KENYA INVESTMENT AUTHORITY

KENYA EXPERIENCES AND RECOMMENDATIONS IN REFORMING THE INTERNATIONAL INVESTMENT AGREEMENTS REGIME

I. Introduction

- Kenya Investment Authority is charged with the responsibility to promote and facilitate investments in Kenya as well as advice government with regard to policies and regulations that affect the investment environment.

- Kenya is thankful to UNCTAD for the opportunity to share its experiences with regard to Investment Agreements Reforms. We appreciate the support and technical assistance UNCTAD has given Kenya in the process of developing Kenya and EAC's Investment model.

- We underscore the fact that UNCTAD's Expert meetings are extremely useful in highlighting the latest trends and developments in BITs and provides critical alternatives and perspectives that can be adopted by countries in their negotiations.

II. Discussion

- Kenya has taken keen interest in the developments in investment agreements, noting opportunities and challenges they present. It is important to mention here that Kenya, and indeed the east African region is now a primary FDI destination. This increases the opportunities, but also the stakes, for strategic investment targeting, promotion and protection policies in these countries.

- Likewise, Kenya has become a large investor within the region (EAC, COMESA and AU), thus the pressure to provide protection for investments made by others now includes consideration of the security and treatment of its own investors' interests in the region.

- This has directed the focus and stand of Kenya in the development of the its draft model BIT and the regional BIT models, to align and reflect the country and region's development needs while balancing against challenges of exposure to international arbitration.

- UNCTAD's work and those of institutions such as the International Institute for Sustainable Development (IISD) have had a lot of impact in supporting these developments. The latest versions of the Models, including the reforms Kenya is taking on the formulations of ongoing BIT negotiations are guided by the Investment policy framework for sustainable development developed by UNCTAD.

- The formulations include provisions safeguarding the right to regulate, right to pursue development goals, exclusions of umbrella clauses, including sustainable development objectives, carve outs and provisions aimed at minimizing exposure to international arbitration.

- The Kenyan model and EAC draft Model BITs includes carefully drafted national and MFN provisions; it omits FET and replaces it with a provision focusing on the non-discrimination of the administrative, legislative, and judicial processes. Similar to the SADC and Indian models, they include provisions on the obligations of investors and the right of host countries to regulate investment for developmental objectives as well as a circumscribed ISDS provision.

- The preamble address the states' right to regulate and the right to pursue development goals, thus balancing the investor rights expressly with the state rights commonly recognized by international law. This gives the platform to present performance requirements as well as local content provisions in the model. It does not focus on investment protection as the sole goal of the agreement, in a way that would guide arbitral tribunals to apply and interpret it in light of the investor's interests only or mainly. Instead, it highlights the importance of cooperation between the states and their desire to encourage investment, in view of its potential contribution to sustainable development, while preserving the states' right to regulate and a balance between rights and obligations of investors and states. It also introduces the objectives and intentions of the Treaty, and serves as guidance for its application and interpretation.

- The models do not to extend National Treatment to investors and investments during the pre-establishment phase, by not including the words "establishment, acquisition, expansion", and by covering only "the management, operation and disposition" of investments. This Kenya and EAC Partner States to preserve their policy space and to open or close sectors to investment in accordance to their development strategies.

- There are provisions for non-conforming measures. Separate schedules allow for each party to submit lists of measures and sectors permanently excluded from the scope of the post-establishment non-discrimination obligations under the treaties. This is in line with most advanced investment agreements, which allow for many exceptions to post- establishment National Treatment coverage. Including grandfathering all existing non-conforming measures.

- The MFN clauses do not include pre-establishment commitments, while treatment promised under other treaties is excluded. While FET is completely left out in the Kenyan model, it has a more restricted formulation which is less likely to lead to expansive interpretations in the EAC model, and changes the focus from investor rights to governance standards.

- The models include provisions on compliance with domestic laws reinforcing the fact that the treaties do not change the states' right to regulate. Likewise, provisions of exclusions from the treaty for measures taken to promote development within host states have been made. These ensure that performance requirements may be imposed by states on foreign investors to promote the social and economic benefits of their investment. It is important to mention that the treaties have provisions that include various investor obligations, such as corruption, environmental protection, human rights, public health, etc.

- Kenya intends to review all existing, signed and BITs under negotiation to identify specific reform needs in line with national development objectives, domestic legislation, and developments in the IIA arena. Recommendations have been made to review the COMESA model as well. We hope UNCTAD and institutions such as IISD will support the process.

III. Challenges

- Challenges experienced in the reform process in developing countries include lack of understanding at the policy level of implications of BITs, the emerging multilateralization of investment related issues in trade and economic partnership agreements, limited knowledge of BITs by negotiators, and political influence.

IV. Recommendations

- Countries be encouraged and supported to continuously improve the understanding and specifically negotiating skills of the technical teams that hold discussions and negotiations of BITs;

- There is need to support efforts aimed at improving the investment and business environment of developing countries to strengthen laws, policies, rights, procedures and regulations that govern business;

- There should be direct involvement of high level policy makers and leaders to improve understanding and buy in of reform efforts;

- There should be a dedicated negotiating team to handle matters of BITs as opposed to ad hoc teams;

- There is need to have clear components of investment promotion and facilitation in the agreements;

- Institutions such as IISD should be supported as they provide valuable support to developing countries.

V. Conclusion

- UNCTAD is ideally positioned as a multilateral forum for discussions with regard to investment agreements, and thus the discussions and recommendations from this meeting should form UNCTAD's policy action plans to share with countries.

- Kenya looks forward to carrying on these discussions during the UNCTAD 14, to be held in July 2016. We welcome you all to the conference and specifically to the WIF.