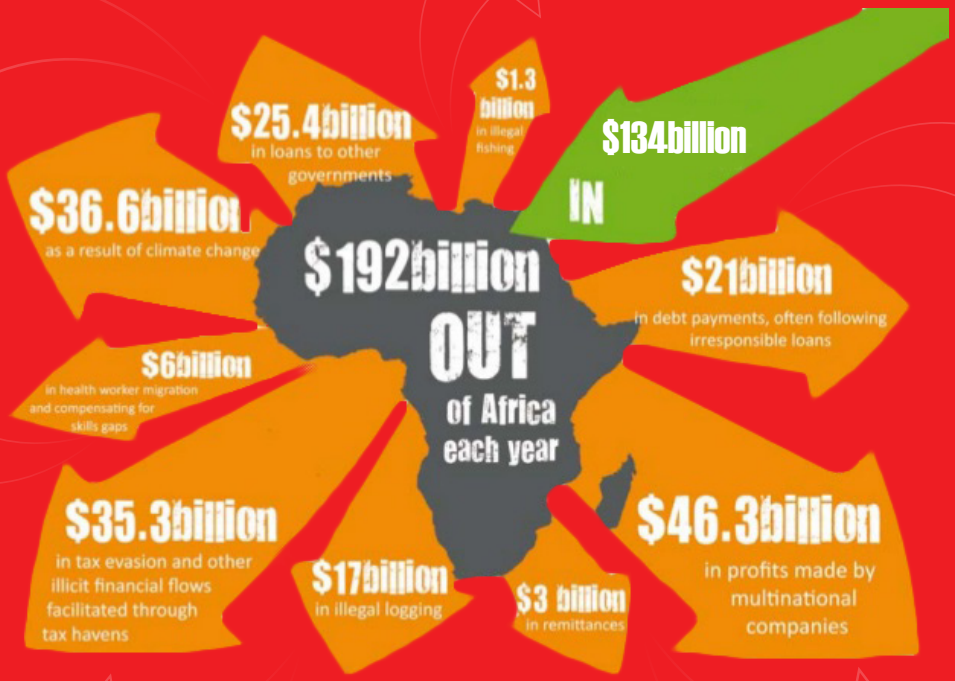
ASSESSMENT STUDY OF THE DRAFT EAC FRAMEWORK AND INVESTMENT MODEL TREATY

Key Provisions and proposals for pro-development investment policies and agreements



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Assessment study of the Draft EAC Framework and Investment Model Treaty:

Key Provisions and proposals for pro-development investment policies and agreements

June 2015

Executive Summary

The study presents an assessment of the provisions of the EAC Framework and Investment Model Treaty in terms of their being pro-development for EAC member countries. Prior to making recommendations on how to make the Model Treaty more pro-development, the study motivates why it is important for developing countries to revisit traditional Investment Treaty models based on the experiences of South Africa\SADC and India's and their respective progressive model treaties.

To make the EAC Investment Model Treaty more development oriented, the study recommends the following changes and/or additions to the draft Model:

- **Preamble:** Be reworded to make it explicit that the intended investment promotion and protection will be pursued to the extent that it supports local sustainable development.
- **Objective:** The objective should be revised to reflect the measurable and visible parameters of sustainable development that the investment is expected to influence.
- **Definitions of investment and Investor:** An "enterprise" based definition of investment; where an enterprise is defined as one having "real and substantial" business operations should be adopted. The investor should be a natural person(s) or enterprise conducting real and substantial business operations in the host country.
- **Scope and coverage of the treaty:** EAC member states ought to discuss aspects to which the treaty should not apply in terms of obligations, rights, claims... The India Model provides a useful reference in this regard.
- **Right of entry and establishment:** Should be included in the Model Treaty as it provides host country the freedom and right to regulate the entry and conditions of establishment of investments/ investors.
- **National Treatment (NT) and Most Favored Nation Treatment (MFN):** EAC Member states need to explicitly set exceptions to NT, but for MFN, it should be completely excluded in the Model Treaty.
- **Fair and Equitable Treatment:** Article should be left out of the Model Treaty.
- **Expropriation and Compensation:** A clear distinction should be made between legitimate state regulatory activity in the public interest and those state measures that are to be deemed expropriatory and therefore liable to the payment of compensation under the investment agreement.
- **Transfers:** The Model Treaty should incorporate a SADC like model provision which includes the fact that the decision taken under the asset transfer safeguards cannot be challenged under the arbitration process.
- **Performance Requirements (PRs):** An article of PRs be introduced in the draft model. This will go a long way in promoting backward and forward linkages within the domestic economy.
- **Obligations against Corruption:** Article on this should be introduced in the Treaty. EAC member countries need to have robust discussions among themselves on whether investors should be allowed to contribute resources in support of or against political agendas in the investment host country.
- **Dispute settlement:** More specificity need to be incorporated in the article to minimize risks of legal contestation.
- **Environmental and Social Impact Assessment:** Article should be introduced in the Model Treaty drawing from SADC Model template.

- **Environmental Management and improvement:** This article should be included borrowing from the SADC model template.
- **Minimum Standards for Human Rights, Environment and Labour:** Article on this should be introduced. The SADC Model provides good reference.
- **Corporate Governance Standards:** Article on corporate governance should be added.
- **Obligations of States on environment, Human Rights and labour standards:** Article should be introduced in the Model Treaty.
- **Exceptions:** Include two additional clauses under exceptions article; one which provides for a self-judging clause which allows for the necessity or appropriateness of the measure to be judged only by the invoking state itself. The second clause should clarify that the exceptional measures must be applied in a non-arbitrary manner and not be disguised as investment protectionism.
- **Periodic Review of the Treaty:** Include provision for consultation. India model is a good reference in this regard.
- **Investor –State Dispute Settlement:** Exclude the article from the Model Treaty. It increases likelihood of legal challenges.
- **Entry into Force (of the Treaty):** Introduce article that clearly articulates this.
- **Duration, Termination and Amendments:** Include article(s) on this drawing from the SADC model.

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Abbreviations and Acronyms

BEE	Black Economic Empowerment
BITs	Bilateral Investment Treaties
COMESA	Common Market for Eastern and Southern Africa
DDT	Double Taxation Treaties
EAC	East African Community
EMS	Environmental Management Systems
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
EITI	Extractive Industry Transparency Initiative
ICSID	International Centre for Settlement of Investment Disputes
IFF	Illicit Financial Flows
ILO	International Labour Organisation
ISDS	Investor-State Dispute Settlement
LDCs	Low Developing Countries
MFN	Most Favored Nation
NT	National Treatment
OECD	Organisation for Economic Cooperation and Development
PRs	Performance Requirements
R&D	Research and Development
SADC	Southern Africa Development Community
SCTIFI	Sectoral Council on Trade, Industry, Finance and Investment
TRIMs	Trade Related Investment Measures
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organisation

1 Background and Introduction

Investment, whether foreign or local, can increase the production potential of a country and directly contribute to enhancing benefits that emanate from higher levels of economic growth. Such benefits include more employment opportunities, increased incomes to the citizenry, improved welfare and standards of living of people. As such, a number of trade and investment related negotiations are being conducted world over to attract investments. The East African Community (EAC) has also been involved in these negotiations both, as a region and as individual partner states.

At the national level, individual partner states have their respective investment codes. However, the changing dynamics within the investment policy framework at the regional and global level, including the need to attract Foreign Direct Investments (FDIs) and fact that the EAC is increasingly negotiating bilateral trade and investment agreements as a bloc has necessitated harmonization of the region's investment policies. These bilateral investment treaties have far reaching implications on development. Consequently, an EAC Investment code 2006 was developed as a model investment code to assist partner states in improving their national investment codes.

During the meeting of the EAC Sectoral Council on Trade, Industry, Finance and Investment (SCTIFI) held on 26th to 28th September 2012, it was agreed that the EAC should develop a joint Investment Policy which it would use in informing the region's position on trade and investment related negotiations. A draft EAC framework and Investment Model Treaty to guide Partner States' engagement with third parties on trade and investment negotiations is in place. To promote economic growth and sustainable development in the EAC region, it is critical for such a model treaty to draw lessons from new progressive model investments treaties.

Against this background this study sought to provide input into the draft EAC framework and Investment Model Treaty with the aim of making it more pro-development. Under the theme "The EAC Framework and Investment Model Treaty: Key Provisions and Proposals for a Pro-development Investment Policies and Agreements" the study identifies pro-development gaps in the model treaty and provides proposals on minimizing these gaps. The study draws lessons from new generation model investment treaties of progressive countries, mainly South Africa and India.

1.1 Research scope

To provide context for the need to assess and provide input to the draft EAC Investment Model Treaty in terms being pro-development, a review of contemporary debates on Bilateral Investment Treaties (BITs), from the perspective of the role of FDI in the development of the host country was done. The review was limited to South Africa and India. This was followed by a pro-development analysis of key provisions of draft EAC Framework and Investment Model Treaty, and the EAC Investment Code of 2006. Drawing from the new generation model investment treaties of progressive countries, notably South Africa and India, recommendation are made on how to make EAC Model Investment Treaty more pro-development.

1.2 Objectives

The overall objective of the study was to identify development gaps in the draft EAC Framework and Investment Model Treaty and to provide proposals on making the treaty more development oriented.

Specifically, the study sought to;

i. Examine the gaps in the draft EAC framework and Investment Model Treaty in the context of the development challenges facing the region and how they related to achieving pro-development investment policies and agreements.
ii. Analyze the EAC Investment Code of 2006, its objectives and how they are related to achieving pro development investment policies and agreements.
iii. Examine the new progressive investment models of South Africa and India, and ascertain how they related to the EAC model with an objective of highlighting lessons as well as experiences for the EAC region.
iv. To provide key policy proposals to improve on the draft EAC Framework and Investment Model Treaty in order to promote pro development investment policies and agreements.

2 Need to Renegotiate BITs Agreements: The South African and Indian Experience

There has been a long held view that FDI in unequivocally important for the economic growth of low-saving countries. As such, any policy intervention aimed at attracting FDI, including investment treaties, was considered good without qualification. Proponents of the first generation BITs argue, for example, that such treaties attract FDI by offering protection to foreign investors in jurisdictions where legal regime is weak or biased against foreigners. In so doing, the treaties are important to the economic development of investment-host countries.

The narrative of non-qualified support of any intervention that is expected to attract investment to a country has and is changing though. This can be attributed, in part, for failure of FDI to support sustainable development among many developing countries particularly. For many developing countries, there is a low or no correlation between the level of inward investment received overtime and evidence of sustainable development in the local economy. This realization has led to a re-think about traditional policy interventions aimed at attracting investment.

South Africa and India are some of the developing countries that have already taken steps to re-define policies regarding the attraction of FDI. Their experiences are briefly discussed, the following section, as part of contextualizing why the EAC Framework and Investment Model Treaty ought to the critically assess the terms of its relevance and appropriateness to the development needs of the EAC region.

2.1 South Africa and the re-negotiation of BITs

South Africa is one of the African countries that have undertaken a move to change its BIT agreements in recent times. Despite being considered controversial by some, the country went ahead to restructure its BITs. In some cases the country let the existing BITs lapse without possibility of renewal.

The review of South Africa's BITs took place in the period 2007-2010. Two elements were at the centre of country's decision to review and change the first generation BITs it had signed with mostly EU countries. First, the recognition that the existing BITs extended too far into the policy space needed by the government to influence the implementation of social economic priorities for the country. Moreover, some aspects of the BITs were incompatible with the country's constitution and other laws. Second, the existing BITs allowed for legal challenges to regulatory changes, which the government considered to be in the public interest.

The country had been legally challenged on some of its domestic policies based on the BITs it had signed. Two legal challenges were publically acknowledged by government. The first one related to a Swiss investor who had acquired a private game reserve which was subject to poaching, vandalism and theft. In 2004, he opened up a legal challenge with the South African government for failing to provide him with protection and security as one of the aspects stipulated in the country's BIT with the Swiss. The second legal challenge to the South African government arose in 2006 under the Italian treaty. It dealt with alleged expropriation of mineral rights, and a failure to apply fair and equitable

treatment. The investor specifically objected to the application of Black Economic Empowerment (BEE) rules to his business, which the South African government considers sacrosanct in terms of its post-apartheid transformation agenda.

Ultimately, the country found the first generation BITs to be skewed towards protection of foreign investors through the provision of guarantees and protections against any potential adverse effects on their investment in the local economy. The BITs were less concerned with development aspiration of the country.

South Africa argue that the new BITs will endeavor to strike a balance between the protection of investors in the local economy while at the same time allowing the government flexibility to introduce policies intended to fast track achievement of socio-economic development priorities. Policy makers in the country further reasoned that the country offers robust investor protection, guaranteed in the Constitution. It is also highlighted that South Africa receives no FDI from many countries with which it has a BIT, while receiving FDI from countries without BITs such as the USA, Japan and India. By implication, the country can still attract investment without committing itself to BITs and risks they create regarding the country's implementation of its development agenda. Based on these arguments and observations the country undertook revise it BITs.

2.2 India and the Re-negotiation of BITs

Like South Africa, the review of India's BITs was motivated, in part, by the recognition that its existing BITs were making the country vulnerable to legal challenges. For example, in 2012 arbitration notices served by 17 foreign companies, challenging various policy measures and demanding billions of dollars in compensation for the alleged violation of India's BITs.

In addition, there was no hard evidence that having BITs in place translated into increased investment for India. BITs which India had signed included binding clauses that often encroached on a country's sovereignty in domestic policy making, yet their value to local development was not guaranteed. India had signed BITs with countries such as Mangolia, Serbia, Macedonia and Iceland but the two-way investment flows between India and these countries was not significant. India like South Africa received substantial foreign investments from the US and Canada without any BIT in place. This observation weakened the case of having highly constraining BITs in the name of trying to attract FDI for the country.

India decided to focus on attracting investment with lower risk of legal challenges than BIT-related investment. It was recognized that BIT was just one of the many factors that attracted external investment to a country. Other factors such as natural resources, market size, rate of economic growth and political dynamics can be a major factor in FDI flowing into a particular country.

Another subtle reason for the review of India's BITs was the recognition that there were no guarantees that FDI would support local development. Of specific concern to India, was the fear that multinationals would dominate the local retailer sector which was a major employer of citizens. It was anticipated that big foreign businesses would monopolize the retail sector in India by destroying all small competitors, and then they would be in complete control of prices. This would in turn lead to higher prices of basic commodities and job losses. The retail sector in India is a significant employer and has a great growth potential. It is the second largest employer in the country. The potential of FDI distorting the Indian culture was another issue of concern. Though FDI in Indian retail was expected to contribute to the enhancement of tourism, hospitality and few other industries, the culture of the people in India would slowly be changed.

The above factors combined led to the India renegotiating most of its BITs. The new BITs framework was supposed to take into consideration all socio-economic aspirations of the country. Some of these aspirations like the culture had no specific monetary value attached to them, but remains important to the lives of Indians.

The next sections look at the objective and the pro-development of the EAC Investment Code 2006. This is followed a systematic assessment of the EAC Investment Mode Treaty in terms of it being pro-development drawing from the experiences, and the revised BITs for South Africa and India. The assessment is done on only those sections of the model treaty that were judged to be highly linked with the pro-development needs of the EAC region. The section further suggests additional aspects that ought to be introduced in the EAC Framework and Investment Model Treaty drawing again from the templates of South Africa and India model treaties.

3 The EAC Investment Code (2006): Objective and pro-development dimensions

Before one engages in the assessment of the draft EAC Framework and Investment Model Treaty, it is important to have some insights into the EAC Investment Code of 2006, which is, to some extent the precursor of the Model Treaty.

The Code presents an earlier attempt by the EAC region to harmonise aspects pertaining to investment among member countries. The aim of the Code was to be a guiding instrument to partner states on engaging with foreign investment and investors without any binding effect on any partner state. Partner states could use or supplement their investment laws and policies borrowing from any or all of the Code's provisions.

The Code has five distinctive parts. The first part, after the preamble named preliminaries, focuses on the interpretation of the Code, its application, transitional provisions and scope. In the second part, right of establishment, establishment procedures, operation, protection and benefits of an enterprise are set out. Part three and four deals with investment promotion agencies and special economic zones respectively. Part five concludes with miscellaneous issues.

The pro-development intentions of the Code are expressed in the preamble through recognition that Partner States needed and pursued open, liberal and transparent investment policies that they believed would significantly contribute to their economic progress principally through the private sector led development. A notable shortcoming of the Code's preamble in terms of the targeted investment being pro development is the assumptions it makes about development. It makes a strong assumption that liberal policies are a pre-requisite for the EAC achieving development and by implication relegates the role that national governments have to play in the realisation of local development of course with tandem with the private sector. Lessons from the East Asian countries indicate that governments can and should play a key role in driving local development.

The preliminary part does not directly address the pro-development intention of the Code however, from the way key aspects are defined, particularly investor and investment, some pro-development dimensions of the Code can be deduced. In terms of defining investment, the Code defined investment as local or foreign capital by an investor including the creation or acquisition of business assets by or for a business enterprise. The Code defined an investor as a natural person, an incorporated company or partnership in which the majority of the issue share capital is owned by non-citizens. The wide definition of an investor and investment under the Code creates a risk that non-developmental capital may be attracted. In some member countries there are already concerns that those considered as investors in the local economy have ended up competing with the local business in small-scale trading business.

A good attempt is made to make the Code pro-development under the part on right of establishment, establishment procedures, operation, protection and benefits of an enterprise. In particular, the specifications under National Treatment and Non-discrimination clauses which states that a foreign investor may invest and engage in any business activity in a Partner State which any local investor of the Partner State may undertake but with qualification. The qualification of equal treatment of foreign

investors as nationals in terms of undertaking business and taxation relates to a provision that it may be a condition of any license or other authorization to, or any agreement with a foreign investor for the grant of rights over natural resources that the Government shall be entitled to or may acquire an interest in any enterprise to be formed for the exploitation of such rights. This qualification allows space for mineral rich countries to use their national resources in the best way possible to support their local development aspirations without artificial constraints.

To safeguard local business from external competition that may be triggered by foreign capital, the Code empowers a national minister to limit foreign investors undertaking of any business or category of business which, in his or her opinion, is engaged primarily in the provision of services or the production of goods which can be provided or produced adequately by the citizens of the Partner State. The Minister may further establish a minimum threshold for foreign and national investments that are permissible. This provision, to some extent, reduces the risk of non-beneficial and opportunist foreign investment and in so doing increase the likelihood of the attracted investment being pro-development.

The Codes goes into great details in terms of operational and process issues that pertains when foreign investment comes into a country under the section on investment promotion agencies and special economic zones. These sections do not talk directly to the pro-development objective of the Code but they provide certainty and guidance to the investor on how foreign investment will be dealt with in the host country.

The miscellaneous section that concludes the Code does not also talk to the pro-development aspiration of foreign investment to the investment host countries. The section rather focuses on additional discretionary powers of the minister regarding foreign investment or capital operation in the local economy.

In all, EAC Investment Code of 2006 overarch objective is pro-development. However, there are gaps in the way the Code anticipates the realisation of local development from the attracted investment. Moreover, the Code provisions are not binding to member state countries. At best, it only provides a starting point for coming up with a pro-development EAC Framework and Investment Model Treaty. The positives from the Code are articulated in the next section that deals explicitly with the pro-development assessment of the EAC Investment Treaty Model.

4 Pro-development Assessment of Key Provisions of the EAC Investment Treaty Model

Most, if not all investment treaties start with a preamble setting the scene or the context of the treaty. So, it is appropriate the pro-development assessment of the EAC model treaty should start with the preamble.

4.1 Preamble:

The importance of a preamble stems from the fact that as stated in Article 31 of the 1969 Vienna Convention on the Law of Treaties, it constitutes part of the context of the agreement. Consequently, the preamble is relevant for the interpretation of a treaty. Although not legally binding, a preamble is a contextually important part of a treaty serving to indicate its objectives and purpose. A preamble can thus be used to send out a clear message regarding the purpose of the Treaty.

The Draft EAC Investment Model Treaty includes a preamble which states that the objective of the treaty is to create and maintain favorable investment conditions for investors for the mutual benefit of both parties. The preamble also recognizes the important contribution investment can make to the sustainable development of the Parties, including the reduction of poverty, increase of productive capacity, economic growth, the transfer of technology, and the furtherance of human rights and human development. Most important the preamble reaffirms the right of the State to regulate and also to balance the rights and obligation of both the investors and the host government in order to meet national policy objectives.

The EAC Investment Code of 2006 did not explicitly talk to the development objectives of the treaty. The overriding objective of the Code was stated as follows: 'to improve the region's investment climate in order to attract more investor by pursuing open, liberal and transparent investment policies; openness to foreign investors, providing a conducive repatriation conditions, national treatment status and simplification of investment procedures. Like in the case of the old South Africa's BITs, the Code was biased towards the interests of the foreign investor than national development aspirations.

It is proposed therefore that the preamble of the Draft EAC Investment be reworded to make it explicit that the intended investment promotion and protection will be pursued to the extent that it supports local development. The investment will not be pursued, for example, at the expense of other key domestic development goals and public interests such as health, environment, human rights, consumer protection, anti-corruption, consumer rights and the promotion of internationally recognised rights such as labour rights. However, since the reference to these rights in the preamble does not create any substantive obligations for investors, they should again be expressly referred to in the main text. The Preamble should also further assert the right of the state to introduce new rules and regulations on investments as is with the case of India's Investment Treaty Model. The Indian model reaffirms "the right of Parties to regulate Investments in their territory in accordance with their Law and policy objectives including the right to change the conditions applicable to such investments".

4.2 Objective:

Stating the objective of the Treaty is important as it provides and reemphasizes the intent of the Treaty. The stated objective of the Draft EAC Model clearly links the promotion of investments to the promotion of the sustainable development of both parties especially of the host country. The Investment Code 2006 on the other hand did not include an article on objective. .

The EAC model investment treaty objective limits itself to increasing investment for sustainable development more especially in the investment host country and it mirrors that of SADC model. Sustainable development is a wide concept that can be subjectively defined depending on the interests of the defining party. Moreover its achievement takes place over a longer period of time. Whether a particular investment is supporting sustainable development in the short term for a host country can be contentious and contested. This possible contention is minimized by stating clearly and beforehand the parameters that will be used or referred to in adjudicating whether investment is indeed serving the host country's sustainable development agenda.

It is recommended that the objective of the EAC Model Investment treaty be rephrased to capture the measurable and visible parameters of sustainable development that the investment is expected to influence. The revised objective of the EAC Model Investment Treatment may read: " To encourage and increase investments between investors of one State Party into the territory of the other State Party that supports, employment, technology and skills transfer, synergizes with local firms and ultimately contribute to poverty reduction in the host country in a sustainable way".

4.3 The definitions

Under this article, the most important area is the definition of what constitutes an "investment" and an "investor" since the privileges in the agreement will apply to either the investment or the investor. Both the Draft EAC Treaty Model and the Investment Code have a very wide definition of what constitutes an investment. According to the Draft Model, the forms that an investment may take include, inter alia:

- An enterprise
- An equity security of an enterprise
- A debt security of an enterprise:
- A loan to an enterprise
- An interest in an enterprise that entitles the owner to share in income or profits of the enterprise
- An interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraphs (3) or (4) of this Article
- Real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes

In the Investment Code investment includes:

a. Expansion, restructuring, improvement or rehabilitation of a business enterprise;
b. Movable and immovable property as well as any other rights in respect of every kind of asset;
c. Rights derived from shares, bonds and other kinds of interests in companies and joint ventures;
d. Title to money, goodwill and other assets and to any performance having an economic value;
e. Rights in the field of intellectual property, technical process and know-how;
f. Rights granted under public law including rights to protect, explore, extract and win natural resources;

Both the Draft and the Code use an asset based definition to define an investment. The problem with this definition is that it may also include assets which are not contributing to the development of the host country's' economy for eligibility for protection under the Treaty. The definition of investment further extends the privileges of the agreement to many aspects related to 'theoretical' investment but not necessarily beneficial investment.

It is noted that the Draft Model has put some qualifications for an asset to qualify as an investment i.e. "it must have a [substantial] commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and significance for the Host State's development". Portfolio investments, goodwill, market share, proceeds from commercial contracts for the sale of goods or services are exempted in the definition of investment. Nonetheless, both the qualification and exemption clauses in Model are not strong enough to eliminate the risk of non-developmental and opportunistic investment Borrowing a leaf from India's new model BIT , the EAC should adopt an "enterprise" based definition of investment; where an enterprise is defined as one having "real and substantial business operations" in the host state with "substantial and long-term commitment of capital" and engagement of a "substantial number of employees in the territory of the host state." The enterprise definition of investment reduces the risk of attracting footloose and opportunistic foreign investment that often targets windfall profits and thereafter shift to new locations. Such investment normally has minimal positive effect onto the domestic economy of the host country because it does not create long term linkages with local production sectors. The enterprise definition of investment increases the likelihood of attracting long term investment which has a higher probability of supporting of host country development aspirations by benefiting its citizens.

The enterprise should also have "assumed entrepreneurial risk" and made "a substantial contribution to the development of the host state through its operations along with transfer of technological knowhow, where applicable."

The 4 criteria for an enterprise to qualify as an investment should be, a) contribution made by an investor; b) certain duration of the enterprise, c) an assumption of risk and d) a contribution to the economic development of the host state. In other words, an enterprise which carries out minimal business operations in the host country should not qualify as an investment. This definition will assist the EAC in promoting and protecting "Greenfield" investments.

India's Model Treaty explicitly states that an enterprise must be "constituted and operated in compliance with the laws of the host state." This clause enables government to deny protections to an enterprise that has violated obligations related to corruption, disclosures and taxation.

In a far as defining investment for the purpose of the Model Treaty, it is recommended that the definition of be enterprise-based, narrowed down and made more specific and beneficial to the EAC region. Even after narrowing down the definition, there should be an exclusion list which should be a schedule attached to the treaty. The exclusion list should be extensively discussed by the partner states.

The Draft model also provides for a definition of who an investor is: "Investor means a natural person or a juridical person of the Home State Party making an investment into the territory of the Host State Party" This implies that an "investor" is only the foreign investor. The Code on the other hand is clear that "investor" means a foreign or local investor".

It is important to put emphasise on the operations of the "investor" in the host country. The Indian Model defines both natural persons and enterprises "conducting real and substantial business

operations in the home state" as investors. The inclusion of requirement that investors conduct real and substantial business operations in the home state is intended to deny protection to so-called "mailbox companies" which have a minimal commercial presence in the home country. This definition would address the out flow of resources as a result of "Treaty shopping" due to the Double Taxation Treaties (DTT) that the EAC partner states have signed with countries with low tax jurisdictions like Mauritius. In other words the definition of an investor should go hand-in-hand with what the investor does.

4.4 The Scope and Coverage

Scope and coverage sets out the delimits of a treaty in terms of the measures that the Treaty applies to. The Draft EAC Treaty Model has a specific article on scope and coverage. The article states that the Treaty applies to the investors of the other party and covered investments. The Draft Model further provides for exclusions, that is, where the Treaty will not apply. For example acts or facts that took place or situations that ceased to exist before the date of entry into force of the Treaty are excluded. The Code 2006 on the other hand is not specific when it comes to scope and coverage. It simply states that ".....the Code shall supplement a Partner State's investment laws and policies when any or all of its provisions are adopted."

Scope and coverage of a treaty is very important and relevant to development efforts of an investment host country. The wider the scope and coverage of an investment treaty, the higher the risk that it may constrain the host country other development policies.

The SADC Model does not have a specific article on Scope and coverage but India has. The article on scope and coverage of the India Model makes it clear that provisions of the treaty cannot be applied retrospectively. Further, the agreement does apply to measures or laws that existed before the date of entry into force of the Treaty or any subsequent modifications thereof.

It emphasizes the right of the Parties to retain their rights to supplement, modify, amend or revoke its law in good faith. Any obligation that is not explicitly set out in the treaty does not apply to both parties to the treaty.

Given the importance of scope and coverage in minimizing the risk that an investment treaty does not encroach on other national development policies, it is important for partner states to discuss and agree on the areas where the Treaty will not apply. Lessons could be drawn from the Indian Model in which government procurement, subsidies or grants provided by a party, services supplied in the exercise of governmental authority are outside the scope of the treaty.

4.5 The right of entry and establishment

This article provides the foreign investors conditions and regulations of entry and establishment in a host country.

The Draft EAC Model does not have this article, although some regulations regarding entry are included under other articles. The Investment Code 2006 has an article "Right of Establishment, Establishment procedures, Operation, Protection and Benefits of an Enterprise". Under this article, foreign investors are allowed to invest and engage in any business activity which any local investor of the partner state may undertake. Foreign investors are also accorded equal treatment unless provided for in the Code or other relevant laws. However the Code provides for the refusal of foreign investors to engage in certain specified business activities; especially where the citizens can adequately produce those goods and services. This can be done through a statutory instrument with approval of parliament.

Both the Indian and SADC model treaties do not explicitly have this article though some of the issues regarding the regulation of entry and establishment of investors/investments are provided for in other articles in their respective treaties. In the SADC Model, the article on "Admission of investments of Investors of the other party" provides that the parties shall promote and admit investment in accordance with their applicable law and shall apply such laws in good faith.
It is important to have this specific article in the Investment Treaty Model as enables the EAC to retain the freedom and right to regulate the entry and conditions of establishment by deciding whether or not to accept a potential investor or investment and the right to impose conditions on the investment if it decides to allow entry. Regulation may include various conditions and restrictions on a sectorbysector basis. For example foreign investors may not be allowed to operate in certain sectors. In sectors where they are allowed, they have to apply for permission to establish themselves, and if approval is given it should come with conditions. The conditions may include equity restrictions (for example, a foreign company cannot own more than a certain percentage of the equity of the company it would like to set up); and ownership restrictions (for instance, foreigners may not be allowed to own land or small scale agricultural production. In Brazil, for example, foreign ownership of land in rural areas and adjacent to international borders is prohibited. Malaysia has regulations limiting the degree of foreign equity ownership in some sectors. The conditions may include encouraging joint ventures, reducing the amount of outflow of foreign profits, encouraging the allocation of part of the company's shares to locals so that a portion of FDI profits accrue to locals; and requiring or encouraging a foreign firm to retain a significant part of their profits for reinvestment. Such conditions will allow the EAC partner states to control the quantity and quality of foreign investment in order to generate spin-offs for and linkages to the national economy, in so doing, boosting inclusive growth and sustainable development.

The right of entry and establishment is a critical article since it allows governments to provide for policies and rules on entry, establishment and operations in line with national, development, social and environmental objectives.

4.6 Non discrimination: National Treatment (NT) and Most Favored Nation Treatment (MFN)

This article provides for the manner in which foreign investors will be treated. National treatment means that the foreign investor would be given rights to be treated no less favorably than local investors; while MFN refers to the equal treatment of foreign investors from other countries.

The Draft Model and the Code 2006 provides for the national treatment of foreign investors, although the Draft Model qualifies the treatment by including the term "in like circumstances" in respect to the management, operation and disposition of investments in its territory. The Draft Model also provides for a schedule of sectors and activities which will be excluded from National Treatment. It is important for EAC partner states to agree on this list of exclusions.

The scope and coverage of non-discrimination in a Treaty is important as it protects host government from a blanket coverage; hence the importance of exceptions in this article. The qualifying term "in like circumstances" and the exemptions narrow down the scope of NT and provide host governments with a tool to differentiate among investors and investments based on their dissimilar circumstances. Local enterprises often require affirmative action and special treatment, before they can compete on more balanced terms with the bigger foreign companies. Affirmative action measures that promote local industries or services include subsidies, preferential tax treatment, R&D subsidies. The Indian Model also excludes from National Treatment financial assistance or measures taken by a party in favour of its investors and their investments in pursuit of legitimate purpose including the protection of public health,

safety and the environment. The SADC model recommends exceptions to NT to some sectors or sub sectors and also includes an exclusion Schedule. The SADC Model limits NT to the post –establishment phases of management, operation and disposition. This effectively excludes the pre-establishment phase from NT.

The SADC and the Indian Model do not provide for MFN treatment. The explanation given in the SADC Model as to why this Clause should be excluded from a bilateral investment treaty is that it allows for the multilateralization of a basically bilateral treaty. It also increases the risk of legal challenge based on unrelated treaty signed with a third party.

It is recommended, therefore that the MFN clause should not be included in the EAC Investment Model.

4.7 Fair and Equitable Treatment (FET)

This article provides for the obligation for host governments to accord fair and equitable treatment to covered investments. The FET principle provides a standard against which to determine whether the behavior of the contracting parties towards covered investments is reasonable.

The Draft Model includes this article which obliges the Parties to have in place administrative, legal and judicial processes that deliver procedural justice, provide access and timely information regarding administrative and judicial proceedings affecting the investments and the right to appeal. However the Draft provides provisos i.e. all this will take into consideration the level of development, availability of resources, and on domestic laws and regulation of the state parties.

Both the Code 2006 and the Indian Model do not contain this article. This provision is highly controversial due to the lack of certainty as to what constitutes "fair" and "equitable" treatment. These terms have been a subject of very expansive interpretations in arbitral decisions; and have been regularly invoked by claimants in investor-State dispute settlement (ISDS) proceedings, with a considerable rate of success (UNCTAD, 2014).

Given the significant risks and uncertainties that may arise from these broad interpretations it is better for this provision to be left out of the Treaty.

4.8 Expropriation and Compensation

This article provides for the protection of covered investments from nationalization or expropriation except in public interest in accordance to the due process of the law and on payment of fair and adequate compensation within a reasonable time. The Draft model and the Code 2006 under "Protection from Deprivation of property" have included this provision. The Draft Model clearly states how "fair and adequate" compensation will be calculated and assessed. This is important to avoid any ambiguities.

It is important to note that the biggest challenge with this provision is the wide definition given to "expropriation" especially in the US investment Model. The definition includes both "direct and indirect" expropriation. Indirect expropriation usually includes the loss of goodwill and future revenue/ profits of a company or an investor, as a result of a government measure or policy. Investors have frequently used the 'expropriation' provisions to challenge government regulatory measures, including those regulations that were apparently made for the protection of the environment. For example, the banning of a polluting petrol additive (Methanex v. US) and refusing to permit a hazardous waste facility (Metalclad v. Mexico).

These challenges have been based on the Hull rule or formula that requires that expropriation be accompanied by compensation in a relatively strict manner that is 'prompt, adequate and effective (Radu, 2008). 'Prompt' denotes that compensation be, at the very least, 'speedy' (if not immediate), 'adequate' means that the property be given an appropriate valuation which comes 'close to its full or fair market value', and 'effective' describes a payment method that is usable and negotiable (Wouters et al, 2012). Expropriation based on the Hull principle is impractical to most developing countries, it constrains their ability to expropriate foreign assets even if it is for national interests and makes the investment host country vulnerable to legal challenges. This situation should be avoided by developing countries as they endeavor to achieve more development through the attraction of foreign capital.

Therefore the EAC Model Draft should clearly stipulate and make a clear distinction between legitimate state regulatory activity in the public interest and those state measures that are to be deemed expropriatory and therefore liable to the payment of compensation under the investment agreement. In cases where it may not be possible to exhaustively distinguish measures that will constitute expropriation, then a provision that whether a measure or a series of measures have an effect equivalent to expropriation should be dealt with on a case-by-case basis and on fact-based inquiry.

4.9 Senior Management and Employees

This article provides for the entry, sojourn and employment of foreign personnel for purposes relating to an investment. The facilitation of the entry of foreign employees and the right to hire expatriates including senior managers and members of the board of directors can be an incentive to attract investors. However this should be balanced with the underlying promises of FDI of skills transfer and employment creation.

Both the EAC Draft Model and the Code 2006 includes this article. In order to ensure spill overs in the local economy, the Article should remain in the Model to ensure that host retains some control over the employment of expatriates in senior positions "as long as it does not materially impair the ability of the investor to exercise control over its investment" (SADC Model BIT; Article 7); and also require investors to employ nationals by limiting the number of expatriates in certain sectors. It is also important to ensure that the EAC partner states retain control over their immigration policies.

4.10 Transfers

This article is sometimes referred to as "Repatriation of investments and returns", or "Repatriation of assets". This article provides for the right of an investor to freely transfer /repatriate all assets relating to a covered investment in a convertible currency and at the prevailing market rate at the time of transfer. Such transfers include, inter alia:

- Contributions to capital;
- Profits, dividends, capital gains, and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;
- Interest, royalty payments, management fees, and technical assistance and other fees;
- Payments made under a contract, including a loan agreement;
- Payments made pursuant to Minimum Standard of Treatment and Expropriation and Compensation; and
- Payments arising out of a dispute.

The uncontrolled outflows of profit and other investment income have a negative effect on the balance of payment of the investment host country. The financial outflows increase through time as the stock of foreign capital rises leading to "decapitalisation". Because of the much higher rate of return of FDI

compared to the rate of interest paid on aid or debt, the "decapitalisation" effect of FDI is greater than of aid or debt (Atan, 2006). Samuel (2013) emphasise the adverse effect of capital outflows on a country's balance of payment via the current account deterioration. A prolonged current account deficit is often associated with an unsustainable balance of payments and eminent currency crisis. Ultimately, if not controlled, capital outflows contract the local economy. Countries like Uganda that allow 100% profit repatriation may be vulnerable to this negative side effect of capital outflows.

The Draft model as well as the SADC and Indian model provide for exceptions and safeguards whereby the Parties may temporarily restrict transfers in the event of serious balance-of-payments difficulties or if movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies, or if there are regional or global financial crises.

It will be useful for the EAC model to adopt or incorporate the SADC model provision which includes the fact that the decision taken under the asset transfer safeguards cannot be challenged under the arbitration process. Although the investor can be consulted, it does not provide the investor with legal space to veto the decision.

4.11 Performance Requirements (PRs)

Performance requirement refers to the imposition of conditions on the investments or investors such as to source inputs locally, transfer technology, perform Research and Development, promote joint ventures, process sector products locally, employ and train local employees. These PRs assist host governments to discourage enclave operations by investors that contribute very little to the domestic economy. Investor enclave operations tend to import most of their inputs, technology and experts; employ few locals and export unprocessed materials. They provide little benefit to the local economy due to minimum positive linkages with the domestic economic activities.

Many investment model treaties including the Draft EAC Model, the Indian and SADC model have not explicitly included this provision signaling that the Treaty will not prohibit the imposition of performance requirements. This option allows for the PRs to be included in other articles of the Treaty though.

Preclusion of PRs has been due to the WTO Trade Related Investment Measures (TRIMs) agreement which prohibits certain PRs especially local content. However there are many other PRs beyond the ones prohibited under TRIMs. In any case the 6th WTO Ministerial Conference 2005, under the LDCs Package, the LDCs were allowed to maintain, on a temporary basis, existing measures that deviate from their obligations under the TRIMs Agreement. LDCs were also allowed to introduce measures that deviate from their obligations under the TRIMs Agreement until 2020.

Another cited challenge is the National Treatment clause which prohibits the discriminatory imposition of PRs on foreign investors. This challenge can be addressed by imposing these PRs on both the local and foreign investments depending on their level of competence.

The 2012 U.S Model Bilateral Investment Treaty, in Article 8 categorically states that "Neither Party may, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement or enforce any commitment or undertaking…"

The EAC should therefore impose PRs on investments/investors as this will go a long way in promoting backward and forward linkages, improve social outcomes of the investments and strengthen the local private sector.

Rights and Obligations of investors and state parties

Most Investment treaties set out obligations for states without any obligations on the investors. In order to address this anomaly, progressive bilateral treaty models sets out investor obligations and responsibilities for example, the compliance to domestic laws, internationally recognized labour and human rights standards. The following articles discuss the Rights and Obligations of investors and state parties in the context of development aspiration of investment host countries.

4.12 Compliance with Domestic Laws

The EAC Draft Model and the SADC model clearly stipulates that investors and investments shall comply with all laws, regulations, administrative guidelines and policies of the Host State concerning the establishment, acquisition, management, operation and disposition of investments.

This provision establishes a legal obligation on the investors to comply with the domestic laws and not use the treaty as a legal excuse for not doing so.

4.13 Common Obligations against Corruption

This article addresses the issue of bribery and corruption; and is based on the UN and OECD conventions on bribery (OECD, 2006).[1] Both the UN and OECD Conventions cover a wide range of corruption offences, including domestic and foreign bribery, embezzlement, trading in influence and money laundering. The UN provision obligates State Parties to take a number of public and private anti- corruption measures. One of the measures is to include anti-corruption issues in the bilateral investment treaties.

The EAC Draft model does not include this provision against corruption. However both the India and the SADC model provides for the issues of obligations against corruption. The relevant article in the SADC model states that "Investors and their Investments shall not, prior to the establishment of an investment or afterwards, offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a public official of the Host State, or a member of an official's family or business associate or other person in close proximity to an official, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, in order to achieve any favour in relation to a proposed investment or any licenses, permits, contracts or other rights in relation to an Investment". The SADC model also further provides for the penalties resulting from the breach of article and by extension breach of the domestic law by an investor or investment i.e. liability to conviction.

It is also important to note the India Model specifically restricts political contributions by investor as part of guarding against corruption. It states "Investors and their Investments shall not make illegal contributions to candidates for public office or to political parties or to other political organizations. Any political contributions and disclosures of those contributions must fully comply with the Host State's Law.

The EAC Model should include an article on obligations against corruption provision mirroring that of the SADC Model. EAC member countries also need to have robust discussion among them on whether investors should be allowed to contribute resources in support of or against political agendas in the investment host country.

1 OECD 2011: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions "United Nations 2005 : United Nations Conventions against Corruption

4.14 Provision of information

This article deals with the issue of misrepresentation in terms of the information provided by an investor especially when making an investment. This provision broadens the issue of corruption to fraud as regards the provision of misleading information. The EAC Draft Model as well as the SADC and India model have included this provision. In addition to the requirement for timely and accurate information, the EAC Draft Model further provides for the nature of information to be provided that is. Corporate history and practices of the investor. Breach of this article tantamount to the breach of the domestic law and is liable to prosecution. The EAC Draft obliges the host state to protect the information provided by the investor though.

This article is important and should be maintained as host states depend largely on information provided by the potential investors for decision making particularly regarding the adjudication that proposed investment will support local development needs. .

4.15 Investor Liability

The EAC Investment Code of 2006 does not have a section on investor liability but the Draft EAC Investment Treaty Model has it. In the later, it is stated that "Investors and Investments shall be subject to civil actions for liability in the judicial process of their Home State for the acts, decisions or omissions made in the Home State in relation to the Investment where such acts, decisions or omissions lead to significant damage, personal injuries or loss of life in the Host State. The home country is required to ensure that their law has a provision for such claims.

This clause is rather problematic because it puts the responsibility of undertaking legal action again the investor onto the investor's home country. It may not be in the interest of the Home country to take such actions against its own entities. Moreover, it makes it hard and expensive for the host country to follow through its grievances as the legal adjudication process has to take place in Home country. Although it is important to keep the investor liability section in the EAC Investment Treaty model, the section should revised to capture the essence that a investor should be subject to civil action for liability in the host country rather than the home country to avoid potential conflict of interests.

4.16 Transparency of contracts and payments

This article concerns transparency in contract negotiations and sets out the principle of transparency. This article is important in the fight against corruption. The EAC Draft Model as well as the India and SADC model provides for the publication of contracts related to establishment and operation of an investment, all payments made to a government in terms of taxes, rents and royalties. This is an important article in line with the Extractive Industry Transparency Initiative (EITI).

4.17 Dispute settlement

This article provides for establishment of a mechanism for the settlement of Investment Disputes between parties involved in the treaty. The EAC Draft Model has borrowed this article from the SADC Model Treaty. The article includes a specific provision that breaches of the treaty obligations by an investor shall be prosecuted under domestic laws. The article further empowers government officials, private persons or private organizations to bring civil action against an investor or investment which breaches its obligation in domestic courts.

This is a very important article which enforces compliance of obligations by investors which should be maintained. It compels investor to be mindful of the effects of their business in the host country. If read

in conjunction with the overall intention of host countries in attracting foreign investment, this article, mitigates against attracted investment veering off the development objective.

It should be noted though that India's Model goes into great details regarding specifics and processes of dispute settlement. To avoid ambiguity, the India model states and sets explicitly the purpose and scope of the dispute settlement article. It further provides for exhaustion of local remedies, notices and consultations. Submission procedures of disputes to arbitration are set and the process of appointment of Arbitrators is stated. The article also include details pertaining to conduct and transparency of arbitral proceedings, prevention of conflicts of interests, burden of proof, awards and counter claims. Having experienced legal challenges on the previous investment treaties, it seems like India did not want to leave any loophole that could be exploited legally by investors in case of dispute and dispute settlement.

Based on the India model treaty, it is important that EAC member states consider introducing specificity to the dispute settlement article (in addition to some included under General Provisions section) to reduce the risk of losing on foreign investment-related legal challenges

4.18 Environmental and Social Impact Assessment

This article reiterates the imperative by investors /investments to undertake environmental and social impact assessments. The assessment should include assessment of the impacts on the human rights of the persons in the respective areas, including the progressive realization of human rights in those areas. Investors are obliged to make their environmental and social impact assessments public, including via the Internet, and accessible to the local communities and other relevant stakeholders. This should be done in a timely manner to allow stakeholders' in put prior to a decision being taken regarding the establishment of the investment.

The SADC Model provides for the inclusion of a provision in the article that obliges the investors to apply the precautionary principle in the environment impact assessment. The Rio Declaration on Environment and Development, Article 15 refers to the Precautionary Principle as thus: "In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as reason for postponing cost-effective measures to prevent environmental degradation". The SADC model further includes a need to supplement the domestic law in this respect by invoking the obligations to undertake environment and social impact assessment under the International Finance Corporation's performance standards on Environmental and Social Impact Assessment.

The India model does not include a separate article on the environment and social impact assessment but requirement that investor should not undertake activities that are detrimental to the local environment are spread among different articles. For example under disclosure article, investors are supposed to report on the potential environmental impacts and management systems related to their planned investment.

The article on environment and social impact assessment is missing for the EAC Draft Model. It should be included.

4.19 Environmental Management and improvement

This article ensures that the investors /investment not only comply with and implement the environmental laws but also ensures ongoing environmental diligence and improvement in the implementation

investor operations in the host country. This provision obliges the investor/investment to: maintain an environmental management system (EMS) consistent with recognized international environmental management standards (i.e. ISO 14000) and good business practice standards; and include in their EMS emergency response and decommissioning plans. Investors are further obliged to state beforehand how they will continuously environmental management technologies and practices over the life of the Investment.

In addition to promoting sustainable development, this article is very important given the fact that increasingly many investors are seeking environmental law stabilization clauses and there are many arbitration cases based on environmental laws.

The EAC model treaty does not have an article on environment management and improvement. A provision to this effect should therefore be included in the EAC Draft model; borrowing from the SADC model since it is very well covered.

4.20 Minimum Standards for Human Rights, Environment and Labour

This provision imposes a duty on investors and investments to respect the international human rights, environmental standards as adopted and ratified by host states. For example investors and investments are obliged to act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work. The Article also operationalizes the principle of "The corporate Responsibility to Respect Human Rights" as provided for in the 'UN Guiding Principles on Business and Human Rights". The article obliges the investors and their investments to respect human rights in the workplace, community and State in which they are located. The investors and their investments are further obliged under this article not to undertake acts that breach human rights or assist in, or be complicit in, the violation of human rights by others in the host state.

This Article is also missing in the EAC Draft model. It is recommended therefore that the article be introduced in the EAC model given the importance of these provisions in the general improvement of people's welfare in the investment host countries. The EAC Draft model can draw the wording from the SADC model in crafting this article.

4.21 Corporate Governance Standards

This article tries to address the current problem of transfer pricing which is a mechanism by which profit is allocated within a group of companies. This problem has led to massive out flow of resources from many African countries including EAC partner states. According to the AU –ECA High level Panel on Illicit Financial Flows (Popularly known as the Mbeki Report), Africa is estimated to be losing more than US$ 50 billion a year in Illicit Financial Flows (IFF); while Uganda lost about US$ 509 million in IFF between 2000-200. (Estimates from Global financial integrity)

This article compels investors/investments to meet or exceed national and internationally accepted standards of corporate governance for the sector involved; and in the application of internationally accepted accounting standards. Investors and their investments are further obliged to ensure that all transactions with related or affiliated companies be at arm's length transactions at fair market price. This provision is also in line with and operationalizes the "OECD Guidelines for Multinational Enterprises" which recommends that transactions between a group of companies should be valued as if they had been carried out between unrelated parties.

The EAC Draft Model should include this article as it is missing.

4.22 The Right of States to Regulate

This article reaffirms the basic right of host states to regulate in line with national/regional sustainable development goals and in order to achieve social and economic objectives. This article should be read in conjunction with other articles in the treaty such as performance requirement, expropriation and National Treatment.

This right is clearly stipulated in the EAC Draft Model. The article reiterates the right of host states "to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives"

This article is very important in an investment treaty as it balances the right of host states to regulate and the obligation to protect investments/investors.

4.23 The Right to Pursue Development Goals

This article together with the article on the right of host states to regulate reinforces the rights of host states to regulate investors/investment to achieve national/regional development aspirations. Although this article does not impose any performance requirements, it enables host governments to require them without fear of breach of the treaty.

The EAC Draft Model in line with the SADC model has included this article. The article provides for the right of host governments to grant preferential treatment in accordance with their domestic legislation to any enterprise so qualifying under the domestic law in order to achieve national or sub-national regional development goals. This article further empowers the host states (regardless of any other provisions in the treaty) to support the development of local entrepreneurs; seek to enhance local productive capacity, increase employment, increase human resource capacity and training, research and development including of new technologies, technology transfer and other benefits of investment through the use of specified requirements on investors made at the time of the establishment or acquisition of the investment and applied during its operation. The article further allows host states to take measures to address and correct historical economic imbalances.

This Article should be maintained in the EAC Draft Model Treaty.

4.24 Obligations of States on environment, Human Rights and labour standards

This article addresses the concern of host states lowering environment, human rights and labour standards in the struggle to compete for foreign investors/investments. The danger of a "race to the bottom" is very real and it needs to be addressed by including a "not lowering standards" provision. The article should prohibit the lowering of environment, human rights and labour standards for the purpose of attracting investments. It should also reaffirm commitments under international recognized labour, human rights and environmental standards.

This article which is covered in the SADC investment Model has not been included in the EAC Draft model. It should be included as it also enables the host states to balance their obligation to protect the investors and the obligation to protect, promote and uphold labour and human rights and labour standards as these are the cornerstone of sustainable development.

General Provisions

4.25 Cooperation in Promotion of Investment

Investment treaties are concluded for the purpose of attracting development enhancing investment flows. In this respect, investment treaties include both protection and promotion aspects. However, many investment treaties do not contain provisions for the promotion of investments.

This article in the EAC Draft Model addresses this anomaly by setting out specific tools to promote investments. The tools may include joint investment promotion events, exhibitions, conferences, outreach programmes, tours with industrial leaders and investors, technology promotion, exchange of information with respect to investment opportunities, laws and regulations for foreign investors in their territories; and formation of joint committees responsible for investment promotion. The article also obliges the state party (if it is from a developed country) to provide technical assistance and for the exchange of best practices on how this issues of investment promotion should be advanced. The article is important and should therefore be maintained in the EAC Draft Model

4.26 Transparency of Investment Information

This article promotes transparency as regards information availed to investors. The article sets out binding obligations on the respective parties to promptly publish, or otherwise make publicly available, its laws and regulations of general application as well as international agreements that may affect the investments of investors of the other State Party. This article also includes publicizing policies and administrative guidelines or procedures that may affect investment under the treaty.

The EAC Draft Model includes this article; it should be maintained.

4.27 Exceptions

This article reaffirms the host states' right to regulate in the public interest. General exceptions help in making the treaty more conducive to the attainment of sustainable development goals and in linking the treaty to public policy objectives. This provision allows for measures that would otherwise be prohibited by the treaty. This article further allows host states to circumvent accusations by investors of sidelining investors' interests at the expense of the promotion public interest objectives.

The EAC Draft Model ably addresses this issue , allowing host states to take measures, in good faith, to protect public morals and safety; to protect human, animal or plant life or health; and for the conservation of living or non-living exhaustible natural resources; and to protect the environment. Other measures are related to maintenance of financial stability, taxation, monetary and credit policies and international and national peace and security.

The EAC Draft Model should however include two addition clauses under exceptions; one which provides for a self-judging clause which allows for the necessity or appropriateness of the measure to be judged only by the invoking state itself. This provision helps host states to avoid disputes. The second clause should clarify that the exceptional measures must be applied in a non-arbitrary manner and not be disguised as investment protectionism. This clause prevents abuse of the exceptions provision.

4.28 Denial of Benefits

This article sets out the circumstances under which host states has a right to deny an investor / investment the benefits under the treaty. The circumstances include where a host state does not have

diplomatic relations with the home state of the investor making the investment; where the investor is from which is subject to economic sanctions by the host state; and where the investor does not carry on substantial business activity in the putative home state. This article assist host states to discourage investments from "treaty shopping" which is the process of routing an investment so as to gain access to a more favourable BIT protection. This article also reinforces the definition of an investment which goes beyond just formal incorporation.

The EAC Draft Model rightly includes this article.

4.29 Periodic Review of the Treaty:

The provision of a review preferably every 5 years after the entry into force of the treaty (as per SADC and India investment model), enables the parties to review the value and effectiveness of the treaty. It also allows for adjustments to be made to improve on the effectiveness of the implementation of the treaty. The review process assists Parties to avoid the risks of arbitration.

The EAC Draft Model has provided for this article. However drawing from the India model, it would be advisable for the EAC Model to include the issue of consultation in this article. The India Model provides for consultations, on request by either party, on any issue of the Treaty without being constrained by the 5 year timeframe; it could be interpretation, application, implementation or execution of the treaty. Parties may take any action jointly agreed upon to improve the effectiveness of the treaty.

Dispute Settlement

4.30 State –State Dispute Settlement

This article provides for the resolution of disputes under the Treaty. The provision which is covered in the EAC Draft Model clearly sets out the circumstances under which a state-state dispute settlement occurs i.e. when a state is claiming damages on behalf of an investor for alleged breach of the Treaty; and when a dispute is between state parties over the interpretation or application of the Treaty. The Article exhaustively covers the process of resolving disputes from the non-binding amicable means to a formal binding dispute settlement process; the appointment and operation of a tribunal; identification of arbitration rules (i.e. ICSID, UNCITRAL) to apply to the tribunal to the dispute. In line with the SADC, COMESA and other Treaty Models like Canada, the EAC model provides for the public availability and access of documents and information related to the dispute.

This is a very important article and it is exhaustively covered in the EAC Draft Model Treaty.

4.31 Investor –State Dispute Settlement

This provision grants investors the right to sue a host state in international arbitration processes in case of alleged violation of its obligations under the Treaty. The EAC Draft Model has included this provision with a proviso that "the preferred option is not to include investor-State dispute settlement. Several States are opting out or looking at opting out of investor-State mechanisms, including Australia, South Africa and others. However, if EAC decide to negotiate and include this, the text below may provide guidance for this purpose".

There has been an increasing questioning of the efficacy of the investor –state dispute settlement mechanism as such cases and awards increases. For investors, the major purpose of by-passing domestic courts to international arbitration proceedings i.e. ICSID, UNICTRAL is to ensure independence and impartiality, speed and effectiveness of the process and enforceability of arbitral

awards. However for host states, the process has many pitfalls, i.e. it is very expensive sometimes taking several years to resolve; and usually challenges domestic regulatory measures implemented for sustainable domestic development objectives. There is also no single, unified mechanism as there are different tribunals which most often give divergent and contradictory interpretations of similar treaty provisions. The constitution of the tribunals and the proceedings most often lack transparency.

Given all these challenges and given the increasing trend by many states to delete this provision from their model investment treaties, the EAC should also delete it.

4.32 Governing Law in Dispute Settlement

This provision specifies the governing law in the Treaty. This article, which is also included in the SADC Investment Model is covered in the EAC Draft Model. This provision is important not only for identification of the applicable law under the Treaty but also ensures a broad purposive approach to the interpretation and application of the treaty thus mitigating against a tribunal focusing only on the investor protection provisions as the basis of an interpretation exercise. This article also ensures that the interpretation of the treaty precludes the addition of new obligations from international law.

The article should be maintained.

4.33 Service of documents

This article provides for the appropriate contact point in the event of a dispute under the Treaty. The EAC Model includes this article but specific details are not provided. The article mirrors that of the SADC Model. India Model does not include this article.

Given the importance of where documents have to be submitted in case of legal dispute relating to the treaty it is important the EAC member countries debate this aspect and agree to a point of mutual practicality and convenience. The article should therefore be retained but more detailed on it should be added.

Final Provisions

4.34 Entry into Force

The article specifies when the Treaty becomes effective. This is key legal provision as it provides certainty as to when the obligations on the parties specified under the Treaty becomes legally binding. For example, the Bilateral Investment Treaty between UK and Uganda states that the Treaty shall enter into force on the day of signature; while the SADC Model provides for 60 days after the deposit by the last State Party of its instrument of ratification with the other Party.

This article is missing from the EAC Draft Model. It should be included and should clearly specify when the Treaty becomes effective.

4.35 Duration and Termination

This article provides for the minimum period for which the Treaty will be in force and the provisions for its renewal or termination. This article is important to address the existing challenges in most of the Bilateral Investment Treaties that the EAC partner states have concluded. For example the existing BITs provides for a quasi-automatic renewal whereby a Treaty is deemed renewed unless there is a written notice of termination.

This article should address this anomaly by providing for a renewal after both parties have explicitly agreed to it in writing after a joint review of the treaty and an assessment of its impact on social, economic and sustainable development policy objectives. Another current challenge is the existence of a "survival clause" in many BITs which locks in Treaty obligations for a number of years after the termination of the Treaty. The UK-Uganda BIT provides for 20 year's continuation after the termination of the Treaty of the provisions of the Treaty for covered investments. Although the "survival Clause" provides legal security and certainty for investments especially the long term projects, it limits the host states' ability to regulate their economies in line with new emerging realities and dynamics. A balance should be reached by providing for a shorter survival clause period.

These provisions are very important and should be included in the EAC Model. The EAC Model should draw from the SADC and India Model which have included this provision in their text.

4.36 Amendment

This article provides for the process of the amendment of the Treaty and when the amendments should come into force. The SADC Model provides for the amendment by the mutual consent of the State Parties through an exchange of notes or signing of an amendment agreement. Regarding the entry into force the SADC model provides for 60 days following the deposit by the last State Party of its instrument of ratification of the amendment with the other Party.
This Article on amendments and when amendments come into force is not included in the draft EAC Model. It should be included the EAC Model.

All the suggested additions, changes and exclusions will jointly increase the likelihood that inward investment to the EAC will be support local development. In addition, they will reduce the possibilities of legal challenges as experienced by countries like South Africa and India with their 'traditional' BITs. It should be noted though that the region will have to negotiate vigorously and convincingly for these changes to be part of investment agreements as some partner countries or regions may not agree to them.

5 Conclusion

FDI remains a major source of capital for countries whose local savings are not high enough to support the desired level of economic activities. Having Bilateral Investment Treaties (BITs) or agreement in place has been one of the traditional ways attract FDI.

The South African and Indian experience reveals the downside of BITs that any developing country or region need to be aware of and avoid to the extent that it is possible. First, that the traditional BITs extended too far into the policy space needed by national governments to influence social economic priorities for their respective countries. Second that the BITs made developing countries vulnerable to legal challenges emanating from regulatory changes a government may consider being in the public interest. Third, that there are not concrete evidence that having a BIT with another country will lead to increased FDI. Based on these realisations, South Africa and India undertook a review their BITs to increase inflow of FDI while minimising associated non-development risks.

The EAC can draw important lessons from the progressive BITs of South Africa and India in drafting its own Framework and Investment Model Treaty. Recommendations of how to make the EAC Investment Model more development oriented, drawing from the experiences of South African and India are made in the main text. The specific changes and additions proposed to the Draft Model are presented in the executive summary at the start of the paper.

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