

POLICY BRIEF ON EAST AFRICAN COMMUNITY INVESTMENT MODEL TREATY



BACKGROUND

The East African Community (EAC) comprising of seven partner states, seeks to attract Foreign Direct Investment (FDIs) to achieve socio-economic development. The question has been how the EAC partner states should formulate their investment treaties to address their aspirations and obligations in the protection of cross-border investment in their countries.

To this end, the EAC has adopted the EAC Model Investment Treaty (the Model)¹ which is the main focus of

this policy brief. The model is a non-binding document which seeks to assist and guide partner states in negotiating and drafting their investment treaties. However, there is inadequate awareness and knowledge among policy makers and citizens, notwithstanding its potential impact.

It's for such reasons Tanzania Trade and Investment Coalition (TATIC) has resolved to develop this policy brief to promote policy dialogue and economic reforms in Tanzania.

POLICY ISSUE: CITIZENS' CONTROL OVER THE ECONOMY



The state should have adequate policy space to regulate and encourage citizens to participate in building its economy. Traditionally, International Investment Agreements (IIAs) facilitates foreign investors to take control of the economy from the citizens by grabbing the preferences that are for citizens.

Based on such background, this brief analyses key articles of the model treaty.

Several Articles Highlighted:

The Model recognizes the right of EAC partner states to regulate and take any measure relating to an investment in its territory to meet its policy objective.²

¹The Model Treaty was adopted in 2016 as a non-binding treaty model which addresses the investment relationship between EAC partner states and other countries. The Model draws from the approaches set out in the 2012 Model Bilateral Investment Treaty Template of the Southern African Development Community (the

SADC Model BIT), the COMESA Common Investment Area Agreement and the Model Text for the Indian Bilateral Investment Treaty (Indian Model BIT).

² Para six of the Preamble of the EAC Investment Model Treaty, 2016(referred to as Model)

Among others, the objective of the model is to promote, facilitate, and increase investment that support locals and increased production and productivity.³

Moreover, the model allows host states to accord equal treatment to both foreign and local investors (National Treatment). However, it gives partner states an avenue to

identify economic sectors and certain treatments that will not be accorded or extended to foreign investors in order to protect local investors.⁴

Finally, the model does not impose restrictions on the employment of non-citizens as it allows investors to employ workers regardless of nationality.⁵

POLICY IMPLICATIONS

- The Model limits the host states' power to amend and update the list of excluded economic sectors under the national treatment (NT) clause.
- The preamble does not provide for aspirations on labour rights. This poses interpretation challenges to a tribunal in disputes relating to labour rights.
- The model focuses on poverty reduction instead of wealth creation and human development which should be the key focus of the investment.
- The model hinders the capacity of host states to build national productive capacity and ensure skills, technology and knowledge transfer.

RECOMMENDATIONS

- The preamble should be expounded to include labour rights aspirations and ensure that they are reflected in substantive provisions as an investors' obligation, as well as a condition for protection.
- The model should aim at wealth creation for human development.
- There must be flexibility to allow the state to take some measures, but the flexibility should not affect the existing investments.
- There must be full participation and utilization of available local capacities in the investment venture as well as the development of new skills and techniques.
- The mode should provide monitoring and evaluation mechanisms as a tool to monitor and evaluate the implementation of obligations under the investment treaty.

CONCLUSION

Generally, the EAC investment model treaty seeks to help the EAC partner states in negotiating investment treaties with other nations so as to attract FDIs among others. Despite using the model, Tanzania's focus should be on investing in capacities that are human capital, innovation and technology, and equity joint venture approach so as not to depend on FDIs or total importation of capital.

³ Article 1 of the Model

⁴ Article 4 of the Model.

⁵ Article 8 of the Model.

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POLICY ISSUE: WEAKENED GOVERNANCE AND SOVEREIGNTY OF HOST STATE

In FDIs venture, a state must have a role to play to ensure it benefits from those investments. Several provisions under this model affect the host states' ability to regulate and hold investors accountable. This jeopardizes the state's ability to foster the welfare of its citizen through policy space. Any article that takes away the ability of the state to enforce or govern FDIs may weaken national sovereignty.

Several Articles Highlighted

Article 5 of the model provides for each state party to accord investors and their investments treatment no less favourable than the treatment it accords, in like circumstances, to investors of any other state and their investments concerning the management, operation and disposition of investments in its territory.

The exception is provided where there are concessions, advantages, exemptions or other measures that may result from Bilateral Investments Treaties (BITs), Free Trade Areas (FTA) or multilateral or regional agreements relating to investment or economic integration in which a state party entered prior.

The Model allows host states to take measures which are not arbitrary or unjustifiable pursuant to National Treatment (NT) and Most Favoured Nation (MFN) clauses. Also, nothing in this model Treaty shall be construed to oblige a state party to pay compensation for adopting or enforcing measures taken in good faith and designed and applied to protect public morals and safety, protect human, animal or plant life or health, conserve living or non-living exhaustible natural resources and protects the environment.

Finally, the model provides that nothing shall apply to taxation measures, subject to the continued application of the Expropriation clause.

POLICY IMPLICATIONS

- The MFN clause limits the host state from applying provisions from other investment treaties.
- The MFN undermines national development strategies and goals by protecting investors without reflecting the national interest. While the country focuses on broader national goals, investors enjoy the protection aiming at making profits at the expense of the citizens of the host state.
- States and investors' negotiations will not be of any need as MFN has already provided for the treatment that the investors will accord.
- The MFN clause undermines the effectiveness of host government institutions to regulate foreign investments



RECOMMENDATIONS

- National interest should dictate the MFN between states and investors and in seeking to apply the MFN clause the national interest should be used as a tool to measure and determine the application of the clause.
- Article 18.1 of the model should also include economic protection, national development goals achievement and human rights protection.
- The model should aim at promoting investments that enhance the value addition, reinvestment and retaining capital for the development of host states.
- The model should provide investors with both rights and obligations instead of favours and protection.
- The MFN clause needs a rethinking if not total removal from the treaty. Instead of according to investors' MFN treatment, they should be guaranteed fair treatment.

CONCLUSION

For Tanzania to enjoy its sovereignty and governance in investments, it should not only depend on the EAC investment model treaty as a negotiating tool as it focuses on promoting and protecting FDIs inflows. Instead, Tanzania should focus on the Equity Joint Venture approach in investments and provide for policy space that ensures investment outcomes are beneficial to the country's development

Tanzania Trade and Investment Coalition (TATIC) is a registered Civil Society Organization which operates across Tanzania's mainland. TATIC envisions a prosperous nation with equitable and inclusive development for current and future generations through the promotion of sovereignty over trade and investment for fair and equitable human development. TATIC works on thematic and intersectional issues concerning national, regional and international trade policy and investment agreements.

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