

MAKING INVESTMENTS WORK FOR PEOPLE!

Multi-stakeholder consultative meeting on the imperative for prioritizing the amendment of the Investment Code, 2000 and review of the Uganda-Netherlands Bilateral Investment Treaty (BIT)”



REPORT OF THE MEETING

Tuesday, 11th October 2016, Hotel Africana

Introduction

Investment, whether foreign or domestic can potentially benefit any economy as it can contribute to structural transformation through increased production and productivity, industrial development, technology and skills transfer. Investment can also contribute to widening a country's tax base thus resulting into greater revenue generation to finance its development. It can also contribute to poverty eradication by increasing citizens' incomes through providing gainful employment. For example, Uganda has consistently benefited from jobs created by investments established in the country. Specifically, out of the U.S \$1,142 million of Foreign Direct Investment (FDI) received by Uganda in 2014, a total of 6,472 jobs were generated while domestic companies were registered to have generated 5,827 jobs¹. A summation of the total number of jobs created by both foreign and domestic investments reveals that investment in any economy can play a major role in addressing a country's unemployment challenges.

However, in order to sustainably tap into these development potentials, the country's investment regime must be supportive. According to the World Investment report, 2015, today, countries are increasingly looking for investment that is not harmful to the environment, which brings social benefits, protects human rights, promotes gender equality, and which helps them to move up the global value chain.

Uganda has over years continually undertaken policy reforms for its investment regime to promote, protect and facilitate greater investment flows into the country. Notably, the country put in place the Investment Code, which is the overarching investment policy framework in the country. The Code has been undergoing amendment, a process that has been ongoing in Cabinet since 2013. The country has also negotiated and signed a number of Bilateral Investment Treaties (BITs) as well as regional trade arrangements with investment provisions. For example, in 2000, Uganda signed an "Agreement on encouragement and reciprocal protection of investments" with the Kingdom of the Netherlands. The agreement which according to Article 14 is stated to remain in force for a period of 15 years will expire in 2018 and can only be terminated by either contracting party at least six months before the date of the expiry.

In addition, the country has among others things, established Economic Free Zones following the enactment of the Free Zones Act, 2014; the country has also adopted Public Private Partnerships (PPPs) and has enacted the PPP Act, 2015. Within the East African Community (EAC) the country adopted the EAC model investment treaty which is supposed to be the guiding document for all the partner states in negotiating Investment Treaties with third parties. The country has also committed under this configuration to negotiate a BIT/ Trade and Investment Partnership (TIP) with the U.S. Under the Economic Partnership Agreement (EPA) with the E.U, the country has also committed to negotiate under the Rendezvous clause, a binding agreement on Investment. Similarly, within the World Trade Organization (WTO), to which

¹ UIA annual investment abstract, 2014/2015

Uganda is a member, proposals have been put forward by developed countries to negotiate "new issues", one of which includes Investment.

The absence of an appropriate policy framework to guide all these processes could be a major impediment for Uganda to realize the development benefits that could accrue from FDI.

Therefore, the need for a harmonized and structured legal framework for the management of investments whether domestic or foreign in Uganda, cannot be over emphasized.

Against this background therefore, SEATINI Uganda convened a multi-stakeholders' consultative meeting to discuss the need to prioritize the amendment of the Uganda Investment Code, 2000 and lay strategies for the review of the Uganda-Netherlands BITs that will soon expire.

Objectives

- a) To raise stakeholders' awareness on the ongoing amendment of the Uganda Investment Code, 2000,
- b) To raise awareness and lay strategies on how to engage on the review of the Uganda-Netherlands BIT.
- c) To discuss strategies for stakeholder engagement in these two processes

Opening session chaired by Hon. Kenneth Lubogo, Chairperson, Committee on Trade, Tourism and Industry within the Parliament of Uganda

Hon. Lubogo opened the session by commending SEATINI Uganda for the role it continues to play in simplifying Trade and Investment policy related issues; and keeping stakeholders abreast on various developments. The challenges Uganda's economy faces today have emerged from the kind policy framework we operate, for example, many factories are limping and or operating at "shut down point" while the existing industries have contributed to very limited or no forward and backward linkages.

Welcome remarks by Ambassador. Nathan Iumba, SEATINI

In his welcome remarks, Ambassador Iumba thanked the Ministry of Finance, Planning and Economic Development for its supportive in SEATINI Uganda's work, especially on the work around the Double Taxation Treaties (DTTs) where a number of successes have been registered. He informed the minister that the SEATINI team would be grateful if this collaboration is strengthened further. In addition, he thanked all the other participants and called on them to be very keen in influencing the policy process noting that it should be shaped by the country's development agenda.

He noted that investment is very critical for development but has inherent challenges. Investment is not charity because it is driven by the need for profit maximisation, thus a need to create a win-win situation in dealing with FDIs is imperative. Uganda's investment regime is

very dynamic and has been changing over the past few years. In Uganda for example, there has been a move towards the need to attract greater FDI flows. This has been in a bid to close the country's investment capital gap. Consequently, the country has continued to implement more liberalised regimes towards FDI, allowing for greater inflows as well as repatriation of profits, dividends, among others.

In addition to putting in place more outward looking investment regimes, the government has taken to negotiating and signing a number of Bilateral Investment Treaties (BITs). BITs are known to erode/constrain government policy space that is necessary for development. New poles of growth and emerging countries such as the BRICS i.e. Brazil, Russia, India, China and South Africa have contributed to increased South-South cooperation. There has also been an intensification for investment to be included in the WTO as one of the new issues. Within the global tax regime, tax evasion by Multinational corporations who own majority of FDIs coming to Africa hence leading to Illicit Financial Flows.

Negotiations for Mega regional trade arrangements like the Transatlantic Trade and Investment Partnership (TTIP) between the US and EU and the Trans Pacific Partnership (TPP) are ongoing and are seeking higher rules that could be transferred to the WTO further shrinking the policy space that we secured at the multilateral level in the past.

It is therefore important that while Uganda crafts its Investment code, it takes into account some of these developments and dynamics. It is also important to understand what drives investment, the inherent dangers behind investment and how Uganda can strategically use the Investment Code to serve its development needs.

Official opening and key note address by Honourable David Bahati, Minister of State for planning, Ministry of Finance, Planning and Economic Development

The Honourable Minister began his remarks by commending SEATINI Uganda for its work; especially in bringing together key stakeholders to discuss the amendment of the Investment code, a process that is currently before parliament; and the review of the Uganda-Netherlands BIT which will expire in 2018.

The purpose of the ongoing amendment of the Investment code is to improve the business environment and investment climate in Uganda. The Code is still with cabinet and what remains very important is the need to craft a legal framework that will support local businesses to enhance their competitiveness in the global environment. Uganda also needs an investment code that can be used to attract greater investment flows, both foreign and domestic.

Experiences from countries like China have shown that investment has the potential to transform economies and deliver development for countries like Uganda as well. But investment should be guided, strategic and focused if it is to contribute towards the achievement of Uganda's Vision 2040, provide gainful employment, contribute to poverty eradication and achieve the middle income status.

The honourable finally informed the meeting that the ministry is looking forward to getting stakeholders' views concerning the amendment of the code and review of the Uganda-Netherlands BIT noting that such input often enriches the policy making process.

Plenary discussion

- The amendment of the Investment Code needs to take into account a number of developments that have recently occurred within the trade and investment system. For example, since the last amendment of the Investment Code, the EAC common market protocol and the EAC customs union have since come into force. Uganda has also negotiated and signed a number of Bilateral Investment Treaties as well as regional trade arrangements with investment provisions. Similarly, the EAC has recently approved the EAC model Investment treaty which is meant to guide negotiations for BITs with third parties. The model must now be domesticated within the EAC partner states. However, this will require harmonization of the country's investment code with the EAC model treaty to facilitate its implementation.
- While FDIs can foster economic development, these investments should be closely monitored and aligned with the country's development interests. Today, capital outflows have been driven by FDIs and these outweigh capital inflows. This has continually had far reaching implications of the country's development, especially in relation to domestic resource mobilization. FDIs can also have far reaching implications on human rights and environmental sustainability. There is need to improve the investment code to minimize these challenges and maximize the benefits, regulate the legal financial outflows and curb illicit financial flows as well as ensure that the FDIs contribute towards industrial development, reduced trade deficit, technology development and increased incomes.
- There is also need to ensure that investments code balances between the interests of investments, especially FDIs and the host community's development interests and human rights.
- The amendment of the investment code should also take into account the need to strengthen the mandate of institutions like Uganda Investment Authority (UIA). It is also imperative that the Code makes explicit provision for the mandate of other closely related government's ministries, departments and agencies such as the Ministry of Trade, Industry and Cooperatives, the Ministry of Energy and Mineral Development, the National Environment Management Authority, among others.
- To what extent do BITs like the Uganda-Netherlands BIT fit into our national development plans? The review process and negotiations of BITs should be harmonized with the citizens' development interests because currently, these BITs even contradict with the country's national policies.
- The review process and the amendment of the investment code should also seek to redefine the role of the state in development for the case of Uganda. Ensuring that these policy and legal frameworks secure the government's policy space. Investments like Ssembule collapsed due to focusing support on foreign investments at the cost of domestic investments.

In his final remarks, the minister responded to the question raised regarding the country's legal framework which a major facilitating conduit for financial outflows through repatriation by foreign investors. In his response, he noted that the legal framework within which Uganda operates provides for a liberalized capital account which indeed allows for investors to take out their profits, dividends and including other resources they generate out of their investments within Uganda. He argued that Uganda cannot at this point, despite its current challenges, reverse its policy on liberalization. He was however informed that if reversing the policy is an impossible agenda, effort should be made to strengthen the regulatory framework by

providing exceptions within the Investment Code and related policies and laws to cater for an untenable situations such as when the country is faced with balance of payment deficits.

Understanding the Global dynamics Investment: The case of the Uganda-Netherlands BIT

Government perspective By Mr. Kasozi Fred, Ministry of Trade, Industry and Cooperatives

Mr. Kasozi began his presentation by noting that Uganda is party to a number of Bilateral Investment Treaties, some of which came into force as early as the 1970s. Countries sign BITs to attract and secure FDI flows from the countries with which they sign these treaties. The Uganda-Netherlands BIT according to the presenter came into force in 2003 although it was signed and agreed upon by the two parties in 2000. The agreement according to Article 14 was agreed to be in force for a period of 15 years subsequent to which it would expire. The agreement however states that if none of the parties expresses intention to renegotiate or terminate the agreement within a period of 6 months before its expiry, it would automatically be terminated for a period of 10 years.

During his presentation, Mr. Kasozi highlighted some of the key provisions within the Uganda-Netherlands BIT. The BIT takes the form the traditional BITs. It provides for an asset based definition which defines ownership and control of legal entities and applies to both pre-existing and post-BIT investments. The BIT also provides for both National treatment and MFN treatment based on post establishment with exceptions to MFN specifically in relation to Economic integration agreements and Taxation treaties. It contains the Standard clause on full protection and security, it prohibits unreasonable arbitrary or discriminatory measures and Expropriation, specifically indirect expropriation. It provides for Transfer of funds, state to state and investor state dispute settlement.

In his concluding remarks, the presenter admitted to the need to balance between national development objectives and providing a favourable investment climate for FDIs. He requested for stakeholders to make their input through providing recommendations regarding the way forward for the Uganda-Netherlands BIT.

Civil society perspective, Ambassador Nathan Irumba, SEATINI

The Ambassador began by stressing that the question of policy space is very central in determining to what extent a developing country like Uganda can benefit from foreign investments. It is for this reason that it is being contested, although indirectly through a push to put in place more strict investment regimes.

He recalled the current debate within the multilateral trading system where developed countries are pushing for the broadening of the WTO agenda to include investment, government procurement, global value chains, intellectual property and competition policy among others as “new issues”. These issues were initially referred to as the Singapore issues and their inclusion into the WTO has for long been contested by developing countries.

If included into the WTO agenda and binding agreements are reached on each of these issues, the policy space that developing countries initially secured would all be lost.

Despite efforts to secure this policy space however, for the case of investment, developing countries have slowly lost the fight. Through BITs, these countries have agreed to concede some of their policy space to be able to direct, regulate and monitor foreign investments in their development interests.

The Uganda-Netherlands BIT for example, which takes the form of most traditional BITs that have been negotiated and signed by many countries today provide for “transfers”. This provision ignores circumstances of balance of payment deficits which would require that government regulates the amount of foreign exchange that flows out of the country during such a period.

In his final remarks, the presenter further argued that because most of these BITs are largely incoherent with the development plans of many developing countries, countries like South Africa, Ecuador and India have taken to rethinking all their BITs. Similarly, within the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) between the US and EU, the arrangements provided under this agreement for investments have highly been questioned e.g. the Investor – State dispute settlement mechanism.

The most important issue to address is how to make BITs more people centred rather than investor centred. For example, how can we make sure that the BITs Uganda signs explicitly provide for local content requirements, among other performance requirements?

Plenary

- Participants raised concern regarding the extent to which Uganda has benefited from the existence of the Uganda-Netherlands BIT. They advised that government should undertake a study to take stock of the benefits vis a vis the some of the negative implications that the country has faced as a result of its being in force. This study should specifically assess the number of Ugandans that have benefited from the existence of this BIT either in terms of investments established abroad i.e. in Netherlands, the number of jobs generated including incomes earned, technology and skills transferred from investments established by Dutch investors in Uganda among others.
- It was further argued that this could also require a review of the Uganda National BIT model treaty with specific attention given to harmonizing this model with the EAC model investment treaty to effect the domestication of the latter at national level. The latter provides more security in as far as the development interests of Uganda are concerned and should therefore be adopted.
- Participants also questioned the extent of citizens’ participation in the design i.e. negotiation and implementation of the treaty. They questioned the extent to which the Uganda-Netherlands BITs for example provides for local content requirements and joint ventures.
- In view of the EPA Rendezvous clause, it was noted that the European Commission is currently developing a “better” version of an Investment Model treaty that has been proposed for use to guide new BITs negotiations by the EU to replace all the BITs that currently exist between EU member states and other parties. The Netherlands could therefore use this as a basis to argue against the urgency and imperative to renegotiate or terminate the Uganda – Netherlands BIT given that under the EPA Rendezvous negotiations for a binding agreement on

investment under the auspices of the EAC would replace this agreement. Since it is not certain how long the negotiations to put in place a “better” agreements under the auspices of the EPA using the new proposed EU model investment treaty, if not renegotiated or terminated, the agreement between Uganda and the Netherlands will be automatically renewed for a period of 10 years under the same arrangement that currently exists. This is provided for under Article 14 of the agreements.

- Finally, participants asked what the plan of Ministry of Finance and Ministry of Trade is regarding renewal or termination of the agreement. In response, the representative noted that the current plans under discussion are to terminate all existing BITs between Uganda and EU member countries.

Panel discussion: Bridging the human rights, gender, environment sustainability and development gap: “key civil society policy proposals”

The panel discussions were led by Mr. Arnold Kyesi, Uganda Consortium for Corporate Accountability, Mr. Ssali Godfrey, Uganda Manufacturers’ Association, Ms. Christine Kobusingye, FIDA Uganda and Mr. Bob Anyuru, LandNet Uganda

a) *Balancing Business and human rights to enhance corporate accountability*

Violations of human rights by businesses is very common today with governments and corporations increasing weighing between protection of human rights and reaping interests/ economic gains. States have the obligation to protect, fulfil and respect human rights while corporates have the responsibility to respect human rights. Investments are supposed to serve man. However, with increasing globalisation, investors are aiming at maximising their profits, sometimes disregarding the human rights angle.

The United Nations has put in place guiding principles for Business and Human rights. The purpose of the guiding principles are to provide governments with a clear mechanism for mainstreaming human rights in trade and investment. However, the extent to which these principles have been adopted within Uganda remains questionable. Instead, the trade and investment and related regimes have limited government’s capacity to ably defend the human rights interests of its people especially in light of labour rights, environment rights, right to health and generally, their right to development.

b) *Preserving human rights in investment policies and practices: Experiences from the flower sector*

There are 6 Dutch companies engaged within Uganda’s flower sector. These comprise of more than 80% of all the flower farms within the country. Majority of the workers within these farms are women. These companies are investments that were established by the Dutch under the Uganda-Netherlands BIT agreement which will soon expire in 2018.

Within these farms, workers’ rights have been violated. Majority of the workers within these companies are required to work 12 hours a day, from 6am-6pm at very low pay.

In case of an injury, the process of compensation is too long. This is despite the fact that the company requires the use of poisonous chemicals as pesticides and has not provided proper

protective gear for its workers. Exposure to these pesticides could cause damage to the skin and respiratory organs including the unborn babies of pregnant mothers.

Mistreatment of workers is generally not the concern of the company. In some incidences, dogs were released on some workers and were bitten by them.

Under such circumstances, the importance of social cost impact assessment of investment cannot be over emphasized. This should not only be undertaken prior to establishment of an investment, but throughout its operations. It is therefore imperative for government to consider increasing its budget on inspection under the Ministry of Gender, Labour and Social Development to ensure that a balance between the protection of human rights and economic interests.

The benefits of investment should go beyond the economic impacts and consider the social and human rights costs of investments. There is need to assess corporates beyond their social corporate responsibility acts within the communities of their engagement. A closer look into the extent to which their operations impact on the wellbeing of such communities is imperative.

c) Proposals for an investment regime that provides for domestic private sector development

Uganda is implementing a private sector led development strategy. While the private sector has been involved in number of negotiations including the WTO negotiations, EPAs, this involvement should translate into real outcomes in term of agreements that take into account domestic private sector development interests.

The absence of an investment legal framework spells doom for a country that is increasingly attracting FDI flows. The Investment Code has been before cabinet for amendment for a very long time. It is imperative that the cabinet process is finalised to open the Code for stakeholder engagement at the parliamentary level.

To what extent has the domestic private sector been empowered to invest in those countries with which Uganda has signed BITs? Are people aware about these opportunities? How many Ugandans for example have utilized the Uganda-Netherlands BIT which has been in force for the last 14 years now?

d) Investment regimes driving the commoditization and privatisation of land

Majority of Uganda's investments like majority of her EAC counterparts are land based investments. This has augmented land acquisition in the country. According to the Food and Agriculture Organization (FAO) estimates, in the last three years 20 million hectares of land in Africa have been acquired by foreign investors.

Farm land, forest land and wetlands has all been opened up for investments in extractives, industrial development, large scale agriculture enterprises among others. Majority of these investments come from food importing countries in a bid to boost food security but mainly of their own country populations. Other investments have included investing in land for agro-fuel production.

These acquisitions have been through both legal and illegal means like land grabbing which has become a common practice in Africa. The government has also been seen in some instances to connive with investors to obtain land from communities at prices below the market price. These have also involved land leases with durations ranging from short term to 99 years for farm land grabbed with limited or no consultation from local communities under the pretext that small holders are unproductive.

The African Union has recently put in place guidelines for large scale land based investments in Africa. The guidelines recognize that majority of investments on the continent are land based and therefore have the potential to negatively impact on the livelihoods of the African people. The guidelines therefore propose the need for such investments to promote and respect human rights while balancing between the protection of human rights and investor interests and obligations. However, like the UN guiding principles on Business and Human rights, the government is yet to domesticate these voluntary guidelines on large scale land based investments.

Plenary discussion

- In view of the issue of domestic private development, there is need to facilitate their participation in government procurement. Government is the largest procurer in any country and it can therefore provide a major market for domestic private sector supplies. However, the government has been seen to increasingly procure externally, goods and services that are produced and supplied locally.
- Uganda needs an investment regime that is explicit on issues of joint ventures and local content promotion. This is because such regimes can foster forward and backward and forward linkages which are critical for enhancing production and productivity and creating employment opportunities.
- The viability of tax incentives in fostering increased FDI flows into Uganda is still debatable. This is especially given that such investors are also allowed the freedom to take out their profits, dividends and equivalent earnings. This kind of investment policy should be rethought.
- Many companies established in Uganda underline the occupational safety and health of their workers. In some factories, where production involves/ requires that the workers are exposed to a lot of heat with improper safety gear have put men at the risk of losing their manhood including in some circumstances their ability to bear children. The Investment Code should therefore take into account the possible social costs of investments.
- Participants also raised concern about foreign investor's behaviour and treatment of people/ workers in other countries. They thus recommended for the need for due diligence to be undertaken before an investor establishes in Uganda to ascertain their behaviour and ways of operations. This should be provided for in the Investment Code.
- Extra Territorial Obligations (ETOs) of states in the area of Economic Social and Cultural Rights require that a state recognizes that its acts and omissions, within or beyond its territory could have effects on the enjoyment of human rights. ETOs also encompass obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally. BITs should be cognizant of ETOs of states in the area of ESCRs and provide for them explicitly. Similarly, human rights protection should

also be provided for in the national Investment Code as this would enhance the country's legal capacity to regulate investments in favour of the human rights.

- In conclusion, it was agreed that democratic governance in terms of enhancing stakeholders' engagement and input in policy making processes can be fundamental in ensuring that Investments, whether domestic or foreign work for the people.

Closing remarks by Mr. Charles Omusana, Uganda Investment Authority (UIA)

In his concluding remarks, he thanked SEATINI Uganda for organizing the meeting which generated very important debate on the kind of investment regime that Uganda needs to make investments work for its people.

The Code currently being implemented was enacted in 1991 and indeed a number of changes have occurred since then. Notably, the EAC Common market protocol and the EAC customs union came into force while discussions towards a Monetary Union are underway. All these shape the investment regime of Uganda and should therefore be taken into account, especially if we wish to contribute towards enhance intra EAC investment flows.

The investment Code provides for both domestic and foreign investors. In order to provide an enabling environment for investments in the country, UIA introduced the provision of serviced land for example the Namanve industrial park to enhance access to land for investors. A one stop centre was also introduced within UIA bringing 5 institutions together to offer their services through an online mechanism. This has helped to address the bureaucratic challenges that initially faced the sector. The amendment process therefore seeks to incorporate and make provisions for such developments. Other proposed amendments include increasing the threshold to 200,000 USD for foreign investors and leaving certain sectors only for Ugandans.

He thanked SEATINI Uganda and all the participants for their contribution towards improving the investment climate in Uganda and officially closed the meeting.