



KENYA INVESTMENT AUTHORITY

UNCTAD's High-level IIA Conference (Geneva, 9-11 October 2017); 1ST ROUND OF BREAK-OUT SESSION: CLARIFYING AND MODIFYING TREATY CONTENT KICK OFF SPEECH BY ROSLYN NG'ENO, MANAGER, POLICY ADVOCACY

- It is an honor for me to kick start this discussion on clarifying and modifying treaty content.
- I wish to thank UNCTAD for giving KenInvest an opportunity to discuss at this very important forum.
- Deliberations over the past few years have intensified especially among developing countries on how to reform the investment agreements and especially so as to benefit from them and to safeguard the countries from the unnecessary exposure to international treaty arbitration, presented by the investor state dispute resolution mechanism which is the center piece of most International Investment Agreements.
- Kenya is actively involved in bilateral and multilateral treaty negotiations with various countries. The existing treaties signed, however, like many developing countries, are not in line with the kinds of steps that states are taking to try to carve out adequate policy space, and similar treaties have been interpreted to limit domestic policy space.
- There is need for countries to align treaties based on the changing international investment agreements arena, especially the investor state dispute resolution mechanism and international arbitration in order to safeguard their development agenda and goals.
- Kenya is on a reform process and has developed a draft Kenya Investment Policy (KIP) with proposals that aims to address the critical elements that is hoped to promote private investments in the country, especially in matters related to investment facilitation and dispute resolution.

- Within the context of investment agreements, the policy has proposed the establishment of an early alert and tracking mechanism designed to identify and track at-risk investments, this way, it will attempt to alleviate the challenges investors face, and the options to escalate cases to international arbitration.
- It provides for an institutional framework that fosters coordination in investment agreements negotiations by creating a single, unified negotiating body within the National Investment Promotion Agency, dedicated in researching and negotiating Kenya's position with respect to investment agreements and treaties, including related chapters in other international and regional treaties. This team will have a formal mechanism for securing input from other stakeholders who can advise, e.g., on needs for and concerns relating to policies on labor, the environment, industrial development etc.
- A blue paper and a white paper will be prepared annually on the state of play in the national, regional and international investment policy and agreements arena to advice on necessary reforms post ante.
- It also proposes a review of the existing treaty network in line with "best practice", exposure, effectiveness and relevance, including conducting periodic performance reviews of, inter alia, all bilateral, plurilateral and multilateral investment agreements to which Kenya is a party.
- This session can explore ways in which governments can respond and craft their treaties in such a way that it caters for its interest; the suggestions could be around;
 - Reviewing the substantive and procedural provisions of their IIAs
 - Clarifying the meaning of absolute standards of protection, in particular, the international minimum standard of treatment in accordance with international law;
 - Clarifying that the investment promotion and liberalization objectives of IIAs must not be pursued at the expense of the protection of health, safety, the environment, and the promotion of internationally recognized labour rights;
 - Enhancing transparency provisions – publications of legal documents, open hearings, "amicus curiae" submissions and;

- Completely doing away with ISDS.
- Thank you very much for your attention and I wish you fruitful deliberations.