REFORMING EAC COUNTRIES INTERNATIONAL INVESTMENT AGREEMENTS: A BRIEF

EXECUTIVE SUMMARY

This brief highlights the current state of International Investment Agreements (IIAs) involving the EAC member states and the challenges presented by the IIAs when it comes to the region's long-term development goals. It argues for the need to reform existing IIAs as they do not encompass other social aspects including human rights, environmental protection and sustainable development. Moreover, as the IIAs currently stand, there is asymmetry in that they protect investors but fail to provide regulatory space for host states. Also, the legitimacy crisis in international investment law and investment treaty arbitration has motivated a push for reforms meaning that existing IIAs must be reviewed. Therefore, it is imperative that investment policies provide certainty and protection to investors, respect the regulatory space of host states, and take into account national and broader sustainable development objectives and priorities. It is also important to note that of the two main types of IIAs – Bilateral Investment Treaties (BITs) and Treaties with Investment Provisions (TIPs) – EAC member states have consistently employed BITs.

KEY POLICY RECOMMENDATIONS

1. **A comprehensive cost-benefit analysis of existing BITs including a review of ISDS provisions** is recommended. Furthermore, governments must **adopt laws mandating an economic and social impact assessment of all future investment agreements.**
2. **Need to achieve an overall balance of rights and obligations** as between host states and investors and **take into account the needs of all stakeholders** while undertaking reforms
3. **Identify capacity-building needs required to engage in necessary and meaningful reform**
4. **Recognize the fragmented and inconsistent nature in IIAs involving African states during the AfCFTA and TFTA negotiations** and **offer concrete proposals on the way forward**
5. As they stand **model BITs should be abandoned and, if necessary, replaced**. Instead of EAC member states developing their own model BITs, **EAC economies should consider adopting, adapting and using existing Model BITs developed at the regional level**.
6. **A thorough and holistic review of the ISDS provisions of all in force BITs is recommended as well as past ISDS cases involving EAC member states.**
7. **Intensify efforts to strengthen domestic legal systems** suitable for all investors and **develop options for investor protection without the need for ISDS provisions**
8. **Participate in ongoing reforms in international investment law in particular ISDS reforms**

INTRODUCTION

IIAs were developed to attract foreign investment given few alternatives for financing development upon independence of EAC countries in the 1960s. Without comprehensive assessments on their impact on sustainable development, African governments encouraged FDI. The United Nations Millennial Declaration explicitly calls for increased FDI to Africa as one of the ways to address the challenges of poverty eradication and sustainable development.[1] However, critics of FDI contend that the effects of FDI are actually limited and, in some cases, detrimental as developing countries are not always able to attract FDI to the sectors where it is most needed and that FDI has the potential to crowd out local competition.[2]

Given this, investment policymaking in recent years is taking a different route. Attention is now on the role of FDI and IIAs in promoting inclusive and sustainable economic growth, and their impact on human rights and the environment. Promoting corporate social responsibility and accountability as well as ensuring transparency and inclusivity in the development of IIAs are some of the issues brought forth in recent policymaking.

FDI TRENDS IN KENYA

In 2018, FDI flows to East Africa stood at $9 billion. The FDI flow to East Africa is not evenly spread, however. [3]

Table No. 2: EAC Member States: FDI In Flows by Economy, 2012–2018 (Millions of dollars)

		2012	2013	2014	2015	2016	2017	2018	2019
	Burundi	1	7	47	7	0.1	0.3	1	1
	Kenya	1 380	1 119	821	620	681	1 275	1 626	1 332
	Rwanda	255	258	459	380	342	356	398	420
	South Sudan	1.61	-793	44	0.2	-8	1	60	18
	Tanzania	1 800	2 087	1 416	1 561	864	938	1 056	1 112
	Uganda	1,205	1,096	1,059	738	626	803	1 055	1 266

Note: For South Sudan, the figures are estimates
Source: World Investment Report 2020

ON EAC BITs

EAC member states have concluded 68 BITS of which:

- Only 1 intra-EAC BIT (Kenya-Burundi)
- 27 BITs are with EU member states
- 36 BITs are unratified
- 51 BITs were concluded before 2010

Shortcomings of EAC BITs:

1. Lack of robust investment promotion and facilitation provisions
2. Narrow Treaty Objectives
3. Broad and vague treaty content with limited role for states in interpretation
4. Safeguarding the right to regulate and domestic policy space
5. Framework for periodic review
6. Ignore corporate social responsibility
7. Does not prioritize the development dimension
8. Include long duration, automatic renewal and long survival clauses
9. Inconsistencies across various BITs including use of exceptions

BITs involving EAC Member States are designed primarily as investor protection instruments. All the BITs reviewed are asymmetrical in the sense that they accord rights to investors and do not impose corresponding obligations on investors or afford rights to host states, albeit in varying

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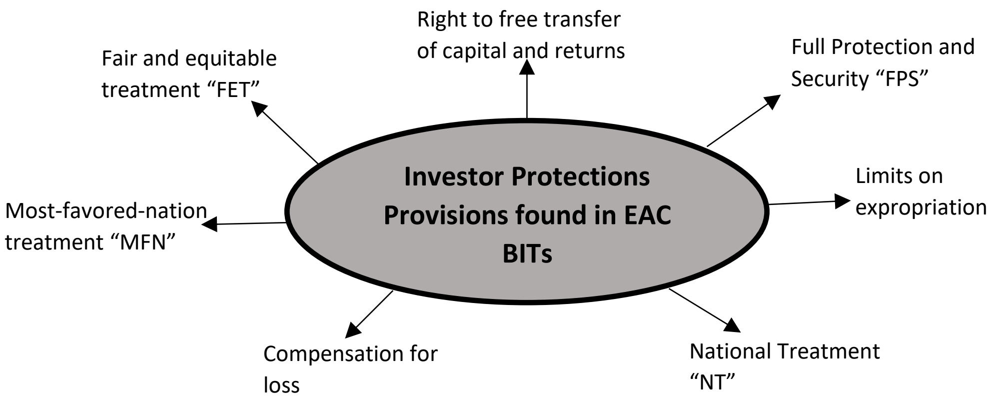
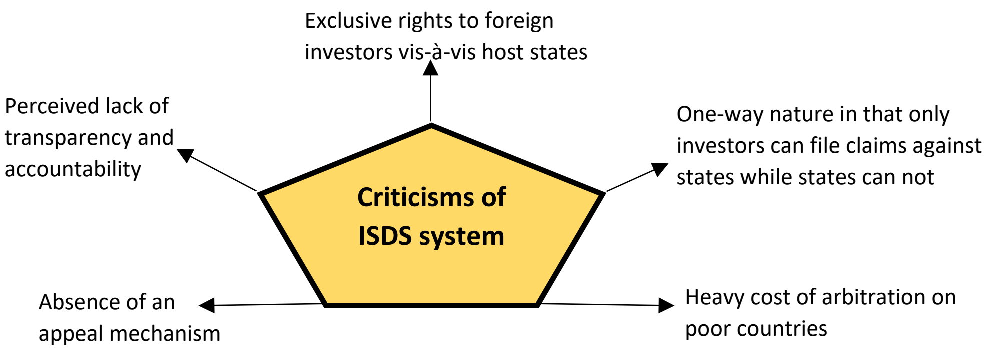
[1] United Nations Millennium Declaration, General Assembly resolution 55/2 of 8 September 2000, para. 28.
[2] AGOSIN, M. R.; MACHADO, R. FDI in developing countries: does it crowd in domestic investment. *Oxford Development Studies*, v. 33, n. 2, p. 149-162, 2005.
[3] In 2017, the top five host economies in Africa were: Egypt ($7.4bn), Ethiopia ($3.6bn), Nigeria ($3.5bn), Morocco ($2.7bn), and Ghana ($3.3bn).

degrees. They tend to be similar in terms of their broad definition of investment, weak provisions on investment promotion and facilitation, and the substantive rights and protection that they offer investors. The rights and protection offered to investors are highlighted below.



INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM (ISDS) – AN EAC EXPERIENCE

The ISDS mechanism in the BITs involving EAC Member States were rarely used through the 1980s. In the 1990s though, the willingness of investors to initiate investment arbitration claims against EAC Member States changed. From 1995 to 2019, EAC member states have been involved in a total of 18 ISDS cases of which 13 were initiated after 2010. In recent times though, the ISDS system has come under scrutiny and in the last decade, calls for systemic reform have been growing.



EAC member states adopted a minimalist approach in the BIT provisions in the sense that the provisions typically allow for a broad range of ISDS claims, contain few procedural specifications, and leave almost every aspect of the procedure to be determined by the selected rules of arbitration or by the arbitrators.[4] EAC member states must consider ISDS-specific reform elements in addition to reform of substantive provisions. The problem with unreformed BITs is that their ISDS provision can be triggered long after the agreements have been terminated. It is important that EAC states review the ISDS provisions in their BITs and decide which reform option(s) is best for them

[4] UNCTAD, Investor-state dispute settlement: A sequel - UNCTAD Series on Issues in International Investment Agreements II, p. 16.

Options for ISDS-specific reforms:

1. Fixing the existing ISDS mechanism
2. Abolish ISDS system and replace it with another mechanism
3. Add new elements to existing ISDS mechanism e.g. an appeal facility
4. Resort to ISDS on a case-by-case basis

ON REFORMS TO BITs

EAC member states may come to different conclusions about whether or not to engage in serious IIA reform. A decision to reform is likely to require states to: (a) **pause IIA negotiations** until reform is complete; (b) **exit some existing agreements**, particularly those that are nearing their initial term; (c) pay very **close attention to its unratified BITs**, particularly those that are outdated; and (d) map out a coherent and meaningful **strategy for the way forward**.

RATIONALE FOR REFORM

1. Need to **reassess the benefits and associated costs of BITs** as well as their **policy and economic implications** for host States
2. **Failure to address many critical issues** related to developing countries
3. **Asymmetrical nature of traditional IIAs**
4. **Widespread consensus on the need for systemic reform** of the global IIA system
5. The **need to achieve policy coherence**.

NATURE OF REFORM

1. **Abandon the IIA system** by terminating all existing IIAs, denouncing relevant multilateral instruments, and limiting exposure to ISDS in investment contracts and domestic regulation
2. **Abandon the IIA system and replace it with a domestic framework** that offers investors more or less similar protections
3. **Engage in unilateral, regional, and multilateral reform** of existing system

MECHANICS OF REFORM

Reform should:

1. Be **methodical and complete** using a phased and comprehensive approach
2. Be **gradual and incremental** by prioritizing the sequence of reform
3. **Target all IIAs** and not just a select few.
4. Be **guided by some agreed guidelines**
5. Be **meaningful and undertaken at multiple levels**: national, bilateral, regional and multilateral

CHALLENGES OF REFORM

1. **Striking the balance** between stability and flexibility, and between investment protection and sustainable development objectives.
2. **Incoherence and inconsistency** at national, bilateral, regional and multilateral levels
3. **Coordination challenges** as reform requires wide stakeholder engagement
4. **Capacity challenges** to understand ramifications and participate in meaningful reform
5. **Other unique country-specific challenges** especially for governance-weak economies

PRIORITIZING REFORM

Four categories of BITs require urgent attention of EAC states. These are:

1. BITs between EAC member states and other African Countries
2. BITs between EAC member states and EU Member States;
3. Unratified BITs
4. Old-generation BITs that fail to focus on investor responsibility, sustainable development, human rights and environmental protection.

EVOLVING BEST PRACTICES IN IIA REFORMS AND DEVELOPMENT

Given the shortcomings of existing BITs, there has been an evolution in recent IIAs which EAC countries should adopt. These include *inter alia*;

a) **Broad Treaty Objectives** articulating objectives beyond investment protection
b) **Explicitly** acknowledging the **Right to Regulate**
c) **Clear and Detailed Definition Section**
d) **Application and Scope of Treaty Carefully Delineated and Circumscribed**
e) **Attention to National Treatment (NT), MFN, and Fair and Equitable Treatment (FET)**
f) **Provisions for expropriation, transfer of funds, transparency, performance requirements**
g) **Reference to Health, Environment and Sustainable Development**
h) **Corporate Social Responsibility/Investor obligation**
i) **Review, Monitoring and Implementation Mechanisms**
j) **Exit strategies and options**

CONCLUSION

Considering that IIA reform "has entered the mainstream of international investment policy making," the question is no longer whether EAC states should engage in reform, but the nature, extent and modalities of the reform.[5] For the EAC region as a whole, the goal ultimately should be an international investment treaty regime that advances the goals of sustainable development and works for all stakeholders. Reform is imperative for several reasons. The risk of investment arbitration exists and the number of ISDS cases against EAC Member States is growing. This is a critical time for the EAC to take a fresh approach to their BITs. A comprehensive and multi-level BIT review is imperative and is highly recommended. Given the long-term political, economic and developmental implications of investment treaties for host States, host communities and foreign investors, to do nothing is not an option.[6]

[5] UNCTAD Reform Package, supra note 206, p. 7.
[6] Uche Ewelukwa Ofodile, *South-South Trade and Investment: The Good, the Bad and the Ugly – African Perspectives*, 20(2) MINNESOTA JOURNAL OF INTERNATIONAL LAW 513-587 (2011).