holiday of fifteen years. Group two enterprises, which must have twenty-five to fifty percent of value added, attract a maximum tax holiday of twelve years. Group three enterprises adding value from twenty-two to twenty-five percent gain a maximum tax holiday of ten years. Enclave enterprises, which produce goods exclusively for export to states outside the CARICOM market, are eligible for a maximum tax holiday of fifteen years. Some OECS states have a fifth category

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95. V.I. CODE ANN. tit. 29 § 708 (1994).

96. Fiscal Incentives Act, *supra* note 77, §§ XV, X, VI, III, & XII. Section VI discusses the capital intensive industry and Section III spells out the tax holiday periods pertaining to the different categories of enterprises. Section XII gives the government the power to grant the duration of tax holidays to the various categories of enterprises.

97. Under the uniform statute, local value is defined as the sales value of the finished or intermediate goods less the following items: (1) cost of imported raw materials, components, parts, fuel, and services; (2) wages and salaries paid to foreign nationals; (3) profits and dividends distributed to non-residents; (4) interest management charges and other income payments to non-residents; and (5) depreciation of imports of plant machinery and equipment. *Id.* § II. A company is not deemed to be resident in a state if it is controlled directly or indirectly by a natural or legal person who is not a resident in a member state of the CARICOM market.

known as capital-intensive enterprises. This fifth category includes enterprises in which there is a large capital-investment. Such enterprises attract a maximum tax holiday of fifteen years. The minimum level of capital investment required to qualify under this last classification varies slightly among states. For example, in 1992 St. Vincent required a minimum investment of $9.25 million, whereas Dominica and St. Lucia required a $9.5 million investment to qualify as a capital-intensive enterprise.

In the area of corporate income tax, national legislation makes the rates vary from state to state. Although the Association of Caribbean Tax Administrators meets periodically to discuss possible areas of cooperation and common problems, there is no common legislation on personal income tax among the OECS states. Some member states, such as Antigua, have abolished the personal income tax, while others retain it. The abolition of personal income tax may benefit the corporations that reimburse employees for the tax because it reduces the cost of maintaining expatriate personnel in the host states. Additionally, it makes expatriate positions more attractive to corporate headquarters personnel. Some OECS states have separate or special statutes relating to international business corporations, particularly those focusing on off-shore banking activities, while other states have not enacted such statutes. Some states that do have these statutes may grant tax holidays to qualified corporations for a longer period than is allowed under the separate Fiscal Incentives Act. Because the corporate tax is quite steep in some states, tax holidays can be very beneficial to the investors.

Dominica has a corporate tax rate of thirty percent.[98] There is no tax on capital gains, but there is a withholding tax of fifteen percent on dividends. Dominica also has a personal income tax for persons earning above a certain annual income. St. Vincent has a corporate tax rate of forty-five percent and a withholding tax rate of fifteen percent on dividends and management charges. There is no capital gains tax in St. Vincent. St. Kitts has a general corporate income tax of forty percent and a withholding tax of ten percent on profits. However, this tax does not apply to the profits of an enterprise approved to receive benefits under the Fiscal Incentives Act. There is no capital gains tax on profits or gains and no personal income tax on residents of St. Kitts. In contrast, St. Vincent has a personal income tax on all persons

98. Interviews with national investment promotion officials of Dominica, St. Vincent, and St. Kitts, Eastern Caribbean Promotion Service Office, in Washington, D.C. (Aug.-Dec. 1992). *See also* DOMINICAN INVESTMENT PROMOTION MATERIALS, *supra* note 17.

whose chargeable income is more than $3,703. In Montserrat, off-shore companies are taxed at a rate of twenty percent while other trading companies pay rates of forty percent, unless the Fiscal Incentives Ordinance applies to them. Montserrat remains under British control but nonetheless participates in many of the harmonization statutes that have been drafted within the OECS. The normal corporate tax rate in Antigua is forty percent. Antigua abolished the personal income tax in 1976. Grenada has waived any withholding tax for any industry in a manufacturing or tourism project approved by the minister under the Investment Incentives Law of 1983.[99] In order to reinforce the tax holidays granted under the Act, several OECS states have signed double taxation relief treaties with capital-exporting states such as the United States, Great Britain, and Canada.[100]

Even though the British Virgin Islands, like Montserrat, remains under British control, its investment incentives legislation closely tracks the provisions of the OECS harmonized agreement on fiscal incentives. Its local statute, the Pioneer Services and Enterprises Ordinance of 1966,[101] provides similar fiscal incentives. A project can apply for pioneer status under Section III of the Ordinance. Once the Administrator-in-Council grants a project pioneer status, it enjoys duty-free entry of equipment required for the construction or extension of the pioneer work[102] for a period of ten years, beginning on the date that pioneer status is conferred on the project. There is a generally applicable corporate tax rate of fifteen percent in the British Virgin Islands for corporations not registered under the International Business Corporate Ordinance.[103] However, corporations given pioneer status may be granted tax holidays for ten to twenty years on a case-by-case basis.[104] There is, however, a personal income tax that is payable on a graduated basis.

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99. Pioneer Services and Enterprises Ordinance, No. 4, *supra* note 59, § VI.

100. *See* Claude H. Denbow, Guidelines For the Negotiation of Double Tax Treaties and Tax Information Exchange Agreements for the OECS States (Oct. 1990) (unpublished consultant's study on file with UNCTC). For the tax treaties with the United States, *see, e.g.*, Tax Treaty with Barbados, Dec. 31, 1984, 20 FED. TAX COORDINATOR 41627 (1994) (entered into force Feb. 28, 1986); Tax Treaty with Trinidad & Tobago, Jan. 9, 1970, 20 FED. TAX COORDINATOR 41857 (1994).

101. Pioneer Services and Enterprises Ordinance, *supra* note 59, § IV.

102. *Id.* § IV.

103. Off-shore companies are registered as international business corporations. Off-shore companies are defined as those that: a) do not carry on business with residents of the island; and b) do not own an interest in real property on the island, other than an office for communications or property used as a residence for directors.

104. Pioneer Services and Enterprises Ordinance, *supra* note 59, § VII.

Given the treatment of international business corporations in the British Virgin Islands, the island is considered a tax haven for such corporations and has attracted a large number of them since 1984.

In the United States Virgin Islands, there is a ninety percent exemption of local corporate income tax payments for eligible businesses approved by IDC, as well as a ninety percent exemption of income taxes on dividends received by stockholders from the enterprise.[105] Reinvestment of at least one half of otherwise repatriable dividends in eligible activities for at least five years results in a reduction of the withholding tax from ten percent to four percent, with an additional reduction to two percent. There is a complete tax exemption for international business corporations that do not engage in the active conduct of trade or business in the United States or in the U.S. Virgin Islands. Similar complete tax exemptions are available to companies insuring only off-island risks and to banks involved solely in international transactions.

Section 934 of the United States Internal Revenue Code[106] enables the U.S. Virgin Islands to reduce the income tax liabilities of U.S. Virgin Islands and U.S. corporations in proportion to the U.S. Virgin Islands portion of their trade or business. Notably, a Section 934 entity is also subject to United States income tax on U.S. Virgin Islands income that is distributed in the United States.[107] This obligation contrasts with the treatment of corporations organized under Section 936 of the United States Internal Revenue Code. Such corporations may repatriate profits to the United States parent with no U.S. corporate income tax obligations if the income generating the profits is retained and reinvested in designated Caribbean states.[108] In other words, the basic difference between Section 934 and Section 936 of the United States Internal Revenue Code is that the latter permits tax-free repatriation of earnings to the United States.[109]

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105. V.I. CODE ANN. §§ 713a-713b (1994). Virgin Islands imposes a ten percent surcharge on the income tax of all corporations. Accordingly, the maximum tax rate on a corporation engaged in Virgin Islands business is 37.4%. US. V.I. BUSINESS GUIDE, *supra* note 40, at 43.

106. 26 U.S.C. § 934 (1992).

107. *Id.*

108. 26 U.S.C. § 936 (1992).

109. The basic qualifications for section 936 treatment are: the corporation must be a United States corporation and must have made a ten-year election to be treated as a 936 corporation; 2) it must have elected a cost-sharing or profit-split accounting method to claim intangible income credit; and 3) it must have eighty percent of gross income from the Virgin Islands sources and seventy-five percent from active conduct of Virgin Islands trade or business. 26 U.S.C. § 936 (1992).

Under Puerto Rico's Tax Incentives Act of 1987, partial exemption from corporate and property taxes is conferred upon manufacturing industries. The system of partial exemption provides a ninety percent tax exemption from corporate income and property taxes, and a sixty percent exemption from municipal license fees, excise, and other municipal taxes for the duration of the tax-exempt grant. The duration of the exemption depends on the location of the industry. There is a clear effort to encourage firms to locate away from the heavily serviced areas. Thus, Zone 1, high development zones have a tax exemption duration of one to ten years. The intermediate development zone has an exemption period of one to fifteen years. The low development zone has an exemption period of one to twenty years.[110] The exemption awarded can be taken by the business in specific tax years, and the length of the period of tax exemption will be extended accordingly.

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110. The off-shore islands of Vieques and Culebra have a tax exemption period that is one to twenty-five years in duration.

TABLE IV[111]
SAMPLE OF CORPORATE INCOME TAX RATES
AND TAX HOLIDAYS
IN OECS AND COMPETITOR CARIBBEAN STATES

STATE		RATE OF TERMINATION	NUMBER OF TAX HOLIDAY YEARS FOR MANUFACTURING ENTERPRISES
1.	Dominica	30% (Flat)	1-10 Depending on degree of value added 1-12
2.	St. Vincent & the Grenadines	45% (Flat)	Same
3.	St. Kitts-Nevis	40% (Flat)	Same
4.	Antigua	40% (Flat)	Same
5.	Montserrat	40% (Flat): General 20% (Flat): Off-Shore Companies	Same
6.	St. Lucia	33 1/3 (Flat) General (for new, small companies, 25% 1st year 30% 2nd year 33 1/3% 3rd year onwards)	Same
7.	Grenada	30% for 1st EC $50,000 Taxable Income 40% for over EC $50,000	Same
8.	British Virgin Islands (BVI)	15% (Flat) (Not applicable to "International Business Corporations")	10-20 for Pioneer Status Projects
9.	United States Virgin Islands	15%-39% Graduated (37.4% Effective Tax Rate) (Not applicable to "International Business Corporations")	10-15. Depending on location of facility. Five year extension possible
10.	Puerto Rico	Effective Tax Rate 43% (22% Basic/Flat and Graduated Surtax)	1-10 1-15. Depending on location of investment 1-20. Partial tax holiday, not total tax 1-25
11.	Costa Rica	10-25% (Graduated)	2-8 Depending on type of enterprise
12.	Dominican Republic	Overall tax rate 12.30%-49.38% (Graduated) (Basic Tax Rate: 10%)	1-20 Depending on location

111. Organization of Eastern Caribbean States Materials from OECS Investment Authorities; ECIPS Office, Washington D.C.; IDC, United States Virgin Islands; PRICE WATERHOUSE, DOING BUSINESS SERIES, Central America, Puerto Rico, Dominican Republic; BUSINESS INTERNATIONAL CORPORATION, INVESTING, LICENSING AND TRADING ABROAD (1985-1991) (on file with author).

Note that corporate income tax rates become critical for location decisions only when there are no tax holidays, or when such holidays are short and unlikely to be extended. Moreover, corporate tax rates must be analyzed in the context of all other relevant taxes and costs in each jurisdiction.

3. Exemption from Import Duties and Other Indirect Taxes

Companies qualifying for tax holidays under the Uniform Fiscal Incentives Act (Uniform Act) are allowed to import duty-free into the particular OECS state all of the equipment, machinery, spare parts, raw materials, and packaging materials to be used in the production of their approved product. If a fundamental change of circumstances occurs in the enterprise, the relevant minister may revoke the company's license for the importation of these items. Importation licenses are issued for imports from outside CARICOM only if the products are not available for export by member states of the common market at a comparable price, comparable quality, and in adequate quantities.[112] There are provisions restricting the sale or transfer of goods imported on duty-free licenses prior to the expiration of the stipulated years from the date of purchase of the duty-free articles.[113] There is also a one hundred percent excise tax exemption for building materials, machinery, equipment and supplies used in the construction, alteration, reconstruction, or extension of the physical plant or facilities. Under the regulations of the IDC of the United States Virgin Islands, for example, there is a one hundred percent exemption from property tax and gross receipts tax for eligible investments approved by the commission.

4. Deduction for Capital Expenditures and Other Forms of Accelerated Depreciation

A company with an approved enterprise product can claim a deduction for capital expenditures from the first year of income following the year during which the tax holiday period ends.[114] On the expiration of the tax holiday, the net losses incurred by the company during the tax holiday may be carried forward and set off against the profit of an approved enterprise for the five-year period following the tax holiday period.[115]

5. Export Allowances and Other Rebates

When a company has made export sales to states outside the OECS, the company can set off an export allowance (calculated in the manner provided by the statute) against its chargeable tax for

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112. Fiscal Incentives Act, *supra* note 77, § VII.
113. *Id.* § IX.
114. *Id.* § XIV.
115. *Id.* § XV. "Net losses" refers to the excess of all losses over all profits made during the tax holiday period.

purposes of collection. However, this allowance cannot be made more than once for any one product.[116] The government of Montserrat expects that export allowances will be enjoyed by companies with tax holidays after the expiration of the tax holiday period.[117]

6. Tax-Free Dividends

Dividends paid to shareholders or their nominees are exempt from the calculation of income tax under the Uniform Act. If the shareholder is not a resident of a CARICOM state, the exemption from income tax is equal to the amount that the tax exceeds the income tax liability of a shareholder in the shareholder's state of residence.[118]

7. Repatriation of Profits and Capital

In Dominica, approved industries owned by foreign nationals are allowed to repatriate a high proportion or, in some cases, all of their earnings. However, Dominica encourages foreign investors to reinvest a portion of their earnings in Dominica.[119] St. Kitts permits all companies registered in the state to repatriate all profits, dividends, and imported capital under an arrangement with the Ministry of Finance.[120] Antigua has the same unrestricted policy for repatriation of profits. An additional incentive to repatriate profits consists of an exemption from the normal one percent foreign exchange levy that is placed on outward transfers. This incentive applies to all approved projects.[121] In Grenada, a 1983 investment incentives law[122] assures full repatriation of foreign money invested in Grenada if the money came from outside Grenada.

Under Puerto Rico's Incentive Act, a "toll gate credit incentive" is aimed at encouraging investors to keep their profits in Puerto Rico even though the investors have the right to repatriate all of their income. Under the general law, non-local manufacturing enterprises that choose to withdraw their earnings

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116. *Id.* § XVI.

117. Montserrat Fiscal Incentives Ordinance, *cited in* MONTSERRAT: BUSINESS INFORMATION, *supra* note 33 (unpaginated).

118. Fiscal Incentives Act, *supra* note 77, § XX.

119. DOMINICAN INVESTMENT PROMOTION MATERIALS, *supra* note 17 (unpaginated).

120. Fiscal Incentives Act, *supra* note 77.

121. Fiscal Incentives Act (Antigua), *cited in* ANTIGUA AND BARBUDA INVESTMENT GUIDE, *supra* note 20.

122. Fiscal Incentives Act, *supra* note 77.

from Puerto Rico incur a toll gate charge of ten percent. However, firms that elect to invest fifty percent of any given year's earnings, for a period of five years or more, in designated investments or in real property in Puerto Rico[123] can repatriate the remaining fifty percent of the total profits at any time with a reduced toll gate charge of only five percent. At the beginning of the sixth year, firms that use this provision of Puerto Rican law can also withdraw the locally invested fifty percent earnings at the reduced toll gate charge of five percent.[124]

8. Miscellaneous Fiscal Incentives

In the U.S. Virgin Islands, up to five percent of the investment in the acquisition, construction, or improvement of real property used in an exempt operation is tax creditable.[125] In Puerto Rico, if the exempted business incurs expenses directly connected with research and development of new products or industrial processes, it may credit up to fifty percent of its applicable tax twenty-five percent of the increase in these expenses. If the exempted business purchases products manufactured in Puerto Rico, an amount equal to ten percent of each year's increment share over the preceding three years' average is creditable.[126]

There are additional concessions in Grenada for approved projects, such as exemptions from the foreign exchange tax.[127] Additionally, enterprises approved under Grenada's Hotels Aid Ordinance are also exempted from the foreign exchange tax. There is also a waiver of the generally applicable value-added tax on all inputs into the manufacturing process.[128] Alternatively, there is an additional layer of incentives in Grenada for businesses that do not qualify for benefits under the Fiscal Incentives Act of 1974 or the Hotels Aid Ordinance of 1954. These benefits are obtainable under the Customs Ordinance SRO 35 of 1960 according to the use for which the business is

123. These are the so-called Section 2.J. designated investments, such as Puerto Rico bonds, bank savings certificates, and participation in construction loans. *See* Industrial Investment Act, 13 L.P.R.A. § 255(j) (1987).

124. PUERTO RICO ECON. DEV. COMM'N, SUMMARY OF THE PUERTO RICO TAX INCENTIVES ACT OF 1987.

125. Interview with officials of the U.S. Virgin Islands, IDC Office, in Charlotte Amalie, St. Thomas (Aug. 1992).

126. PUERTO RICO ECON. DEV. COMM'N, *supra* note 124, at 3.

127. SRO 6-1977.

128. GRENADA INDUS. DEV. CORP., CONCESSIONS AVAILABLE FOR HOTEL DEVELOPMENT (Oct. 1991).

designed. The benefits may be available for businesses that are in industry, agriculture, fishing, shipping, or air travel.

One final type of fiscal incentive relates to the cost of shipping. Because the U.S. Virgin Islands is exempt from the Jones Act,[129] (a cabotage law that requires goods transported between the United States ports to be carried on vessels displaying the United States flag), goods can be shipped on foreign flag vessels between the U.S. Virgin Islands and the United States. The potential for shipping competition may reduce the cost of freight because foreign flag vessels are generally less expensive than United States flag vessels.

C. *General Industrial Incentives*

Apart from the fiscal incentives outlined in the CARICOM and the OECS Uniform Act, as well as the fiscal incentives set forth in the domestic legislation of Puerto Rico and the U.S. Virgin Islands, other government programs and policies also function as incentives for foreign investors to locate in particular Eastern Caribbean states. Indeed, in the case of the OECS states, these general industrial incentives are in many ways the key to making a specific state attractive because the Uniform Act contains the same package of fiscal incentives for all of these states. Thus, factors such as industrial estates, job training support, employment tax credits, zone incentives (such as export processing zones) assume some significance. Additionally, the presence of the appropriate social, economic, and physical infrastructure, such as communication links, favorable wage rates, high productivity levels, and low utility charges, enhance a state's attractiveness.

1. Industrial Estates Construction

Dominica and a number of other states in the Eastern Caribbean subregion have government agencies that construct industrial estates consisting of "ready-to-move-in" factory shells for industries that are not ready to build their own factories. These shells are rented at subsidized rates, and lease agreements are generally for fifteen years with an option to renew. For example, St. Vincent and the Grenadines has constructed such industrial estates. St. Kitts also has industrial estates developed by the local development bank for leasing. Montserrat has similar industrial estates facilities. Other countries in the subregion that

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129. 46 U.S.C. app. § 883 (1988).

provide industrial estates include Antigua, Grenada, and the U.S. Virgin Islands. Puerto Rico has long been a pioneer in providing industrial estates. In contrast, there are no industrial free zones or industrial estates in the British Virgin Islands. This absence is no surprise because currently there is very little manufacturing in that state.[130]

Alternatively, investors may purchase or lease land and arrange to have their own factories built to their specifications.[131] In Dominica and elsewhere, foreign nationals, including corporations, may acquire and hold up to one acre of land for the purpose of productive investment without a formal licensing agreement. If a larger tract of land is needed, a license may be obtained after a development plan is submitted and approved by the government. However, the Alien Land Holding Act provides for the waiver of the alien license land holding fee for land acquired for the development of approved projects.

2. Job Training Support

Dominica and some of the other states in the Eastern Caribbean subregion assist companies in organizing and conducting job training programs. St. Kitts has a job training program (particularly for workers in the garment and electronic industries) that has been jointly funded by the Organization of American States, the United States Agency for International Development, and the government of St. Kitts. Montserrat has a similar, government-funded training program that provides supervisory and management skills training.[132]

3. Wage Reduction Incentive and Other Employment Tax Credits

The government of Dominica has a program that allows employers, during the first six months of initial business start-up, to reduce the standard Dominican minimum wage by up to twenty-five percent while new employees are trained. In Puerto Rico, the Incentives Act makes a special fifteen percent production worker payroll deduction available to qualified

130. Other countries in the subregion with industrial estates include Antigua, Grenada, and United States Virgin Islands.

131. This information is based on personal visits to Dominica and other OECS states, as well as the investment packages from various states.

132. Investment packages from the countries concerned, cited in several places in Part A.

manufacturing firms. This program rewards high-wage and high-employment operations.[133]

4. Section and Zone Incentives

a. Export Processing Zones

A few of the OECS states have established export processing zones that essentially assign duty-free status to goods manufactured within their boundaries. These zones are removed from the application of the general laws concerning the import and export of goods into the state.[134]

b. Hotel Development

The OECS states have separate "hotels aid ordinances," which provide incentives for hotel investment. Under these ordinances, there are tax holidays for the expansion or construction of hotels, guest houses, and apartments. The duration of tax holidays is based on the type of facilities offered by the hotels.[135] The ordinances also provide incentives in the form of duty-free importation of equipment and furnishings for renovation, refurbishment, or expansion of existing hotels and for the construction of new ones. Although the provisions of the separate statutes are very similar, there is no uniform hotel ordinance. For example, there are differences in the range of incentives based mainly on the minimum number of hotel rooms.[136]

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133. Industrial Incentive Act, *supra* note 58, 13 L.P.R.A. § 255(a)(8) (1991). The section provides for a 5% payroll deduction based on the "industrial development income" (IDM) of the exempted business in net IDI per production job before taxes. This deduction is limited to 50% of the net IDI.

134. *See, e.g.*, Customs Free-Zone Act, § V (1983) (St. Lucia).

135. *See, e.g.*, Hotel Aid Ordinance, No. 139 (1954) (Gren.). For example, the larger facilities where the number of guest rooms is twenty-five or more might have fifteen years, whereas those that have less than ten guest rooms would have only ten years. For expansion, the tax holiday period again depends on the facility. Where the number of additional guest rooms is more than thirty-five, the tax holiday may extend to fifteen years; where there are not more than nine additional guest rooms, the tax holiday may be extended for an additional nine years.

136. In the area of agriculture, again, there is no common legislation regarding income tax incentives and customs duty exemptions. Each member state grants its own range of benefits to small farmers and fishermen.

In St. Vincent, investment facilities are offered under the Hotels Aid Act of 1988,[137] a modern version of the colonial Hotels Aid Ordinance. St. Kitts has adopted a similar law, entitled the Hotels Aid Ordinance. The St. Kitts ordinance, together with its income tax ordinance, provides tax holidays and special tax relief benefits for the construction and expansion of hotel facilities. The duration of tax holidays, again, depends on the number of facilities provided. There is also a customs duty waiver for construction materials and hotel equipment.

Montserrat has a similar ordinance to stimulate hotel development. Investors in the hotel industry are exempt from customs duties on materials and equipment used in hotel construction and operation. Upon completion of the hotel facility, the investor may claim a tax holiday for up to five years. For five of the following eight years, the investor may set off up to one-fifth of the incurred capital expenditure against future income. Stockholders who receive dividends during the tax holiday and the set-off period are exempt from taxation.

Like the other OECS states, the British Virgin Islands has a separate statute for hotel development. Under the British Virgin Islands Hotels Aid Ordinance of 1953, amended in 1967, building materials and equipment for the construction or expansion of the hotel are permitted duty-free entry into the islands for a period of ten years and, in some cases, for up to twenty years.[138] Hotels may also be exempt from corporate income taxes for ten or twenty years.[139] Under the ordinance, additional investment deductions against capital expenditure may also be possible. Corporations approved under the ordinance that are enjoying a tax holiday can also distribute tax-free dividends to its shareholders.[140] Grenada's Hotel Aid Ordinance of 1954 provides concessions similar to those provided by the hotel acts and ordinances of the other states. Puerto Rico and the U.S. Virgin Islands also have corresponding incentives for hotel development.

c. Incentives in Other Sectors

Puerto Rico's Tax Incentives Act of 1987 provides special incentives for the textile, clothing, leather, and footwear industries located on the island. Companies in these industries receive a ten-year exemption for ninety percent of their income taxes and seventy-five percent of their property taxes. Service

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137. Hotel Aid Act, *supra* note 46.
138. Hotel Aid Ordinance, §§ III-IV (1953) (on file with the author).
139. *Id.* § XVI.
140. *Id.* § XVI(9).

industries established to provide services outside of Puerto Rico, such as scientific and dental laboratories, also receive a ninety percent tax exemption from corporate and property taxes and a sixty percent exemption from municipal taxes. As discussed earlier, Puerto Rico provides enhanced partial exemptions from income tax for industries located in the more remote development zones.

D. *Credit Access: "936 Funds" and the Problem of Tax Information Exchange Agreements (TIEA)*

Some of the OECS states have access to an investment facility established by the United States and Puerto Rico, the so-called 936 funds previously referenced.[141] These funds consist of the active income and "passive qualified possession source" investment income earned by subsidiaries of United States corporations operating in Puerto Rico, which is retained and reinvested under certain conditions in Puerto Rico and states in the Caribbean Basin Initiative (CBI) area.[142] These funds, which were first established for Puerto Rico in 1986 and extended in 1987 to cover the CBI states, are exempt from United States income tax under Section 936 of the United States Internal Revenue Code and from Puerto Rico's income tax under its Tax Incentives Act. The advantage of using these funds is that their interest rate is lower than that of the private international banks.[143] One should not, however, exaggerate the contribution of 936 funds to investments in the Eastern Caribbean region. These funds are not soft loans or lines of credit such as those available from the World Bank. For investors who are not in the private market, 936 funds may not be particularly attractive. Besides, there is a requirement of credit enhancement for borrowers, which many of them may be unable to meet. Additionally, the project cost must meet a fairly high financial minimum to qualify for credit, which will continue to create

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141. *See* Flax-Davidson, *supra* note 5, at 1021-29.

142. The twenty-three countries covered so far by the CBI are as follows: Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, British Virgin Islands, Costa Rica, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Montserrat, Netherlands Antilles, Panama, St. Kitts-Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago. Nicaragua has filed an application.

143. "The actual interest rate for 936 funds is a result of supply and demand forces in an active local capital market. Generally, 936 funds are available at a base rate of interest equal to approximately 85 percent of the equivalent maturity London Interbank Offering Rate (Libor)." *See* Flax-Davidson, *supra* note 5, at 1024-25.

problems for smaller-scale investors until the 936 funds are available in smaller amounts for particular projects.

However, another issue related to the accessibility of 936 funds has been perceived as a serious problem by many of the OECS states. These states are concerned that the adoption of the Model Tax Information Exchange Agreement (TIEA), sponsored by the United States, is a condition for access to 936 funds. Initiated in 1984, the TIEA obligates each contracting state to exchange tax information about legal and natural persons who are subject to tax liability in its territory. The goals of the TIEA are assuring the accurate assessment and collection of taxes, preventing fiscal fraud and tax evasion, and developing improved information sources for tax matters in general.[144]

The scope of the TIEA is rather broad. It covers not only existing taxes on income, capital, inheritances, real property, and general consumption, but also any substantially similar taxes that might be subsequently imposed by each of the contracting parties.[145] The objectives of the TIEA include the prosecution of tax crimes, as well as the pursuit of civil tax claims.[146] The requirements of the TIEA override each individual state's laws and practices pertaining to disclosure of information regarding taxes.[147] A state requesting information under the TIEA, "the applicant state," can even stipulate the specific modalities for the collection of information, including the time and place for taking testimony and whether the presence of an official (such as a United States Internal Revenue Service official) is required to collect information, interview individuals, and examine books and records.[148]

The TIEA is not confined to tax information on citizens or nationals of the contracting states. It covers any person who might have tax obligations in each contracting state. Hence, "the obligation to exchange information extends to information with respect to persons who are not residents or nationals of a contracting state."[149] Ordinary costs incurred in providing assistance to an applicant state are presumed to be the burden of the state from which information is requested, while

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144. Model Agreement on the Exchange of Information with Respect to Taxes, art. I, para. 1 *reprinted in* TAX TREATIES: CARIBBEAN BASIN DISCUSSION DRAFT ¶¶ 10,629-25, 10,629-29 (Commercial Clearing House ed., 1991).

145. *Id.* art. II, para. 2(a).

146. *Id.* art. 4, paras. 1, 2.

147. *Id.* art. 4, subpara. b.

148. *Id.* art. 4, paras. 5, 8.

149. *Id.* art. 4, paras. 5, 8.

extraordinary costs are to be borne by the applicant state.[150] The TIEA covers virtually all taxes and contains no escape clauses.[151]

So far the only OECS states that are signatories to the TIEA are Dominica, St. Lucia, and Grenada. In the wider Caribbean Basin area, Barbados, Costa Rica, Jamaica, the Dominican Republic, Trinidad, and Tobago have also ratified the TIEA. Apparently, the United States basic rationale for making the adoption of the TIEA a condition for access to 936 funds is to ensure that the comparative benefits of 936 funds are not abused. This objective is pursued in part through the establishment of a tax monitoring mechanism in the form of a tax information exchange between the United States and any state benefiting from the tax monitoring mechanism.

On the other hand, there is a widespread negative perception of the TIEA in the OECS states that have not yet signed the treaty. These states regard its stiff provisions as "politically unpalatable," and as a near takeover of their tax jurisdiction and administration by the U.S. Internal Revenue Service.[152] It has been pointed out that even though the TIEA is bilateral in form, it is unilateral in practice and essentially geared toward the needs of the United States[153] An economic concern about the TIEA is that it undermines the confidentiality of investments and is therefore a disincentive to invest in the OECS area.[154] This argument is particularly applicable in those states seeking to promote off-shore banking investments;[155] with these investments, the emphasis is on the secrecy of data in the hands of the financial institutions.[156] At the same time, it should be pointed out that states like Bermuda and Barbados, which are signatories to the TIEA, continue to grow as off-shore banking centers. This

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150. *Id.* art. VI.

151. *Id.* A final agreement need not contain all the provisions of the Model Agreement in order to be acceptable to the United States. A lack of reciprocity in the operation of certain taxes (e.g. non-collection of information on interests, dividends, and royalties in a contracting state) might lead to omission of such items in art. 4(2) dealing with routine exchanges of tax information. This possibility, however, is a mere dent in the wall of obligations imposed on contracting parties.

152. Denbow, supra note 100, at 38-40; Bruce Zagaris, *The Caribbean Basin Tax Information Exchange Agreements Program of the United States: Eat Softly and Carry a Big Stick*, CARIBBEAN L. & BUS. 94-97 (Dec. 1989).

153. Zagaris, *supra* note 152, at 94-97.

154. Interviews, investment authority officials in Dominica, St. Kitts, and the British Virgin Islands. *See also id.*

155. "Offshore banking business" is defined as banking business conducted exclusively in currencies other than domestic East Caribbean dollars. *See* Offshore Banking Ordinance, No. 15, § 2-1 (1991) (Montserrat).

156. *Id.* at § 26-1 to 2.

development suggests that the TIEA need not have a negative impact on even the sensitive area of off-shore banking investment. Moreover, the Internal Revenue Service officials insist that the existence of TIEA has not acted as an impetus for them to go on a "tax fishing expedition" in the Caribbean area. They also have stated that the number of requests for information made thus far by the United States is very small in comparison to the number of U.S. taxpayers they investigate.[157] Still, there is no doubt that the TIEA is regarded with strong misgivings in the OECS area. To the extent that this attitude continues to impede greater access to 936 funds, the United States might wish to take a fresh look at the TIEA model, particularly its mode of implementation.[158]

In this regard, the basic approach used for another United States-sponsored agreement, the Treaty on the Mutual Legal Assistance in Criminal Matters (MLACM), appears to be a more attractive model for cooperation in law enforcement. While the MLACM is limited to criminal matters and, therefore, is narrower in scope than the TIEA as far as tax administration is concerned,[159] its attractive features include the fact that the execution of MLACM rests essentially with the domestic institutions and personnel of the state from which information is requested, such as the domestic Mutual Legal Assistance Authority and the local judiciary. The MLACM envisions little meddling by officials from the state that requests information. The supremacy of the law of the state from which information is requested is more assured than under the TIEA.[160] Even more attractive is the fact that the MLACM contains a clear escape clause that permits the appropriate authority in a state from which information is requested to deny assistance if its attorney general certifies that "the execution of the request is contrary to the public interest of the . . . party [from which information is requested]."[161] Perhaps the United States authorities might be

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157. Interview with official from I.R.S. Legal Department in Washington, D.C.

158. *Id.* The U.S. official indicated that the U.S. Government was not amenable to any changes in the conception or implementation of the TIEA.

159. In another sense, the MLACM is much wider in scope than the TIEA in the area of crimes. The MLACM deals not only with tax crimes in relation to unlawful proceeds from criminal activities, but also covers racketeering, usury and other unlawful gambling debts, and narcotics trafficking. Treaty on the Mutual Legal Assistance of Criminal Matters, Mar. 8, 1991, U.S.-Montserrat, [hereinafter MLACM Treaty].

160. *See id.* arts. II, IV, V, para. 1, art. IV para. 1; art. X para. 1, art. II para. 1; *see also* Mutual Legal Assistance in Criminal Matters Ordinance, No. 1, §§ 6-1, 15-1 (1991) (Montserrat) (on file with the author).

161. MLACM, *supra* note 159, art. III, para. 3.

persuaded to adopt these features of the MLACM in a future review of the TIEA model.

E. *Investment-Related Trade Incentives*

In addition to the specific incentives offered by individual states, there are a number of trade incentives from which investors in the OECS states can benefit. The presence of trade incentives clearly increases the investment opportunities within the OECS. Because they impact the flow of investment from the United States into the OECS states and the larger CARICOM area, the following investment-related trade incentives are significant.

1. Harmonized Tariff Schedule of the United States, Subheading 9802.00.60

Section 9802.00.60 of the United States tariff schedule grants favorable customs treatment to metal articles initially manufactured in the United States, exported for further processing, and then imported back into the United States for still further processing.[162] One example is ingots of United States origin which are made into aluminum sheets, then processed overseas, and finally returned to the United States to be cut to size and shape and made into various kinds of aluminum products. Import duties on such products are levied only on the amount of value added during processing outside the United States.[163]

2. Harmonized Tariff Schedule of the United States, Subheading 9802.00.80

Under Section 9802.00.80 of the United States tariff schedule, preferential duty treatment is enjoyed by components of a product fabricated in the United States, exported in a condition ready for assembly without further processing, and returned to the United States market without any added value or improvement in condition abroad (except by being assembled or

162. Harmonized Tariff Schedule of the United States Subchapter 9802.0060, 19 C.F.R. § 10.9 (1993), *as amended* 59 Fed. Reg. 25,563 (1994).

163. FOLSOM ET AL., *supra* note 37, at 339-47. The case of *Oxford Industries v. United States*, 517 F. Supp. 694 (U.S. Ct. Int'l Trade 1981), shows how questions of interpretation can arise under this schedule. When is an activity more than an assembly operation? Is the addition of button holes to shirts merely incidental to assembly, or a matter of further processing so as to deny the product the benefit of the tariff schedule?

used in operations incidental to the assembly process).[164] The duty levied is equal to the full value of the imported article less the cost or value of such products in the United States. Thus, operations that qualify for special treatment under this tariff schedule include: the assembly of cut parts of clothing by sewing, hemming, or stitching; the installation of U.S. products on articles of foreign manufacture (such as U.S. engines and equipment on a foreign commercial aircraft); and the assembly of U.S. electrical components by soldering and other operations.[165]

3. United States Generalized System of Preferences (GSP)

Under the United States GSP, which is based on the GATT GSP Resolution of 1971, eligible manufactured and semi-manufactured goods from eligible states, including the OECS states, have duty-free access to the United States market.[166] To be eligible, however, the product must be imported directly into the United States from the beneficiary state without any intermediate processing or trading, and the product must have had thirty-five percent of its appraised value added in the beneficiary state. Even though the U.S. Virgin Islands is part of the United States for all practical purposes, its products may enter other foreign developed states duty free under the international Generalized System of Preference Program.

4. The Caribbean Basin Initiative (CBI)

Under the Caribbean Basin Initiative (CBI), which was introduced by the Reagan Administration in 1983, products from beneficiary OECS states entering the United States enjoy duty-free treatment. To be eligible for duty-free treatment, a product must be imported directly from a beneficiary OECS state, and at least thirty-five percent of the product's cost or value must derive from the direct cost of processing in a beneficiary state.[167] Some articles do not qualify for duty-free treatment under the CBI, such as textiles and clothing subject to the Multi-Fiber Agreement; canned tuna; petroleum and petroleum products; footwear; certain leather, rubber, and plastic gloves; luggage, handbags, and flat goods; and certain leather clothing. However, products

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164. Harmonized Tariff Schedule of the United States Subchapter 9802.00.80, 19 C.F.R. § 10.13 (1993).

165. FOLSOM ET AL., *supra* note 25, at 339-47.

166. JOHN H. JACKSON & WILLIAM J. DAVEY, INTERNATIONAL ECONOMIC RELATIONS 1154-66 (2d ed. 1986); FOLSOM ET AL., *supra* note 25, at 314-26.

167. FOLSOM ET AL., *supra* note 25, at 331-38, 463.

that do not qualify for CBI treatment may still qualify under the aforementioned United States tariff schedules.

5. The Eastern Caribbean Common Market (CARICOM)

Because all of the OECS states except the British Virgin Islands are part of the Caribbean common market, the existence of CARICOM offers another trade incentive for investors who are considering investing in the OECS states. CARICOM allows OECS products to enter other Caribbean states duty-free provided that certain rules-of-origin criteria, such as the requirement of local value added of thirty percent, are met.

6. European Economic Community-Africa, Caribbean, Pacific Convention (EEC-ACP Convention or Lome Convention)

Outside the American hemisphere, there are trade incentives for products that originate in the Caribbean area. In particular, OECS states that are parties to the Lome Convention enjoy preferential treatment in terms of duty-free entry into European states and quota-free treatment for certain products.[168] Several Eastern Caribbean states such as the British Virgin Islands already have direct access to the European Union (EU) by virtue of their special ties to Great Britain. Thus, from the standpoint of investors based in Puerto Rico and the U.S. Virgin Islands, trade and investment activities within the OECS states could increase their access to the European market.

F. *Critical Assessment*

The basic issues about investment incentives offered by investee states concern the cost and the degree of effectiveness of incentives in achieving the objectives of the investee states. What are the trade-offs for the states granting incentives? Are the incentives worth the loss of revenue to the economy? Did they make any meaningful impact on the flow of foreign investment into the economy? Would the investors have invested in the state anyway because the investors were motivated by factors other

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168. The Lome Convention is a series of conventions for tariff preferences initiated in 1975 by the European Union (then the European Community) for the benefit of eligible African, Caribbean, and Pacific states. African, Caribbean, and Pacific States—European Economic Community: Final Act, Minutes, and Fourth ACP-EEC Convention of Lome, Dec. 15, 1989, 29 I.L.M. 783 (1990). For a discussion of the Lome Convention see OLUFEMI A. BARBARINDE, THE LOME CONVENTION AND DEVELOPMENT: AN EMPIRICAL ASSESSMENT (1994). *See also* FOLSOM ET AL., *supra* note 25, at 326-30.

than incentives?[169] In other words, investee states are concerned about the different motivations that influence foreign investors who invest overseas. Capital arbitrage theory indicates that international capital mobility is explained in terms of interest rate differentials between states; states with higher rates of return would continue to attract capital from other states with lower marginal rates of return until the rates are equal. Tax incentives are a promotional tool that go along with capital arbitrage theory.[170]

On the other hand, the industrial organization theory, which focuses on the problem of market imperfections, indicates that industries characterized by oligopoly, product differentiation, high research and development intensity, and other barriers to entry, regard ownership and control as central to their existence.[171] Hence, once industries decide that it would be more profitable for them to exploit their advantages overseas by establishing their own operations, investors will look for a climate where the opportunity to control their operations is greatest. Tax benefits will not be the primary focus of their quest. In other words, as far as these investors are concerned, the most favorable investment climate is the state with the most permissive rules regarding foreign ownership and control.[172]

Some investment economists have also drawn distinctions between the needs and motivations of export-oriented companies and companies with a domestic market orientation. Other investment economists have distinguished outward-bound companies with profit maximization as their main motivation from companies with other motivations such as the elimination of market imperfections in the home state or the maintenance of an oligopolistic position in the world market.[173]

There is no direct empirical data upon which to draw definite or concrete conclusions about whether incentives have a favorable or neutral impact on the decision of foreign investors to invest in the Caribbean states.[174] Some secondary evidence indicates that

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169. For a summary of the basic debate, see STEPHEN E. GUISINGER, INVESTMENT INCENTIVES AND PERFORMANCE REQUIREMENTS (1985); WELLS, *Investment Incentives: An Unnecessary Debate*, U.N. CTC No. 22, 38-60 (1986).

170. Kojo Yelpaala, *In Search of Effective Policies For Foreign Direct Investment: Alternatives to Tax Incentive Policies*, 7 NW. J. INT'L L. & BUS. 208 (1985).

171. *Id.*

172. *Id.*

173. WELLS, *supra* note 169.

174. Although an empirical study is possible and has been carried out for the World Bank on a more global basis, such a study is beyond the scope of this Article. See GUISINGER, *supra* note 169. For an attack on the methodology used in the study—i.e. eliciting responses from officials of transnational corporations

incentives have influenced the location of some major corporations in the general Caribbean area over the past two or three decades. For example, incentives influenced the establishment of the Bauxite Processing Corporation, Harvey Alumina Incorporated (later made part of Martin Marietta Corporation), and the Hess Oil Virgin Islands Corporation in the United States Virgin Islands in the 1960s.[175]

Despite this secondary evidence, the general question of whether these incentives have been very effective in attracting foreign investment throughout the OECS area remains. Four principal reasons have been given for the disappointing rate of foreign investment in spite of the presence of these incentives.[176] First, the OECS states are not meeting the worker training standards required by the international marketplace; second, real wages in the OECS states have risen rapidly to at least four times per capita output; third, there is a lack of sufficient factory space or factory shells in these areas; consequently, there is a long delay before potential investors acquire suitable space; and fourth, the infrastructure is inadequate, especially air and road transportation, which discourages foreign investment. It appears that in addition to improving in these areas, OECS states should improve the efficiency of their human resources and commercial infrastructure. Moreover, the fiscal incentive packages provided by the OECS states should be broadened to include investors that have traditionally been excluded, such as OECS nationals living abroad.

The essential role of fiscal and other industrial incentives in the effective promotion of foreign investment now seems beyond question. Instead, the current debate seems to revolve around the appropriateness and effectiveness of specific kinds of incentives for specific types of investments. This inquiry, in turn, resuscitates the issue of the motivations of foreign investors in choosing locations. There is more than one theory that explains the decision of corporations to locate overseas, and both the

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about the major reasons for their decision to locate in a particular country; see Farrell, *Incentives and Foreign Investment Decisions*, 20 U.N. CTC Rep., 39-42 (1985).

175. John Ambrose, Impact of Selected Public Policies on Economic Development of the U.S. Virgin Islands, 1961-1991 (1991) (unpublished manuscript presented by the Small Bus. Development Center of the University of Virgin Islands at the Fifth Annual Conference on Economic Development and International Trade for the U.S. Virgin Islands and the Eastern Caribbean).

176. T.G. Hamilton, Policy Guidelines for Promoting Foreign Investment and Technology Development in the OECS (Aug. 1990) (unpublished manuscript on file with the author); U.N. CTC, TRADE AND INVESTMENT RELATIONS BETWEEN MEMBER STATES OF THE OECS AND THE FRENCH OVERSEAS DEPARTMENTS IN THE CARIBBEAN 19-21 (on file with author).

capital arbitrage theory and the business organization theory could be simultaneously valid. Therefore, OECS states should continue to offer a comprehensive package of incentives. It is obvious that not every project requires the whole package of available incentives and that the screening agencies should ensure that, with regard to grants of incentives over which the states retain some discretionary power, only incentives that are appropriate, beneficial, and justifiable for a particular project should be selected. A particular set of incentives is appropriate if it addresses the actual motivational factors in the foreign investor's locational decision. Incentives are beneficial if they confer positive net results in operational terms on the investor in both the host state and in the investor's home state. On the other hand, incentives are an unjustifiable cost to the host state if an investor would invest in the state without the offer of incentives, or if the investors do not really enjoy the benefits conferred because of their home state taxes and other regulations.

It has been pointed out that different incentive packages will be more appropriate for export-oriented investments than for inward-bound corporations. For inward-bound corporations, the more desirable incentives consist of "commodity incentives," such as forms of protection against import competition. On the other hand, export-oriented projects are highly motivated by "factor incentives," like tax holidays and grants.[177]

In the case of the OECS states, there is a special concern. Individual states must be discouraged from undercutting each other in an incentives war in which each state tries to outdo other states by providing more incentives. This possibility counsels for continuing the move toward harmonizing industrial incentives and continuing the coordination of industrial location decisions within the region as envisaged under the OECS Treaty, especially the Agreement Establishing the East Caribbean Common Market.[178]

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177. *See* GUISINGER, *supra* note 169, at 49-50. *See also* Agreement Establishing the East Caribbean Common Market, *supra* note 87, art. XV.

178. OECS Common Market Agreement, *supra* note 87. Art. XV of the OECS Common Market Agreement states: "Member states agree to the progressive harmonization of their fiscal policies especially in the fields of taxation of companies and individuals and fiscal incentives extended to persons engaged in industry, agriculture and tourism." *Id.* Art. XII provides as follows: "Each member state shall work towards the progressive harmonization of development, investment and industrial policies. This shall involve a common policy towards development planning and industrial development including fiscal and other incentives to industry . . . . The common policy towards development planning shall have at its ultimate objective the coordination of development plans as well as the introduction of special measures for securing the establishment and distribution of industries equitably among member states . . . so as to facilitate

The transparency of investment laws, previously discussed in the analysis of establishment rules, is a critical incentives issue because the establishment rules affect the locational decision of the foreign investor and also provide a potential haven for favoritism and corruption. To the extent possible, bureaucratic discretion should be reduced in many areas, and the use of "across-the-board" incentives should be enhanced for investments in certain sectors or for certain types of investments.

The total package of incentives offered by the OECS states, Puerto Rico, and the United States Virgin Islands should be comparable to the incentives available in the most obvious competitor states in the Caribbean, such as the Dominican Republic, Haiti, and Costa Rica. This package of incentives should include favorable corporate tax rates. As Table IV indicates, the tax rates in competitor Caribbean states is lower than the typical OECS state corporate tax rate. Performance requirements associated with the granting of incentives, while beneficial to the investee states because performance standards ensure compliance with investment statutes and contracts, should be reasonable and practicable. Unduly burdensome performance requirements are counterproductive.

Overall, the states of the Eastern Caribbean subregion should enhance the development of private sector investment by changing the incentives framework, exploring the possibilities of further uniformity and harmonization or coordination of incentive policies within the OECS states, and increasing the effectiveness and utility of the available incentive regime by eliminating wasteful administrative practices. On the macro-economic plane, the areas most germane to foreign investment should be constantly reviewed. For example, the convertibility of the East Caribbean dollar should be maintained and further enhanced. In the area of credit access, there should be a more effective combination of local, regional, and multinational sources of investment for the benefit of the subregion. There also should be a review of the TIEA to ensure greater autonomy for participating states within the OECS.

With regard to 936 funds, it is important to find ways to break the loanable amounts down into smaller units so that investors in smaller projects can use 936 funds. The use of 936 funds should be promoted by building links with the Commonwealth Development Fund, the European Development Bank, and similar non-United States financial institutions so that these institutions can act as possible sources of credit

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complementarity, avoid unnecessary duplication, and thereby more expeditiously achieve the basic aims of this agreement."

enhancement. These institutions can also act as additional credit sources for areas that do not qualify for 936 funding. In other words, conventional funds should be built into the total package. In order to satisfy the need for a wider group of investors, states should continue to seek suppliers' credits or export credits and should also venture into the regular capital markets. In addition, the United States Export/Import Bank, the Export Department Corporation of Canada, and the Inter-American Investment Corporation are possible additional sources of financing that should not be overlooked.

IV. CONCLUSION

Any review of investment law in the Eastern Caribbean subregion should address not simply legal and regulatory provisions that unduly discriminate against foreign investments, but also provisions that restrict entry into the market such as import and market monopolies and licensing requirements. OECS states should also address discriminatory taxation of normal business activities and administrative practices that increase private sector costs. Huge disparities in incentive regimes among Caribbean states should be avoided. OECS states should also address other investment concerns, such as inadequate protection for intellectual property rights.[179]

A comparative study of investment authorities or agencies in the OECS reveals that there are three basic types of investment agencies: the centralized and truly authoritative one-stop center; the one-stop approval agency with coordinating functions within the government machinery; and the mere information and coordinating agency. The investment agency's most desirable place in the range of investment promotion activities is to act as a coordinator and liaison within the government machinery, while carrying out some of the direct approval and regulatory activities on its own. An analysis of the investment agencies in the OECS states suggest that they are committed to the one-stop agency model and that their agencies do more than mere coordination. However, this model does not exist in all OECS states. States that presently do not employ the one-stop model should adopt it. Because the governmental bureaucracies in virtually all of these states are small, it is probably inefficient to maintain diffused

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179. As far as intellectual property legislation is concerned, it is encouraging to note that the OECS is currently examining the CARICOM legislation on patents, trademarks, and copyrights for possible application to its members.

centers of authority for investment screening. However, to be a true one-stop shop, the technical staff of the implementing government agencies should be deeply involved in the technical phase of project appraisal. Given the size of the economies of most of the OECS states, as well as the size of their ministries and other government agencies, it seems appropriate to locate and structure OECS investment centers as a division of relevant ministries. However, the OECS states with larger bureaucracies might explore the advantages of the corporate form of investment agency.

The investment laws and practices of the OECS states should strive for greater transparency. Regulatory provisions should be reduced to the minimum necessary to protect the Caribbean economy and society. Regulatory provisions that remain should be drafted clearly and should seek to grant minimum discretion to public officials. OECS states might begin to work toward a harmonized investment statute or code, in the same vein as the Uniform Fiscal Incentives Act.

The granting of fiscal and other incentives is always done at a cost to the treasury of the grantor state. Therefore, there must be a meaningful trade-off for the host state. Specifically, the grant must truly affect the locational decision of the potential foreign investor. Incentives in the Caribbean area have persuaded a few large corporations to locate in OECS states. Therefore, OECS states should continue to grant incentives as a general promotional tool. Because different foreign investors have different locational motivations, the investment authorities should not grant incentives indiscriminately, but should instead target incentives to the needs and motivations of particular foreign investors. Factor incentives should be directed at export-oriented projects, while domestic-oriented projects should enjoy more commodity-incentives. The maximum impact of incentives will be realized only in conjunction with an increase in the development of human resources, particularly manpower development, and an improvement in the entire commercial infrastructure.

The benefits conferred under various United States tariff schedules should be fully utilized by the OECS states. The benefits of existing regional and subregional economic integration arrangements such as the Caribbean Basin Initiative and CARICOM should be expanded. Full participation in the interregional tariff preference schemes—the GATT-based Generalized System of Preferences and the Lome Convention—is equally important.