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EAC Civil Society Statement on the development of the Draft EAC model Investment Treaty

June 2015



Agency for Co-operation and Research in Development
Association de Coopération et de Recherche pour le Développement
Agência para Cooperação e de Pesquisa para o Desenvolvimento



Introduction and Background

We civil society organizations within the East African Community during a stakeholder consultative meeting recently organized by SEATINI Uganda on 4th June 2015 in Kampala, Uganda on promoting pro development investment policies in the EAC wish to present our input into the draft EAC investment model treaty, in view of the ongoing consultative process in the region.

According to a report of a 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 with third parties. Another SCTIFI meeting held in May 2014 took note of the progress made in developing the draft model Investment treaty and directed partner states to submit comments.

The SCTIFI meeting held on 18th to 22nd May 2015 directed the secretariat to submit the revised draft model treaty to the partner states by 31st May 2015 and to submit comments to the revised draft by 31st July 2015.

In acknowledging the importance of investment, in terms of its contribution to economic growth and subsequently



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development, we also note the importance of putting in place appropriate policies and frameworks to ensure that investments live to their promises. Against this background, below are our proposals and recommendations for changes and/or additions to be made to the draft EAC Model Investment treaty. These proposals have been drawn from lessons from the SADC Investment model treaty and the India Investment model treaty:

▪ **Preamble:**

We propose 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.

▪ **Objective:**

We recommend that the objective 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”.

▪ **Definitions of investment and Investor:**

With regard to definition, we recommend the adoption of 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. 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 proposed definition increases the likelihood of attracting long term investment which has a higher probability of supporting of host country development aspirations by benefiting its citizens.

▪ **Scope and coverage of 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.

▪ **National Treatment (NT) and Most Favored Nation Treatment (MFN):**

We call upon the EAC partner states to explicitly set exceptions to National Treatment and agree on this list of exclusions. EAC Member states should completely exclude the MFN provision from the Model Treaty because 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.

▪ **Fair and Equitable Treatment:**

We strongly suggest that this Article should be out of the Model Treaty given the significant risks and uncertainties that may arise from these broad interpretations. 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).

▪ **Expropriation and Compensation:**

We urge members to revise this article to 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.

▪ **Transfers:**

We propose that the EAC investment model treaty 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. With reference made to the SADC model, we recommend that the EAC model investment treaty should adopt or incorporate the 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.

- **Performance Requirements (PRs):**

Under this Article we The EAC should therefore impose a provision on performance requirement 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.

- **Obligations against Corruption:**

We recommend that this Article be introduced in the Treaty. The EAC should borrow this provision from the SADC model and therefore state under this provision 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 EAC model should also further provide 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. EAC member countries need to also 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:**

We suggest the introduction of this Article to reduce the risk of losing on foreign investment-related legal challenges. To avoid ambiguity, the EAC model should with reference to the India model provide and set explicitly the purpose and scope of the dispute settlement article. It should further provide for exhaustion of local remedies, notices and consultations, submission procedures of disputes to arbitration and the process of appointment of Arbitrators should be stated. The article should also include details pertaining to conduct and transparency of arbitral proceedings, prevention of conflicts of interests, burden of proof, awards and counter claims.

- **Environmental and Social Impact Assessment:**

We suggest that this Article be introduced in the EAC Model Investment Treaty drawing from SADC Model template where 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 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”.

- **Environmental Management and improvement:**

We recommend that this Article is included in the model treaty since 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.

- **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 the host states. We therefore recommend that the article be introduced in the EAC model treaty 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.

- **Corporate Governance Standards:**

We suggest the inclusion of this Article in the EAC model as it 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 groups of companies should be valued as if they had been carried out between unrelated parties.

- **Obligations of States on environment, Human Rights and labour standards:**

We urge members to consider introducing this Article 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. 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.

- **Exceptions:**

We recommend that two additional clauses under the Article on exceptions are included; 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:**

We recommend that the EAC Model 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.

▪ **Investor –State Dispute Settlement:**

We strongly urge that this Article be deleted from the model treaty. This is because it increases likelihood of legal challenges. 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. 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.

▪ **Entry into Force (of the Treaty):**

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.

▪ **Right of entry and establishment:**

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 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.

▪ **Duration, Termination and Amendments:**

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. 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.

▪ **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.

We believe that these proposals are necessary to ensure that the region secures a pro-development investment policies and agreements when negotiating with third parties and urge you to consider incorporating them in the final model treaty.

Signed By:

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2) Action Développement et Intégration Régionale (ADIR)	Burundi
3) ActionAid Uganda	Uganda
4) African Centre for Trade and Development (ACTADE)	Uganda
5) Centre for Health Human Rights and Development (CEHURD)	Uganda
6) Citizens Platform for Democracy and Accountability	Uganda
7) Consumer Education Trust (CONSENT)	Uganda
8) East African Community Civil Society Organisations Forum (EACSOFF) Rwanda Chapter	Rwanda
9) Eastern and Southern African Farmers Forum (ESAFF) Uganda	Uganda
10) ECONNEWS Africa	Kenya
11) Food Rights Alliance	Uganda
12) Governance and Economic Policy Centre -Tanzania	Tanzania
13) Haki Madini Tanzania	Tanzania
14) Kenya Human Rights Commission (KHRC)	Kenya
15) Kenya Small Scale Farmers Forum (KESSFFC)	Kenya
16) Society for International Development (SID)	Kenya
17) Southern and Eastern Africa Trade Information and Negotiations Institute (SEATINI) Uganda	Uganda
18) Southern and Eastern Africa Trade Information and Negotiations Institute (SEATINI) Kenya	Kenya
19) Tanzania Trade and Economic Justice Forum	Tanzania
20) Uganda National NGO Forum	Uganda
21) Youth Plus Policy Network	Uganda