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# **BILATERAL TREATY REFORM AND REGIONAL DEVELOPMENT**

*A Review of International  
Investment Agreements in East Africa*

# **BILATERAL TREATY REFORM AND REGIONAL DEVELOPMENT**

A REVIEW OF INTERNATIONAL INVESTMENT  
AGREEMENTS IN EAST AFRICA

By  
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Abridged Version

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## Executive Summary

This study is an investigation of the bilateral investment treaties (BITs) involving Member States of the East African Community (EAC) – the Republics of Burundi (“Burundi”), Kenya, Rwanda, South Sudan, the United Republic of Tanzania (“Tanzania”), and the Republic of Uganda (“Uganda”). The study is carried out against the backdrop of the legitimacy crisis in international investment law in general and specifically investment treaty arbitration that exposes countries to considerable political, diplomatic, legal, financial and economic risks arising out of international trade or investment agreements.

Foreign investment plays a critical role as an engine of economic growth in EAC economies. However, there is a growing realization that international investment policies can encroach on national government policy space and can undermine sustainable development goals (SDGs). Consequently, while acknowledging that investment policies should provide legal certainty and protection to investors and their investments, there is a growing consensus that ultimately investment policies should be “aimed at fostering investment, consistent with the objectives of sustainable development and inclusive growth.”<sup>1</sup>

The study examines the provisions of the BITs involving EAC countries and analyses the extent to which these agreements are designed to advance SDGs and achieve an overall balance of rights and obligations as between EAC Members and investors. EAC economies recognize the importance of investments for the growth and development of the EAC region and the need to promote an attractive investment climate and expand investments for long-term development.

However, given international and regional commitments in areas such as human rights, environmental protection, and sustainable development, it is imperative that investment policies in the EAC states provide certainty and protection to investors, respect the regulatory space of host states, and take into account broader national goals, sustainable development objectives and priorities.

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<sup>1</sup> G20 Guiding Principles for Global Investment Policymaking (2016) (hereinafter “G20 Guiding Principles”).

## Key Findings

### On International Investment Agreements

- Of the two main types of international investment agreements (IIAs) – BITs and treaties with investment provisions (TIPs) – EAC countries have consistently employed BITs. However, this is likely to change in the near future. Currently under active negotiation are the investment chapters of two important mega-regional agreements, the SADC-EAC-COMESA Tripartite Free Trade Area (TFTA) Agreement and the African Continental Free Trade Area (AfCFTA) Agreement.<sup>2</sup>
- In terms of treaty partners, historically, EAC members concluded BITs primarily with developed countries. This is changing. In the past two decades, EAC Member States have been concluding BITs with more diverse treaty partners, including other countries in Africa as well as emerging market economies in the Middle East, Latin America and Asia.
- There is very little official record to shed light on the reasons EAC economies decided to conclude BITs in the first place or the negotiation history of individual BITs that have been concluded. While some countries negotiated BITs because economic partners demanded it of them, most concluded BITs to follow a perceived trend and because of the widely held belief that such agreements can help developing countries attract FDI and can contribute to sustainable development.

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<sup>2</sup> On May 30, 2019, the Agreement Establishing the African Continental Free Trade Area (“AfCFTA Agreement”) went into effect. Signed in Kigali, Rwanda, on 21 March 2018, the AfCFTA is a mega-regional trade agreement between member states of the African Union. Agreement Establishing the African Continental Free Trade Area, available at < <https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area> > (hereinafter “AfCFTA Agreement”).

## Findings and Recommendations

### Importance of Trade and Investment

1. Trade and Investments are important for the growth and development of Africa. Policy makers have repeatedly affirmed the desire of States in Africa to promote an attractive investment climate and expand trade and investments for long-term development.
2. Regional and continental instruments emphasize the role played by investment and the private sector in productive capacity, increased economic growth and sustainable development, and the need to create a conducive environment for investment.
3. Given the essential role of investment in promoting sustainable development, it is important that EAC economies create and maintain favourable conditions for the investments and that they foster a transparent and friendly investment environment for investments. It is equally important that investors are adequately protected and are guaranteed access to effective mechanisms for the prevention and settlement of disputes.

### Importance of Other Values

1. Creating an enabling environment for investment is but one of the principles driving policy and planning in Africa. The EAC was established to *inter alia* ensure “the attainment of sustainable growth and development of the Partner States by the promotion of a more balanced and harmonious development of the Partner States,”<sup>3</sup> ensure “the promotion of sustainable utilisation of the natural resources ... and the taking of measures that would effectively protect the natural environment of the Partner States.”<sup>4</sup>
2. Among the fundamental principles of the EAC are the principles of good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.<sup>5</sup>
3. Given broader continental, regional and national goals and vision, investment treaties must not only be designed to promote and protect foreign investment but must also be designed to advance other strategic objectives including the goals of sustainable development.<sup>6</sup>

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<sup>3</sup> EAC Treaty, Article 5(3)(a).

<sup>4</sup> EAC Treaty, Article 5(3)(c).

<sup>5</sup> EAC Treaty, Article 6.

<sup>6</sup> See e.g. Ministry of Trade and Industry: Rwanda Private Sector Development Strategy (2013-2018);

## On Reviewing and Critiquing Bilateral Investment Treaties

- Three EAC economies (Burundi, Kenya and Uganda) have each developed a Model BIT.<sup>7</sup> However, there is no indication that any of these three economies negotiate BITs on the basis of their Model BIT or that their Model BITs ever served as the starting point for any BIT negotiation.
- As between the goals of liberalization, protection, promotion and sustainable development, BITs involving EAC states are primarily protective instruments in the sense that they are designed primarily to protect investors and their investments by imposing binding obligations on host states.
- BITs involving EAC countries are moderately liberalizing in the sense that although they contain liberalizing elements, they do not feature some of the liberalizing elements found in some recent agreements.
- BITs involving EAC members are indirectly promotional and facilitating. Although almost all the BITs examined contain provisions directing contracting parties to promote and encourage investment, they do not specify how investment is to be promoted and do not contain provisions specifically designed to promote investment cooperation or FDI flows.
- There is considerable degree of conformity in the core elements and provisions of the BITs involving EAC states, but significant differences also exist.
- Excluding the BITs that have been terminated, a significant number of BITs involving EAC countries (50%) are not in force meaning that they were signed but were never ratified. What to do with the growing stock of unratified BITs is an issue the EAC economies must address.
- Excluding the BITs that have been terminated, a significant number of BITs involving EAC members (approximately 70.8%) can be classified as “first generation” or “old-generation” agreements in the sense that they were concluded prior to 2000 long before current debates about IIA reform gained momentum; thereby containing provisions that are broad, vague, and imprecise. These do not adequately protect the regulatory space of host states, and do not strike an appropriate balance between the right of investors and those of host states. Indeed, most first generation BITs involving EAC states contain scant exceptions, exclusions, or reservations.
- A significant number of BITs involving EAC members (about 37.5%) are with members of the European Union (EAC-EU BITs). Significantly, EAC-EU BITs are overwhelmingly old-generation agreements and most (85.2%) are in force. Figuring out what to do with the vast stock of outdated BITs that EAC states have with EU countries is an urgent issue that EAC members States must have to address.
- Overall, most BITs involving EAC states that are in force are concerned primarily with investment/investor protection and were not necessarily designed to support sustainable development. Moreover, most of the ‘in force’ BITs involving EAC countries do not appropriately balance the rights and responsibilities of states vis-à-vis those of foreign investors.

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<sup>7</sup> Burundi Model BIT (2002); Kenya Model BIT 2003; Uganda Model BIT (2003).

## Findings and Recommendations

### The Bilateral Investment Treaties Landscape of EAC Economies

1. A significant number of EAC BITs are 'first generation' BITs and suffer shortcomings characteristic of traditional BITs in the sense that they focus solely on investment protection and were never designed to further broader objectives.
2. BITs involving EAC countries are designed primarily as investor protection instruments. All the BITs reviewed in this study 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. BITs involving EAC states pursue two main foreign investment agenda albeit in varying degrees: investment protection and investment liberalization. Although the BITs all claim to pursue the objectives of investment promotion and facilitation, these objectives are not prioritized in most of the agreements reviewed.
3. The BITs are moderately liberalizing in the sense that they contain certain basics on opening economies but do not contain many of the key elements found in some recent IIAs. Overall, as between the goals of liberalization, protection, promotion and sustainable development, BITs involving EAC countries are primarily protective instruments in the sense that they are designed to protect investors and their investments by imposing binding obligations on host states.
4. BITs involving EAC members exhibit a lot of similarities but also considerable differences. \* The BITs are 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. In addition, in almost all the BITs examined, the protection provisions are supplemented by provisions addressing the settlement of dispute.
5. Typically, the BITs provide for State-to-State dispute settlement as well as Investor-to-State dispute settlement. The BITs examined are also similar in terms of the range of issues that are not addressed; most of the BITs examined do not address issues such as consumer protection, corruption, corporate social responsibility, illicit payments, or the control of restrictive business practices. Despite their similarities, BITs involving EAC members are not created equal and considerable variations exist even as between the BITs concluded by the same country.
6. Although investment processes involve host and home countries plus the investors, historically, only host countries have been addressed in IIAs. BITs involving EAC states have largely followed this trend and do not impose direct obligations on the home states of investors. This is unfortunate. The issue of home country obligation is particularly important in the EAC context because all EAC countries are net importers of FDI and home country measures can have a major impact on the magnitude plus quality of FDI flows to the region.
7. The BITs are therefore indirectly promotional and facilitating. Although all the BITs direct contracting states to promote and encourage investment, they do not specify how investment is to be promoted, do not contain provisions that proactively promote investment flows, and do not establish institutional mechanisms to make that happen. Overall, a majority of EAC's in force BITs are old-generation treaties in urgent need of reform.

## On the Emerging Best Practices of Bilateral Investment Treaties

- Most of the BITs involving EAC members are not the product of extended or serious negotiations and were not developed in a transparent manner with the opportunity for all stakeholders to participate. In most cases, the BITs were not subjected to necessary impact assessments, were signed without a real appreciation of their economic, social, and legal cost, and were not informed by national, regional and continental development goals or objectives.
- In international investment law rulemaking, EAC economies are “rule takers” rather than “rule givers.” In most instances, EAC economies do not negotiate BITs on the basis of any model text, they willingly sign BITs that are based almost exclusively on the model BIT of negotiating partners, and they sign the agreements without conducting a critical assessment of potential impact of such agreements on national, regional and continental development goals.

## Findings and Recommendations

- International investment rulemaking is experiencing a level of dynamism that has not been seen in a long time. A study of evolving IIA practice of states suggests that a growing number of States are daring to deviate from standard practice and are crafting IIAs that they believe best advances their development goals and objectives. What is evident is that:
  - More and more countries are reviewing and reforming their IIAs and are not afraid to adopt and adapt available policy options.
  - Countries are also getting bolder in the IIA design and are willing to depart from established models.
  - More and more countries are taking IIA negotiation very seriously and are investing resources towards strengthening their knowledge of IIAs and their capacity to negotiate IIAs that advance their own interests.
  - There are now many options available for countries interested in reforming their IIAs.
- In the final analysis, for many countries the question is not whether reform is necessary but what level of reform is needed and whether there is enough political will to engage in meaningful reform. Increasingly, countries are introducing innovative elements in their IIAs. While most of the innovative features are necessary, some may not be necessary and may already be addressed under customary international law

## On the Dispute Settlement Regime

- Over the years, the number of ISDS claims initiated against EAC states has grown steadily. To date, about twenty (20) ISDS cases have been initiated against EAC states and most were initiated based on a BIT. What is more, ISDS cases involving EAC countries implicate different sectors and industries including, water supply, sewerage, waste management and

remediation activities,<sup>8</sup> electric power,<sup>9</sup> mining and quarrying,<sup>10</sup> agriculture, forestry and fishing,<sup>11</sup> service and trade,<sup>12</sup> and oil and gas.<sup>13</sup>

- The BIT framework of EAC members suffer from fragmentation, overlap and incoherence. There is a lack of consistency as between the BITs of individual EAC states and as between those BITs and national development policies and strategies. Furthermore, EAC countries are discovering that BITs are not benign policy instruments and that they can have serious economic, financial and social implications for a host state.
- Unless addressed, the problem of fragmentation and incoherence in their international investment policy framework is likely to become even more unmanageable when the Investment Protocol of the Agreement Establishing the African Continental Free Trade Area (AfCFTA) becomes operational.<sup>14</sup>

## Findings and Recommendations

1. The growing number of ISDS cases involving EAC economies, the adverse decisions emanating from various arbitral tribunals, and the widespread controversies over the ISDS mechanism should be a concern for EAC economies and should prompt them to each carry out a comprehensive review of their BITs.
2. A thorough review of the ISDS provisions of all in force BITs is recommended. Most old-generation agreements involving EAC Member State renew automatically and some renew for additional fixed durations thus making treaty difficult. Article 14(2) of the Tanzania-Netherland BIT provides “Unless notice of termination has been given by either Contracting Party at least six months before the date of the expiry of its validity, the present Agreement shall be extended tacitly for periods of ten years.” Had Tanzania failed to tender its termination notice on September 30, 2018, the agreement would have extended automatically for another ten years and would have remained valid until April 1, 2029.
3. A thorough and comprehensive review of all ISDS cases involving EAC states is highly recommended. A review of past ISDS cases involving EAC states will help countries assess the costs and benefits of ISDS, identify existing risks and vulnerabilities, develop reform proposals, and determine how best to respond to the legitimacy crisis in investment arbitration. IIAs can impose costs on host States even when they do not result in an arbitral award.<sup>15</sup>

<sup>8</sup> *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22).

<sup>9</sup> *WalAm Energy Inc. v. Republic of Kenya* (ICSID Case No. ARB/15/7).

<sup>10</sup> *Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda* (ICSID Case No. ARB/18/21).

<sup>11</sup> *EcoDevelopment in Europe AB and EcoEnergy Africa AB v. United Republic of Tanzania* (ICSID Case No. ARB/17/33).

<sup>12</sup> *World Duty Free Company v Republic of Kenya* (ICSID Case No. Arb/00/7).

<sup>13</sup> *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya* (ICSID Case No. ARB/15/29).

<sup>14</sup> The Investment Protocol of the AfCFTA is not yet finalized. Article 7 of the AfCFTA Agreement stipulates that Member States “shall enter into Phase II negotiations in the following areas: (a) intellectual property rights; (b) investment; and (c) competition policy” and that negotiations “shall ... be undertaken in successive rounds.” African Union Ministers of Trade have been directed to conclude the negotiations on the Protocols on Investment and other outstanding instruments and to submit the draft legal texts for adoption by January 2021. Decision on the African Continental Free Trade Area, Doc.Assembly/AU/4(XXXII), Assembly/AU/Dec.714(XXXII). 32nd Ordinary Session of the Assembly, 10- 11 February 2019, Addis Ababa, Ethiopia.

<sup>15</sup> Simmons, B.A. (2014). Bargaining over BITs, arbitrating awards: The regime for protection and promotion of international investment. *World Politics*, 66(1), 15.

## On Reforms

- The good news is that some EAC member appear to have begun to undertake reform action in the pursuit of sustainable development oriented IIAs. The bad news is that the present approach to reform is haphazard, inconsistent, and ultimately counterproductive. New BITs with some reform elements co-exist uneasily with old-generation agreements that are in urgent need for reform. For EAC states, the stock of old-generation BITs far outnumbers the few recent, reform-oriented agreements that have been concluded in the last few years. Moreover, while some recent BITs involving EAC countries contain some reform elements, most are still considerably out of step with model BITs developed at the regional (EAC) and continental (Africa Union) level. Although novel and reform-oriented elements are beginning to appear in some recent agreements involving EAC Member States, most appear to be driven by other contracting parties and tend to follow the model BITs of negotiating partners.
- Despite the shortcomings in their respective BITs, no EAC members has conducted or is in the process of conducting a comprehensive review of their BIT framework. This is unfortunate as only a comprehensive BIT review will help each country identify the gaps in its BIT regime, assess the true costs and benefits of concluding IIAs, and assess the best approach to reform.

## Findings and Recommendations

The relationship between BITs and FDIs are ambiguous at best. The relationship between investment agreements and FDI inflows has not been established conclusively and remains a matter of considerable debate. Nevertheless, IIAs can play a positive role in a country's attractiveness. Countries with weak institutions and poor regulatory climate have a much greater need to use investment treaties to bolster their image as jurisdictions that offer stability and certainty. It is imperative that EAC States engage in comprehensive reform of their BITs. Reform is needed at the national, bilateral, regional and multilateral levels. To be meaningful, reform must be comprehensive and must implicate existing BITs as well as investment agreements that are currently under active negotiation. It is equally imperative that EAC countries consider a new framework for international investment that not only supports national, regional and continental development vision and strategies but is also consistent with their obligation under various human rights and environmental instruments.

CHALLENGE	POINTS FOR CONSIDERATION
<b>Getting the Necessary Political Commitment</b>	<ol style="list-style-type: none"> <li>1. IIA reform requires political will and commitment at the highest levels. It is important that political leaders in EAC States commit publicly to revamping their respective BIT program. Commitment is needed to carry out a meaningful review of existing agreements, to engage in meaningful reform, and to implement reform actions once they are decided.</li> <li>2. It is recommended that EAC leaders commit publicly to investment policies that foster and protect investors and investors, respects the right of Governments to regulate in the public interest, ensures responsible investments, and are generally consistent with the objectives of sustainable development and inclusive growth. African</li> </ol>

	<p>leaders are often quick to reaffirm their commitment to investment liberalization but are not as quick to affirm their commitment to transparent, balanced, sustainable, development-oriented investment policies. This is unfortunate.<sup>16</sup> Across the globe, political leaders are committing publicly to reform their respective IIAs.<sup>17</sup> In a 2011 trade policy statement, the Julia Gillard government pledged that it “has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products...”<sup>18</sup></p>
<p><b>Finding the Right Balance</b></p>	<ol style="list-style-type: none"> <li>1. One challenge to successful IIA reform is finding the right balance. It is important that a reform does not deprive a state’s IIA regime of one of its primary purposes, which is the purpose of protecting investment.<sup>19</sup></li> <li>2. In their investment treaties, EAC economies should seek to achieve an overall balance of the rights and obligations as between host States and investors and take into account the needs of all stakeholders.</li> <li>3. It is imperative that EAC Member States seek to create an enabling environment for investment at the same time that they seek to protect the right of host States to regulate in the public interest. In the preamble to the Pan-African Investment Code, Member States of the African Union “RECOGNIZ[E] the right of Member States to regulate all the aspects relating to investments within their territories with a view to meeting national policy objectives and to promote sustainable development objectives.”</li> <li>4. There is no one-size-fits-all approach to IIA reform and such an approach, even if it existed, will not work in the EAC region. In reforming their BIT program, countries must acknowledge weaknesses in their domestic legal and regulatory framework. Countries with weak institutions and less predictable regulatory environment are in a particularly difficult position.</li> </ol>
<p><b>Finding Voice in Future BIT Negotiations</b></p>	<ol style="list-style-type: none"> <li>1. EAC economies must strengthen their ‘voice’ in future IIA negotiations. Although there appears to be a positive relationship between economic power and consistency across a country’s IIA, what a country lacks in economic power it can make up through coherent investment policy, clear negotiation strategy, careful treaty planning, and strong in-house expertise.</li> <li>2. To strengthen their voice in IIA negotiations, EAC states can consider developing and using Model BITs. A Model BIT provides an opportunity for countries to codify their position on key issues and can help a country to enter negotiations prepared. Although Burundi, Kenya and</li> </ol>

<sup>16</sup> UNCTAD, Investment Policy Framework for Sustainable Development, UNCTAD/DIAE/ PCB/2012/5, Geneva, 2012, available at [http://unctad.org/en/PublicationsLibrary/diaepcb2012d5\\_en.pdf](http://unctad.org/en/PublicationsLibrary/diaepcb2012d5_en.pdf)

<sup>17</sup> For example, during his administration, President Obama promise that: “With regards to provisions in several FTAs that give foreign investors the right to sue governments directly in foreign tribunals, I will ensure that foreign investor rights are strictly limited and will fully exempt any law or regulation written to protect public safety or promote the public interest. And I will never agree to granting foreign investors any rights in the U.S. greater than those of Americans.”

<sup>18</sup> Gillard Government Trade Policy Statement, “Trading Our Way to More Jobs and Prosperity”, April 2011, p 14, <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobsand-prosperity.pdf>

<sup>19</sup> UNCTAD’s Reform Package, at p. 8.

	<p>Uganda, have developed their individual Model BITs, these instruments are outdated and must be updated.</p> <ol style="list-style-type: none"> <li>3. Instead of each country developing its own model BIT, EAC economies should consider adopting, adapting and using existing Model BITs developed at the regional level such as the Pan-African Investment Code and the SADC Model Investment Treaty.</li> <li>4. It is also recommended that EAC economies find their voice in broader global policy debates about the future of the international investment law regime. For example, on-going debate about the merits and demerits of an international investment court require the full attention and input of EAC States.</li> </ol>
<p><b>Achieving Coherence</b></p>	<ol style="list-style-type: none"> <li>1. Inconsistency, fragmentation and incoherence marks the BIT landscape of EAC economies. Presently, EAC BITs are not completely grounded in domestic, regional and continental development visions, policies and strategies. Regional policy instruments such as the Pan-Africa Investment Code and the COMESA Investment Treaty co-exist with a growing number of intra-African BITs and IIAs and have not replaced these agreements. Thus far, EAC economies have largely ignored the provision of Article 3(2) of the Pan-African Investment Code which provides, “Member States may agree that this Code replaces the intra-African bilateral investment treaties (BITs) or investment chapters in intra-African trade agreements after a period of time determined by the Member States.”</li> <li>2. In regards to new agreements with third States, it is recommended that EAC States take into account Article 3(3) of the Pan-African Investment Code which stipulates that “Member States and Regional Economic Communities (RECs) shall take into account as far as possible the provisions of this Code when entering into any new agreement with a third country in order to avoid any conflict between its present or future obligations under this Code and its obligations in the other agreement.”</li> <li>3. It is recommended that in the negotiations for the investment chapters of the TFTA Agreement and the AfCFTA Agreement, EAC Member States should raise and bring to the forefront the problem of fragmentation and inconsistency in the IIA regime of African States and offer concrete proposals on the way forward.</li> <li>4. Investment treaties are not the only pathway to ISDS. In the past, ISDS claims have been brought against EAC state on the basis of investment contracts and domestic law. Should countries decide to exit the ISDS system or to reform the ISDS provisions of their BITs, it is important that they ensure coherence between their BIT obligations, domestic laws and policies between their BIT obligations and the investment contracts they conclude with individual investors, and between their BIT obligations and their obligations under multilateral treaties such as the ICSID Convention.</li> </ol>

<p><b>Transparency and Broad Public Participation</b></p>	<ol style="list-style-type: none"> <li>1. Transparency, broad stakeholder engagement, and accountability in a country's IIA regime are highly desirable and should guide reform action in the EAC region. According to the G20 Guiding Principles for Global Investment Policymaking, "regulation relating to investment should be developed in a transparent manner with the opportunity for all stakeholders to participate and embedded in an institutional framework based on the rule of law."</li> <li>2. Parliament, the general public and relevant stakeholders, should be involved in reform efforts and kept fully abreast of future developments in this area. Before Cabinet adopted India's Model BIT in December 2015, a draft version was widely circulated for public comments<sup>20</sup> and was vetted by the Law Reform Commission of India.<sup>21</sup></li> <li>3. It is recommended that the legislative branch in EAC Member States, as far as constitutionally possible, take more active role in investment treaty negotiations. In established democracies, parliamentary oversight of trade and investment agreements is not at all unusual and is expected. The EU Parliament is actively involved in the EU's investment treaty efforts.</li> <li>4. The level and quality of parliamentary involvement and oversight of investment treaty making varies from country to country but may include briefing on plans to enter into any treaty negotiation, periodic briefing about on-going treaty negotiations, access to all confidential documents relating to treaty negotiations, and parliamentary scrutiny of draft treaty texts.</li> <li>5. It is recommended that EAC economies revisit their apparent decision not to ratify the multilateral instruments designed to enhance transparency in the ISDS system such as the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014); to date, no EAC Member State has signed or ratified the convention.</li> </ol>
<p><b>Capacity</b></p>	<ol style="list-style-type: none"> <li>1. Capacity constraints can affect the level and quality of IIA reform and must be proactively addressed. Successful IIA reform requires considerable financial and technical resources.</li> <li>2. It is recommended that EAC Member States assess their capacity to engage in necessary reform and identify their capacity-building needs.</li> <li>3. Five of Six EAC Member States are classified as least developed countries and may need help with IIA reform.<sup>22</sup> It is recommended that countries that lack the necessary expertise seek help from appropriate quarters including from organizations such as UNCTAD and UNICITRAL.</li> </ol>

<sup>20</sup> Draft Model Text for the Indian Bilateral Investment Treaty, [https://www.mygov.in/sites/default/files/master\\_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf](https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf).

<sup>21</sup> Government of India, Law Commission of India, Report No 260, Analysis of the Draft Model Indian Bilateral Investment (August 2015), <http://lawcommissionofindia.nic.in/reports/Report260.pdf>

<sup>22</sup> United Nations, List of Least Developed Countries (as of December 2018), available at < [file:///C:/Users/Uche/Documents/EAC/ldc\\_list.pdf](file:///C:/Users/Uche/Documents/EAC/ldc_list.pdf)>

### On the need to Review IIAs and BITs

- A thorough, multi-level and comprehensive review of the substantive provisions of all BITs involving EAC states is highly recommended.
- A thorough review of the ISDS provisions of all in force BITs and all known ISDS cases involving EAC countries is also highly recommended. A review of past ISDS cases involving EAC members will help countries; assess the costs and benefits of ISDS; identify existing risks and vulnerabilities; develop reform proposals; and determine how best to respond to the legitimacy crisis in international investment arbitration.
- Until the necessary reviews are carried out, it is recommended that EAC members observe a timeout and 'pause' negotiating and concluding new IIAs.
- A comprehensive, holistic, strategic, multi-level IIA reform is recommended for each EAC state and for the region. Instead of suggesting policy options, the report offers a range of options based on the evolving best practices of States.

### Findings and Recommendations

To ensure coherence in their international investment policy, address gaps in their stock of BITs, and reduce their exposure to considerable legal risks and ISDS claims, EAC states must (i) review their BITs; (ii) critically assess the costs and benefits of their IIAs; and (iii) address glaring problems in most of their BITs. Although a holistic and comprehensive reform requires that EAC countries pay attention to all BITs, some agreements deserve more urgent attention. It is advised that EAC members pay attention to four categories of BITs: (i) BITs between EAC states and other African countries; (ii) BITs between EAC economies and EU members (EAC-EU BITs); (iii) unratified BITs; and (iv) old-generation BITs.

#### A Time to Review BITs in the EAC

1. It is time for each EAC state to rethink its BIT programme and for the EAC bloc to evaluate its broader IIA strategy. One of the goals of a comprehensive review is to assess the true costs and benefits of international investment regime for each EAC economy and for the region as a whole. Another goal is for each State to take stock and identify the gaps and problems in its BIT regime.
2. The review should address all BITs paying particular attention to four categories of investment treaties: old-generation BITs, unratified BITs, EAC-EU BITs, as well as EAC-Africa BITs. In force BITs that have expired or about to expire deserve urgent attention. It is important that each BIT is reviewed in terms of coverage, content (both the substantive aspects and the procedural aspects), partners, benefits and costs.
3. The Model BITs of Kenya, Burundi and Uganda are outdated and fall short in many important respects. It is recommended that these three model BITs be completely abandoned and, if necessary, replaced.
4. Although fairly recent, the draft EAC Model BIT (2016) falls short in some important respects and should be reviewed, and perhaps, updated. As part of the review process, the EAC Model BIT (2016) should be put up for wide public comments and suggestions.
5. Until the necessary reviews are carried out, it is recommended that EAC economies observe a timeout and 'pause' negotiating and concluding any new BITs.

6. No specific reform path is recommended in this report. A successful and comprehensive BIT review should prompt each EAC state to make some strategic choices. Each country must address at least four specific issues: (i) whether or not to have IIAs; (ii) whether or not to disengage from existing IIAs; (iii) whether or not to engage in IIA reform; and (iv) how to reform and the degree of reform.<sup>23</sup> Studies show, and this report demonstrates, that on these very important policy issues, countries are coming to vastly different conclusions.
7. Although no specific reform path is recommended, inaction is not an option. Action is urgently needed on multiple fronts particularly the ISDS provisions of old-generation agreements. With some of their BITs boasting 20-year initial duration and 20-year survival periods, it will be a very long time before some EAC States are free from the effects of some of the treaties they have concluded. Even if all old-generation BITs are terminated today, the effect of some of these agreements will be felt for a long time to come, some until 2039.
8. Although no specific reform path is recommended, what each EAC economy urgently needs is an international investment policy regime that is transparent, effective, coherent, balanced, and oriented towards sustainable development.<sup>24</sup>

#### A New Generation of BITs

9. Should EAC Member States decide to continue to keep their existing BITs and to conclude new investment treaties, it is recommended that they move towards a new generation of investment treaties, ones that are oriented towards sustainable development and strike an appropriate balance as between investment protection and respecting regulatory space, and as between investor protection and investor obligation.
10. Reform should be methodical, strategic, and comprehensive. A phased approach to reform is recommended. Phase 1 should concern the substance of the BITs and should address the five policy priority areas identified in this report.<sup>25</sup> Phase 2 of the reform should address the existing stock of old-generation IIAs. Finally, Phase 3 of IIA should focus on improving coherence, consistency and interaction between different levels and types of policymaking.
11. Reform should be holistic, multi-level, and comprehensive. Reform should target all BITs – BITs between EAC economies and developed countries, BITs between EAC economies and emerging market economies, BITs between EAC economies and other African States, old-generation BITs as well as more recent agreements.
12. Reform should be guided by agreed guidelines. In this regard, the six guidelines for IIA reform proposed by UNCTAD merits serious consideration: (i) harness IIAs for sustainable development; (ii) focus on critical reform areas; (iii) act at all levels; (iv) sequence properly

<sup>23</sup> UNCTAD's Reform Package, at p. 18-19.

<sup>24</sup> See The Draft Joint ACP-UNCTAD Guiding Principles for Investment Policy Making. See also, the G20 Guiding Principles for Global Investment Policymaking.

<sup>25</sup> UNCTAD's Reform Package, at p. 7 ("IIA reform should aim at (i) safeguarding the right to regulate in the public interest while providing protection; (ii) reforming investment dispute settlement to address the legitimacy crisis of the current system; (iii) promoting and facilitating investment; (iv) ensuring responsible investment to maximize the positive impact of foreign investment and minimize its potential negative effects; and (v) enhancing the systemic consistency of the IIA regime so as to overcome the gaps, overlaps and inconsistencies of the current system and establish coherence in investment relationships.").

for concrete solutions; (v) ensure an inclusive and transparent reform process; (vi) strengthen the multilateral supportive structure.<sup>26</sup>

13. With any reform, national-level reform action should be the starting point. It is recommended that each EAC economy carry out a comprehensive national review of its BITs, identify areas where reform is needed, prioritize reform actions and plans, and act.
14. It is recommended that following the national review of their respective IIAs, each country should develop a national IIA action plan as part of a larger trade, investment and development agenda. A national IIA strategy should address a host of issues including; whether to conclude IIAs in the future, the design criteria of future IIAs, and the approaches for IIA reform.
15. A regional IIA action plan is also urgently needed. Given the gradual shift in Africa from BITs to regional IIAs, it is important that international investment policies of the emerging mega-regional framework are clear and consistent with evolving best practices.
16. It is recommended that EAC institutions, in particular the East African Legislative Assembly, become more engaged in IIA rulemaking and implementation. It is also recommended that the role of regional bodies in international investment rulemaking is addressed in the investment chapters of the TFTA Agreement and AfCFTA Agreement.
17. Should EAC economies decide to continue to conclude new investment treaties, it is recommended that they only conclude 'smart IIAs' and that they only negotiate new agreements on the basis of clearly defined and transparent negotiation strategies. Across the globe, although countries are continuing to use IIAs as a tool for international investment policy making, they are becoming savvy, strategic and smart about the IIAs that they conclude.

### On Pathways in Treaty Reform

- In line with the recommendations of the United Nations Conference on Trade and Development (UNCTAD), reform should aim at (i) safeguarding the right to regulate in the public interest while providing protection; (ii) reforming investment dispute settlement; (iii) promoting and facilitating investment; (iv) ensuring responsible investment; and (v) enhancing the systemic reliability so as to overcome inconsistencies and establish coherence in investment relationships.<sup>27</sup>
- Although most BITs involving EAC countries are in need of reform, some categories of BITs deserve more urgent attention than others. Altogether, four categories of BITs require the urgent attention of EAC members: (i) BITs between EAC states and other African countries; (ii) BITs between EAC countries and members of the European Union (EAC-EU BITs); (iii) unratified BITs involving EAC states; and (iv) old-generation BITs involving EAC countries. Attention to these categories of BITs will go a long way towards eliminating and/or reforming existing "high risk" agreements and promoting coherence in the BIT regime of EAC members.
- Whatever reform paths and options EAC states choose, it is important that reform is driven by some agreed guidelines. In this regard, the six guidelines for IIA reform proposed by UNCTAD merits serious consideration: (i) harness IIAs for sustainable development; (ii)

<sup>26</sup> UNCTAD's Reform Package, at p. 22.

<sup>27</sup> See generally, United Nations Conference on Trade and Development, UNCTAD's Reform Package for the International Investment Regime (2018). See also, UNCTAD, 'Investment Policy Framework for Sustainable Development' (2015) (hereinafter "IPFSD 2015").

focus on critical reform areas; (iii) act at all levels; (iv) sequence properly for concrete solutions; (v) ensure an inclusive and transparent reform process; (vi) strengthen the multilateral supportive structure.

- International cooperation is needed to help least developed countries (LDCs) establish effective, balanced, and transparent investment policies that are consistent with the objectives of sustainable development and inclusive growth. In line with the G20 Guiding Principles on Global Investment Policymaking, this report calls on the international community to proactively support IIA reform efforts in LDCs and other developing countries.
- Beyond IIA reform, international cooperation is needed to foster an enabling international economic environment that is supportive of nationally owned sustainable development strategies. Global partnership for sustainable development in line with the Addis Ababa Action Agenda of the Third International Conference on Financing for Development, requires that the international community promote a coherent and mutually supporting world trade, monetary, and financial system. It should also substantially reduce illicit financial flows, scale up international tax cooperation, promote responsible business and investing, while strengthening the mechanisms for compliance.

## Findings and Recommendations

### Long-term Goals and Strategies

1. It is recommended that EAC Member States adopt laws that mandate economic and social impact assessment of all future trade and investment agreements.
2. It is recommended that EAC economies redouble their efforts to develop strong domestic legal systems suitable for protecting all investors and to develop options (e.g. political risk insurance) for domestic companies to protect their investments in overseas markets without the need for ISDS provisions.
3. A strong governance and legal system that is predictable and creates a safe and secure environment for domestic and foreign investors would be in the long-term best interest of EAC economies. As UNCTAD rightly notes, "IIAs cannot substitute for sound domestic policies and regulatory and institutional frameworks. IIAs alone cannot turn a weak domestic investment climate into a strong one, and, like other treaties, they cannot guarantee market outcomes in the form of inflows of foreign investment." It is recommended that EAC states strengthen their effort to improve democratic institutions and consolidate rule of law reform efforts in their respective jurisdiction.
4. It is recommended that EAC Member States participate in on-going discussions about ISDS reform at the multilateral level such as UNCITRAL Working Group III on Investor-State Dispute Settlement (ISDS) Reform. EAC economies should also actively participate in related processes such as the Intergovernmental Working Group on creating a binding instrument on multinational enterprise and other businesses with regards to human rights.