



**STRATEGIC CONSULTATIVE
MEETING ON REFORMING
BILATERAL
INVESTMENT
TREATIES (BITS) IN
KENYA**

With support from

CONCEPT NOTE

24th April 2019, Hilton Hotel, Nairobi, Kenya

STRATEGIC CONSULTATIVE MEETING ON REFORMING BILATERAL INVESTMENT TREATIES (BITs) IN KENYA

Background

Bilateral investment treaties (BITs) are treaties between two countries or regional economic communities regarding promotion and protection of investments made by investors from respective countries in each other's territory. The signing of BITs by African states dates as far back as the post-colonial/ post-independence period. In fact, most of the EAC partner states first signed their first BITs a few years or a year after their independence. The primary purpose of BITs is to protect investors. Increasingly, however, most capital-exporting countries are also using BITs to further their market liberalization agenda. The claim that BITs result in increased Foreign Direct Investment (FDI) flow to countries that sign them is controversial and highly contested. The related claim that FDI flow yields positive development outcome for host countries is also highly contested. Under these treaties foreign investors enjoy exceptional legal rights, including the exclusive access to arbitral procedures against the State, without corresponding responsibilities.

There are growing challenges to the international investment law which is primarily made up of bilateral investment treaties. The challenges to international investment law are coming from States, the academia, as well as civil society groups. Some critics have called on governments to withdraw from the BITs that they have signed and to specifically reject investor-state dispute settlement mechanisms in future BITs. States are responding to the challenges posed by the international investment system in different ways. Some states have halted plans to negotiate new BITs and are seeking to renegotiate the terms of existing ones and others have withdrawn from key multilateral agreements such as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID or the Washington Convention).

The crafting of BITs offers a range of substantive rights and procedural guarantees to investors. The substantive rights offered include relative standard of treatment; National Treatment and Most Favored Nation Treatment; absolute standard of treatment; rules on expropriation and compensation; transfers of capital and returns as well as restriction against performance requirements. The procedural guarantees relate to the question of dispute settlement which is primarily done through international arbitration. In addition, the policy space of states to regulate foreign investors in the public interests faces major threats and hence, the desired objectives/ outcomes of countries signing BITs in the case of many African states in general, and the EAC partner states in particular has yet to be fully realized.

It is for this reason that SEATINI and Econews Africa have taken to analyzing and monitoring the implementation of BITs within the EAC region and ensure that the region adjusts its policy orientation in line with what is happening at the global level. In terms of trends at the global level, the United Nations Conference on Trade and Development (UNCTAD) contends that the International Investment Agreements (IIAs) framework is under review in many countries around the globe. By example, some countries such as India, Indonesia and South Africa are terminating their BITs. There are also countries that are upgrading old BITs such as the India-Belarus BIT of 2018. Yet other countries are charting new paths with their IIAs such as the Brazil-Ethiopia Cooperation and Facilitation Investment Agreement (CFIA) of 2018.

UNCTAD has called for a “new generation of investment policies” which place inclusive growth and sustainable development at the heart of efforts to attract and benefit from investment. These policies address specific investment policy challenges at the national and international levels. At the national level, these include integrating investment policy into development strategy, incorporating sustainable development objectives in investment policy and ensuring investment policy relevance and effectiveness.

In their recent analysis, SEATINI and Econews Africa discovered that on 26th May 2019 and on 10th July 2019 the Kenya-France and Kenya-Switzerland BITs will expire respectively. It is against this background therefore that these organizations seek to convene a consultative and strategic task team meeting of key stakeholders including trade unionists; CSO working on issues of trade, investment, human rights and the environment; government officials from the Ministry of Foreign affairs, trade and investment; and members of the EAC Secretariat and EALA to discuss the BITs. The meeting which will agree on potential coordination, information sharing mechanism and advocacy strategies to support broader policy engagement to review/ terminate these Kenya BITs will take place on 4th April 2019. It is hoped that the meeting will contribute towards unlocking a broader discussion around reforming Kenya Bilateral Investment Treaties in view of the EAC Model Investment Treaty.

Specific Objectives:

1. To raise awareness of key stakeholders on the expiry of the Kenya-France and Kenya-Switzerland BITs and the need to review the investment agreements
2. To identify the discuss areas for consideration in notifying the France and Switzerland governments of Kenya’s intent to renegotiation the Investment Treaties
3. To garner stakeholders’ positions on the renegotiation of the Kenya-France and Kenya-Switzerland BITs for a pro development country position.

1. Expected outcome

- A road map for stakeholders’ engagement in towards reviewing the treaties.
- A taskforce of key stakeholders to implement the road map.

Tentative Program

STRATEGIC CONSULTATIVE MEETING ON REFORMING BILATERAL INVESTMENT TREATIES (BITs) IN KENYA

- 07:00-08:00am: Media Break fast
- 09:00-09:30am: Arrival and Registration
- 09:30-10:00am: Self Introductions
- 10:00-10:30am: Welcome and Opening Remarks**
Welcome remarks:
Mr. Edgar Odari, Econews Africa
Ms. Jane S. Nalunga, SEATINI
Ms. Sandra Kidwingira, Diakonia
Opening remarks:
Official from the Ministry of Finance, Kenya
- 10:30-11:00am: Contextual analysis of investment treaties in the global policy landscape**
Ms. Jane S. Nalunga, Country Director, SEATINI Uganda
- 11:00-11:30am: HEALTH BREAK**
- 11:00-11:30am: Presentation of Inception Report to Regional Study**
Mr. Edgar Odari, Executive Director, Econews Africa
- 11:30-12:00am: Presentation:**
Key contentious provisions in Kenya's Bilateral Investment Treaties (BITs): Kenya-France and Kenya-Switzerland
Ms. Faith Lumonya, SEATINI Uganda
- 12:00-01:00am: Panel Discussion**

Mr. Alvin Mosioma, Executive Director, Tax Justice Network – Africa
Mr. Kwame Owino, Executive Director, Institute of Economic Affairs
Ms. Crystal Simeoni – Advocacy Coordinator, FEMNET
- 01:00-01:30pm: Plenary Discussion**
- 01:30-2:30pm: LUNCH**
- 2:30-3:30pm: Group Work towards a Road map for engagement**
- 03:30-04:00pm: Presentation and agreeing on a way forward**
- 04:00-04:30pm: Closing remarks**
By Ministry of Finance, Kenya
- 04:30pm: LOGISTICS AND DEPARTURE**
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