CAPACITY BUILDING WORKSHOP FOR GOVERNMENT OFFICIALS ENGAGED IN INVESTMENT PROMOTION IN THE EAST AFRICAN COMMUNITY

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INTRODUCTION

Investments are increasingly becoming an important element in the EAC partner states' development journey. They have generally been viewed as a major source of employment creation, tax revenue and industrialization among others. Investments, especially foreign direct investments (FDIs) have also been perceived to be important for skills development and technology transfer, and have also played a key role in growing new sectors that require large capital investments, such as the extractive sector.

Consequently, the investment regime globally, regionally and nationally has been evolving. Currently, a lot of focus has been drawn towards attracting greater FDI inflows through the provisions of greater protection and incentives to secure such investments. At the global level, a proposal to include investment within the WTO agreement has been under discussion. Within the bilateral and regional levels, investment provisions are being included in trade agreements and in other instances, Bilateral Investment Treaties are being negotiated and signed. These agreements as well as other investment policy reforms are generally being used to attract and "guarantee" greater FDI flows into countries. These include various provisions that guarantee inter alia, investment liberalization; investor and investment protection (including provision such as those against expropriation and nationalization, National Treatment, Most Favoured Nation Treatment, Fair and equitable treatment); and investment incentives such as tax holidays/ exemptions and land concessions.

While these reforms may have resulted into greater FDI inflow according to the World Investment Report, 2017, which reported that the EAC received about US$ 7 billion in FDI in 2016, a figure that is projected to rise in the years to come, the region's level of development has remained undersized. The promises of FDI have yet to be realized. According to World Bank data of 2014, Burundi, Rwanda, Uganda and Tanzania were ranked among Africa's 25 poorest African states each possessing GDP per capita of 295.1USD, 652.1USD, 677.4USD and 998.1USD respectively. Whereas Kenya may boast of impressive GDP per capita figures that have placed it among the top rich countries of Africa, the country faces the largest youth unemployment burden which is estimated at 17.3% compared to 6% for both Uganda and Tanzania[1].

This state of play has been attributed to a number of factors notably, the absence of an appropriate investment policy regime for the East African region to be able to effectively realize the development promises of FDI and other investments. This situation has further been compounded by the numerous modifications that have been undertaken and could adversely impact the extent to which the EAC government's policy space to regulate and direct investments in the partner states' development interests can be fully exercised.

[1] http://www.theeastafrican.co.ke/news/Kenya-tops-East-Africa-s-list-of-youth-joblessness/-/2558/3109420/-/1120u3z/-/index.html 19th September 2016

It is against this background therefore that SEATINI Uganda with support from Diakonia Regional Africa Office and Both ENDS and in partnership with Governance for Africa, Rwanda organized a three day capacity building workshop for government officials engaged in Investment Promotion in the EAC region on investment and sustainable development.

Specific objectives

1) To equip participants with knowledge on the historical perspectives of investment policy and the current investment policy dynamics.
2) To enable participants understand of the link between investment, investment policy and sustainable development.
3) To equip participants with skills and knowledge to preserve EAC's policy space in Investment Policies and Agreements.

FOREIGN DIRECT INVESTMENT (FDI) AND DEVELOPMENT

FDI: why the promises have not been realized

This session, which opened the workshop provided participants with an opportunity to ponder on the issue of FDI and why the promises have remained on paper. Below are some of the issues that were raised:

The current international investment policy architecture makes realization of the development promises of investment challenging to realize, especially for most developing countries. The architecture, in addition to national and regional investment policy frameworks, consists of a network of treaties that is growing at an amazing speed. These frameworks seek to protect the rights of investors at the expense of host countries' development needs and their people's rights.

The focus has been drawn towards what the investor wants rather than what governments' want from investors/ investments for their countries' development. Investors want to influence the investment policy architecture, including the laws, policies and investment treaties, however, these investment policy frameworks do not influence the investment decisions of an investor. Investment decisions depend on a wide range of factors i.e. Macroeconomic stability, Availability of skilled labour, Quality and efficiency of infrastructure, Market Size, Market Growth, Exports, Per capita income, Consumer preferences, Cost of doing business, among others.

The challenge is that the extent to which the investment policy frameworks either at national or regional level are linked to the countries' development agendas remains unclear. The obligations of the investors have remained unclarified in most investment policies and laws of African states. Countries like China on the other hand have put in place clear demands regarding what they would want from foreign investors establishing within China, they have for instance emphasized the need for joint venture formation.

Whereas the absence of key pro development provisions provide an explanation to the failure of some African states to realize the development interests of FDI, also the existence of certain provisions has narrowed the policy space of governments to be able to regulate investments in the public interest. Such provisions include among other, free transfers/ the right of investors to externalize their funds; protection against expropriation and compensation; national treatment; Most Favoured Nations Clause; and Fair and Equitable Treatment. These provisions have also been used by many investors to sue governments and demand huge claims/ compensations. At the moment, claims by private investors have been reported to be approximately 1.4 million USD worth as compensation according to UNCTAD. It has further been noted that so far, an average of 545 million USD has been paid to settle such claims, an expense that could strains governments' ability to facilitate access to social services and other public goods.

It is for this reason that countries like South Africa, Ecuador and India took to review and in some cases terminated Bilateral Investment Treaties (BITs) within third parties; and reviewed their national investment policies and laws to align them to their national development objectives. In other cases, reviews were undertaken with the emphasis of removing provisions on Investor-State Dispute Settlement (ISDS) which have been proven to be problematic across the globe. Consequently, UNCTAD has taken interest in the ISDS issues to provide a long lasting solutions to the challenges that surround this provision.

Countries of the EAC partner states must be keen to ensure that investment treaties that are about to expire are not automatically renewed. This is given the fact that majority of investment agreements contain a provision that states that *if neither of the contracting parties notifies the other contracting party of its intent to review or terminate the treaty, then the treaty would be automatically renewed*. Uganda has recently submitted to the Netherlands' government a notification to review the Uganda-Netherlands BIT which is set to expire on 1st January 2018. Tanzania – Netherlands BIT will also expire on 1st April 2019. The Tanzania government must therefore submit their notification to review or terminate this treaty before 1st October 2018 to avoid having the treaty to automatically renewed for another period of 10 years as it's provided for under Article 14 of the agreement.

Regarding the question of Public Private Partnerships as an alternative source of investment finance. Besides the mainstream investment finance, there is a growing interests around PPPs. These arrangements are being used to finance, build and operate projects. They have become a very popular alternative for development financing amidst developing government's inability to fully finance certain development projects. However, while they remain an important cooperative arrangement for financing big projects, they pause a huge risk to the public which in many cases has to bear the risks and loses that may arise.

GLOBAL INVESTMENT POLICY DYNAMICS FROM A HISTORICAL PERSPECTIVES

The historical perspectives and trends of global investment policy

The first attempt to launch a Multilateral Agreement on Investment was after the 2nd World War. In 1948, the draft Charter to establish an International Trade Organization (ITO) was discussed during a meeting in Havana. The ITO, along with the International Monetary Fund and the World Bank were institutions that were put in place to promote post-war economic cooperation. Besides trade issues, the draft Havana Charter had provisions to address Foreign Direct Investment issues. It was however not ratified. If it had been ratified, the ITO would have played a decisive role in the investment policies of the governments globally.

Within the Charter, the US had proposed extensive rights for investors including the obligation of host countries to extend national treatment and most-favored-nation treatment. But these measures were strongly opposed by other countries. US, EU and Japan corporations were also opposed to provisions such as regulating anti-competitive policies of private businesses. This was despite that fact that the Charter was already limited in its scope i.e. it did not incorporate any rules related to performance requirements. For a long time, the proposed multilateral investment agreement at the WTO has been opposed on grounds that it is likely to harm the developing countries' prospects for development.

In addition to the Charter, the 1955 Resolution on International Investment for Economic Development was adopted by the GATT contracting parties as a resolution in which they urged countries to conclude bilateral agreements to provide protection and security for foreign investment. The failure to establish ITO was one of the major reasons which facilitated a shift from multilateral to bilateral investment agreements.

In the sixties and seventies, the discussions around international investment negotiations were moved to other fora. Big capital exporting countries led by the US started initiating discussions on investment issues at the OECD, whose membership at that time consisted of the developed world, most of who were in favor of a liberalized investment regime. Consequently, 2 Codes were proposed i.e. the Code of Liberalization of Capital Movements and the Code of Liberalization to encourage members to liberalize restrictions on the cross-border movement of capital.

The OECD also attempted to bring investor protection issues in the 1960s with a multilateral convention on the protection of foreign property but it was never adopted. An attempt to enact a non-binding code for transnational corporations at the OECD began in the seventies. The Guidelines for Multinational Enterprises were adopted in 1976 by the OECD member countries, largely in response to the Code of Conduct on TNCs, then under negotiation at the UN. At the same time, developing countries began to raise investment issues at the United Nations since it was viewed as an equal voting rights institution during the General Assembly.

The Code was drafted to include the conduct of governments in addition to the conduct of TNCs. It contained extensive provisions regulating the entry and operations of transnational corporations in the host country. When the US realized that the Code was unlikely to serve the interests of capital exporting countries, it persuaded other developed countries to block it at the UN. Consequently, it was not approved and the UNCTC was dissolved in 1992. Since then, the work on investment issues has been carried out with an entirely different agenda of promoting foreign investment.

During the early stages of development of most developed countries today, they systematically discriminated against foreign investors. They used a range of instruments to build up national industry, including: limits on ownership; performance requirements on exports, technology transfer or local procurement; insistence on joint ventures with local firms; and barriers to 'brownfield investments' through mergers and acquisitions. The general trend has been looking at liberalizing the rules that control investments without requiring investors to deliver on certain development opportunities.

The TRIMS Agreement & Why Developing Countries are opposed to Investment in the WTO

The policy space of African states to design their own national policies to direct investment and thereby foster industrial development, employment creation, among others, has been shrinking since the Uruguay Round. However, under the Trade-Related Investment Measures (TRIMs) Agreement, efforts to reclaim the lost policy space was made. The TRIMS agreement constrains governments from adopting certain investment measures that oblige or encourage investors to use local materials or restrict imports, as this is counter to GATT's Article III (on national treatment) and Article XI (on quantitative restrictions). This illustrative list of prohibited measures includes local content policy (which countries can use to increase the use of local materials and improve forward and backward linkages to the local economy) and some aspects of foreign exchange balancing (aimed at correcting balance-of-payments problems).

The TRIMs Agreement provides for exceptions to implementation of the TRIMS agreement in as far as Least Developed Countries are concerned. Such countries are allowed to adopt policy measures that promote domestic industrial development. Implementation of TRIMs has already given rise to problems in several developing countries. It is important to note however that this exception that was given in the form of a transition period will soon expire i.e. in 2020.

What needs to be done?

- There is therefore need to have the TRIMS transition period extended. At the moment, within the WTO, the LDC group has submitted this request for consideration.
- At the national and regional level, countries must take to putting in place local content policies and laws

- All existing contracts for investment projects should emphasize the requirements for local content and joint venture formation. Therefore, countries should develop model contracts that guide all other contracts to be entered into by various government ministries, departments and agencies for given projects.
- Within Africa and the existing regional trade arrangements therein, there is need to strengthen the regional integration agenda including addressing trivial issues like visa requirements from members to allow for the free movement of service supplies. This will allow for the promotion of local content even within the region.
- Regarding the issue of Fair and equitable treatment, partner states were advise to adopt the utilization of appropriate disclaimers in their external communications with potential investors.

CURRENT INVESTMENT POLICY DYNAMICS AT GLOBAL, BILATERAL, REGIONAL & NATIONAL LEVELS

Current Investment policy dynamics in the WTO: Implications for Africa

The Cancun Ministerial Conference failed to bring into discourse the issue of investment. Attempts to do so resulted into the collapse of the ministerial. In 2004, it was agreed under the Doha work program that no further work would take place within the WTO Doha Development Round was finalized.

There is currently no negotiation mandate within the WTO on investment. However, there are a number of groups such as the Friends of Investment Facilitation, which is a diverse group including Argentina, Brazil, China, Colombia, Hong Kong, China, Mexico, Nigeria and Pakistan, among others who. China on the other hand is currently pushing for a new working group on trade and investment. The multilaterization of investment could further open developing countries and LDCs to the challenges that arise from investment agreements emanating from the controversial provisions that have been proposed in most IIAs such as Most-Favoured-Nation clauses, the possibilities of treaty-shopping and the impact of investor-State arbitrations.

Developing countries and LDCs should therefore reject the current proposal to include investment into the WTO for negotiations.

Contentious issues in International Investment Agreements

The session elaborated on the various contentious IIA provisions and their attendant implications. Specifically:

- **National Treatment:** This is a basic principle that prohibits discrimination between foreign and domestic investors. This could be through government regulations. That the word "Covered investment" could be used in like situations.

While this provision remains very popular in most IIAs, countries like India have included exceptions to what would be covered under the provisions on National Treatment.

- **Most-Favored-Nation clause (MFN):** Under this principle/ clause, host governments are required to extend the same treatment they provide to foreign investors/ investments operating under an agreement to other investors/ investments that may not necessary be operating under an agreement signed with the host country. This is often within the context of WTO members. It puts the host country at risk of facing arbitration cases from countries with which it has not signed an agreement with.
- **Fair and Equitable Treatment (FET):** This is a provision that is contained in a number of investment agreements that provides for the main standards for the protection of foreign investors. Nowadays however, most successful claims have been made based on this provision.
- **The right to regulate clause:** Drawing lessons from the Comprehensive Economic Trade Agreement (CETA) where emphasis has been made on the need to better balance state regulatory interests and investor rights. Although this provision continues to be contested by most capital exporters, it is increasingly being considered as an important element.

The EAC's current investment policy and strategy

Under this session, the EAC secretariat provided an update on the ongoing process to put in place the EAC investment policy and strategy. As countries endeavour to meet broader development aspirations, including the Millennium Development Goals, it is imperative to increase investment levels to at least 25% of GDP in order to have meaningful development impacts in their economies. Yet, current statistics for Sub Saharan Africa countries indicate that investment levels constitute a paltry 15% of GDP thereby posing even greater development challenges for these countries, including the EAC partner states. It is therefore imperative for the EAC region to formulate an investment policy and strategy that would enable it to meet its investment targets, particularly in the light of the current global economic realities.

The efforts to develop an EAC Investment Policy and Strategy were initiated in 2009 as a directive of the Summit of the EAC Heads of States and this culminated in EAC undertaking a Study on the EAC Investment Policy Framework which was discussed by Investment Promotion Experts and subsequently adopted by the Sectoral Council of Ministers responsible for Trade, Industry, Finance and Investment (SCTIFI) in November 2013.

Principles of investment policy frameworks:

- Openness to foreign investment
- Right to private ownership and establishment
- Full protection of property rights
- Liberalized foreign exchange markets
- Conducive repatriation conditions

- Stable, transparent and predictable regulatory framework
- Simplification of investment establishment procedures
- National treatment status
- Right to national and international impartial arbitration in the event of a dispute
- Responsible investments

The draft framework comprises of various components including Investment Facilitation; Investment promotion; investment policy advocacy; liberalization of investment measures; and investment protection i.e. for purposes of cross border investment and national level investment and Cooperation on investment.

Concerns raised by plenary:

- Concern was raised regarding the fact that there exists a delink between the spirit in principle and content between the proposed draft EAC policy and strategy and the EAC model Investment treaty which was adopted by the Sectoral council in 2015.
- Concern was also raised regarding the extent/ plan to utilize/ make reference to the EAC model investment treaty in development of the Investment policy and strategy given that the former is largely described as a progressive document. The document also takes into account the development interests of the EAC partner states in particular and the region in general.

INVESTMENT AND SUSTAINABLE DEVELOPMENT

Tax incentives and financial flows – the case of Rwanda

The 2005 Rwanda Investment code was the pioneer Investment regulation and was aimed at providing incentives and guarantees to attract, promote and protect investments and exports. The Code was reviewed to put in place a new Code with specific focus on shifting from the generic investment promotion to a more targeted approach; phasing out incentives that had not achieved the code's strategic objectives, i.e; (those that did not translate to real economic benefits e.g. tax discounts based on employment and exports, were loophole for abuse, e.g. construction incentives, and did not conform to EAC's customs union e.g. import duty exemptions); and providing attractive fiscal incentives for large scale investment projects.

Rwanda's incentives structure has been designed as indicated in the table below:

The Incentive	Areas covered
0% Corporate Income Tax	1. International/ Regional Headquarters relocating. 2. $10M investment in Rwanda.

	3. Conduct international financial transactions equivalent to $5M through local commercial bank. 4. Well established in that industry. 5. Annual expenditures of $2M in Rwanda. 6. Actual and effective operations in Rwanda, e.g. Procurement, HR, R&D, Market control, etc.
15% Corporate Income Tax	1. Investments exporting over 50% of goods/services produced. Specific reference to BPO and exclusion of unprocessed tea, coffee and minerals. 2. Energy (Generation, transmission and distribution) Excludes EPC's. Focus on 'clean' energies. 3. Transport – Both goods and passenger transport. 4. ICT- Services, Manufacturing and Assembly. Excludes wholesale and retail trade, repair services and telecommunications industry. 5. Financial services- Excludes locally oriented financial services, retail banking and insurance. 6. Affordable housing 7. Any new priority sectors
Seven year tax holiday	For investment worth $50M with 30% equity in following sectors: 1. Energy 2. Manufacturing 3. Tourism 4. Health 5. ICT- same exceptions as under 15% CIT 6. Export investments 7. Any other priority sector
Export Processing Zones	• This is outside the customs territory therefore no customs taxes and duties applicable
Accelerated Depreciation	1. This is a uniform rate of 50% across the country 2. It is also linked to specific sectors

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Issues arising from plenary

- Incentives are not sufficient for attracting investments. While they are one of the key incentives often used, they cannot work on their own. Investors often consider market potentials, macroeconomic stability, availability of skilled labour, quality and efficiency of infrastructure, exports, per capita income, consumer preferences and cost of doing business, among others.
- Within the context of the EAC regional integration, partner states must work towards promoting the region as a single hub/ investment destination. Reliance on incentives and other undefined incentives could lead to the "*race to the bottom*" due to competition between partner states.
- The EAC partner states should consider undertaking a review of their incentives structures in view of their contribution towards attracting investments. Further still is that in addition to reforming the incentives structure, there is need to harmonize the EAC incentives structure to curb the risks of competition i.e. the race to the bottom.
- Majority of the EAC partner states investment laws and policies including the investment agreements they have signed allow for investors to freely externalize their profits, dividends and capital, something that places these countries at risk of balance of payments difficulties. Are there incentives that encourage investors not to repatriate profits?
- There is also need to encourage and attract investments from the diaspora rather than fully relying on foreign investment inflows. According to the Rwanda experience, efforts have been made by the government through the president to encourage the nationals of the country to increase the flow of remittances into the country and undertake investments.

Video – Tax Havens

The session began with a video titled "The New Tax Havens". The video tells a story of the small town called Zug which has the lowest tax rates, as low as 15-16%, the lowest in Switzerland. The town, which has a population of about 26,000 people has 30,000 companies, and this number keeps growing at an average rate of 800 a year. These companies mainly have mail boxes, even though most of them indicate that this is where their companies' headquarters are located.

The Texas democratic congress man questioned the legitimacy of this moves of these companies giving an example of Transocean, a Texas company which moved to Zug. But Transocean maintained about 1300 employees in Huston area and have only about 12 or 13 in Switzerland, and this company claims that it is a Swiss company. But this is only for tax purposes. According to the congress man, this company, which is an American company has saved about 2 billion USD in taxes by moving to Switzerland, which is a tax haven. Another company, Weatherford, which is a 10 billion USD company and provides oil field services firm, also moved to Switzerland but still has about 2800 workers in Huston. While its headquarters are in Zug, it only rents a boardroom there which according to the Huston office is never used.

According to the video, while this may appear unrealistic, according to the Zug and US tax laws, this is legal to get a low tax rate in Zug, even when the company does not have presence there.

This situation has contributed to worsening the deficit crisis in the U.S but the companies argue that all they want is a plain level field because the tax rates in the USA are too high, up to 35% high.

Comments raised by plenary

The key challenge involved in this process is the issue of monitoring the conversion aspects of investment projects

The EAC region must urgently consider harmonizing their tax policy regimes as well as the incentives regime. It has been noted that Kenya is currently making attempts to become a tax haven. Debates questioning where MNCs/ TNCs should pay their taxes have concluded that they should pay taxes where they are located and operating. This argument was justified on various grounds including the fact that such companies generate externalities both positive and negative, of which the impacts of the negative externalities must be addressed by the host governments, hence necessitating tax revenue.

In addition, Double Taxation Treaties should be rethought given that majority of them have been proposed by countries that are or have tax havens and thus form grounds for profits to be shifted to these countries and taxes not to be paid in the host state. Such arrangements have also facilitated corruption where officials within certain African governments choose to invest in such countries money that they wish to hide because they have stolen it from their governments. Mauritius, which is one of Africa's largest and most popular tax haven has been identified as a popular hideout for money swindled by Africa's corrupt officials.

INVESTMENTS AND EXTRACTIVES

The Africa Mining Vision and other voluntary initiatives for transparency in the extractive sector

"The recovery of the mining sector in Africa will require a shift in government objectives towards a primary objective of maximizing tax revenues from mining over the long term, rather than pursuing other economic or political objectives such as control of resources or enhancement of employment. This objective will be best achieved by a new policy emphasis whereby governments focus on industry regulation and promotion and private companies take the lead in operating, managing and owning mineral enterprises." *Strategy for African Mining – World Bank, 1992.*

The Africa Mining Vision (AMV) was adopted in 2009 by African Union Summit. It seeks to foster "a transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development."

The Action Plan that has nine program clusters to be implemented at national and regional levels was also approved by Ministers in December 2011. The AMV stresses that developing a strong, capable and robust African mineral resources sector requires an astute understanding of Africa's relative advantages in the global mineral value chain.

The idea of the vision is a knowledge-driven African mining sector that catalyses & contributes to the broad-based growth & development of, and is fully integrated into, a single African market through:

- Down-stream linkages into mineral beneficiation and manufacturing;
- Up-stream linkages into mining capital goods, consumables & services industries;
- Side-stream linkages into infrastructure (power, logistics; communications, water) and skills & technology development (HRD and R&D);

It also emphasized mutually beneficial partnerships between the state, the private sector, civil society, local communities and other stakeholders.
In terms of the policy direction to facilitate the implementation of the AMV, the session proposed the following key issues:

- Proactive role of all government ministries, departments and agencies in the mineral sector;
- Expanding role of linkages (backwards, side-stream and forward linkages, knowledge, fiscal) of minerals in the local economy;
- Optimizing the fiscal policy regimes to ensure that the right revenue is generated and not lost;
- Transforming artisanal and small scale mining (ASM) into a development tool;
- Creating a transparent and accountable mineral regimes;
- Supporting regional integration and cooperation;
- Upholding high standards of safety, health and environmental protection; integrating Corporate Social Responsibility (CSR) into local and national socio-economic development plans.

INVESTMENTS AND HUMAN RIGHTS

Towards a Binding treaty on Business and Human Rights: Implications for Africa

"*20 years ago, 'human rights' & 'business' was very rarely used in same sentence. Human Rights was the business of Gov't while companies just had to mind their own business." FIDH.* Business entities have a vast and growing impact on peoples' lives, including on gender relations, the environment, neighborhoods and access to land and other resources. When businesses pay insufficient attention, they often infringed on people's human rights."

It is on the basis of this growing reality that proposals to put in place a binding treaty on human rights for Transnational Corporations and other business was made and is being pursued.

The CORPORATE responsibility is to *respec*t human rights, to act with due diligence to avoid infringing on the rights of others and to address adverse impacts of activities in which they are involved. STATE's duty on the other hand is to *protect* against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, investigation, enforcement and adjudication

The proposed treaty elaborates that TNCs and other business enterprises, regardless of their size, sector, operational context, ownership and structure, are to comply with all applicable laws and respect internationally recognized human rights, wherever they operate, and throughout their supply chains.

They are also to prevent adverse human rights impacts of their activities and provide redress when it has been so decided through legitimate judicial or non-judicial processes; and that they are to further refrain from activities that would undermine the rule of law.

African states should take a more effective role in the process towards putting in place a binding treaty on business and human rights: and support all its outcomes, given its importance to African states as they related with foreign investors (especially MNCs and TNCs).

KEY OUTCOMES, STRATEGIES AND WAY FORWARD

How to Preserve EAC's Policy Space and also make Investment Work for People

The draft EAC Investment policy and strategy

- EAC secretariat should circulate the draft Investment policy and strategy
- There is need to review the draft EAC investment policy and strategy with close reference to the EAC model Investment treaty, 2015 which was sighted as a more progressive document

Memorandum of Understanding between the US and EAC on Investment cooperation

- EAC secretariat to share the draft Memorandum of Understanding as shared by the US.
- Stakeholders to review the MOU with reference to the EAC model investment treaty, 2015 and partner states' National Development Plans

The Expiry of the Tanzania – Netherlands BITs and the inconsistent Burundi-Kenya BIT

- The Tanzania- Netherlands BIT will expire on 1st April 2019. The agreement provides that either contracting parties should notify the other contracting party at least 6 months before the date of expiry of the agreement. If neither of the contracting parties notifies the other contracting party of its intent to review or terminate the treaty, then the treaty would be automatically renewed. The Tanzania government MUST therefore notify the Netherlands government in writing of its intent to either renegotiate or terminate this agreement by 1st October 2018, beyond which the agreement will be automatically renewed.
- The existing BIT between Kenya and Burundi should be rethought as it contradicts the EAC common market provisions on National Treatment (according to the agreement, it can be terminated by October 2018)

Trade Related Aspects of Investment Measures (TRIMS)

- The EAC partner states governments should support the demand for a further extensions of the TRIMS transition period which is supposed to expire in 2020.
- Need to support the enactment of Local content policies and laws

Tax incentives

- Partner states should review their investment incentive regime to ensure a balance between the resources foregone in the form of incentives and the benefits accruing from such investors
- There is need to harmonize the EAC partner states' incentives regime to establish a common investment incentives framework
- Partner states should embrace targeted tax incentives and undertake periodical cost and benefit analysis of the incentives
- They should also ensure transparency and accountability such that tax incentives are a recognized system

Tax treaties and tax havens

- Partner states should renegotiate outdated tax treaties and cancel the unnecessary tax treaties (for example, where a country does not have strategic trade and investment interests)
- They should include anti treaty shopping clauses in the tax treaties/ agreements

More strategies

- The EAC partner states Investment Promotion Agencies should adopt the utilization of appropriate disclaimers in external communications regarding investment opportunities in their countries

- Partner states should develop model investment contracts to guide the processes of negotiating and signing contracts of big projects
- Partner states should undertake analysis and review of all their BITs, country BIT models and national investment legislations to ensure that they are in line with and are supportive of national development agendas.
- The EAC partner states should reject the proposal to introduce Investment facilitation in the WTO
- Partner states should reject provisions for Investor-State Dispute Settlement mechanisms that require international arbitration mechanisms; and review all investment frameworks with such provisions to provide only for State-State Dispute Settlement. They should on the contrary strive to exhaust local remedies in addressing disputes.
- All signed agreements and contracts should be availed to promote transparency and accountability
- Partner states should recognize and reaffirm the role of the state in safeguarding against human rights violations, environment sustainability and their right to regulate investments for the public interest and pursue development.
- Partner states should support the process of putting in place the UN Binding treaty on Business and Human rights
- They should operationalize the Africa Mining Vision (AMV) as the EAC region and make efforts towards implement all its principles
- Partner states should operationalize their country action plans for implementation of the AMV
- Regarding PPPs, partner states should come up with a clear mechanism to manage PPPs and ensure that all associated risks are mitigated through contingent liabilities and that the benefits are maximized.

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