

Kick-Off Speaker at the 2017 (9-11 October 2017) edition of UNCTAD's Annual High Level IIA Conference Phase 2 of IIA Reform: Modernizing the existing stock of old – generation treaties.

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Chairperson

Distinguished experts on the panel

Representative of the Director General of UNCTAD

Distinguished Ladies and Gentlemen

All other protocol respectively observed

It is a honour and privilege for me to be invited to participate in the 2017 edition of UNCTAD's Annual High Level International Investment Agreement (IIA) Conference. This year's edition is different as it focuses on reforming the existing old-generation of treaties in response to Sustainable Development Goals and other recent global initiatives. At outset, please allow me, on behalf of the Government and the people of The Gambia, to thank UNCTAD for the invitation and support that they have been rendering to the country over the years. Indeed, they have been and still being supportive to the development process of The Gambia, even at the time when it was difficult to have friends/development partners.

In recent years, UNCTAD has been providing invaluable support to The Government of The Gambia in various areas including the development of a National Entrepreneurship Policy, Investment Policy Review and also working on the development of a national Industrial Policy and Trade Strategy with funding from EIF Trust Fund. It has also helped, with the support from UNDP, The Gambia, to establish EMPRETEC Gambia which is doing quite well in supporting the development of Micro, Small and Medium Enterprises. The IPR has provided useful information to Government in understanding its investment environment and critical issues affecting its competitiveness as well as suggest reforms needed to address them. The report will be presented to the ninth session of the UNCTAD Investment, Enterprise and Development Commission, to be held from 20 to 24 November 2017 here in Geneva. This will be an opportunity for The Gambia to highlight its progress

on investment reform and facilitate an exchange of best practices with UNCTAD member States, including donor countries.

Chairperson

Developing countries have entered into a large number of bilateral investment treaties (BITs), free trade agreements (FTAs) or regional trade agreements (RTAs) that, among other matters, include provisions for the protection of foreign investors on the basis of Most-favoured-nation and national treatment principles. Under these agreements, host countries assume broad obligations for the protection of foreign investments, particularly against expropriation and strife.

Policies welcoming foreign investments have become a common feature in developing countries in the last twenty years, after the failure of attempts to impose some forms of control over the activities of transnational corporations and the flows of foreign direct investment (FDI) and technology. Investment agreements have been regarded by some developing countries as an instrument to attract foreign investors. The number of BITs increases over time. Despite expectations about the impact of BITs on FDI, there is no evidence indicating that the adoption of BITs has actually encouraged FDI flows to signing developing countries.

Many of these BITs negotiated in the 1990s impose far-reaching obligations on the developing countries with few safeguards. Many of such treaties were open to disputes and in most cases settled in favour of the investor. It is therefore important to review and modernize these treaties and make them consistent to sustainable development investment.

Reference international standards in investment treaty negotiations would provide a global context to investment discipline, and would make it easier in the review of the old treaties. It will also help not only place obligations on the state party but also rights and obligations of the investor. The role of investor/investment in the promotion of development in the developing countries would be essential. The promotion of labour rights and environmental protection as well as corruption should form an important component of proposed global standards.

Chairperson

The Government of the Gambia recognized the role that private investment, including foreign investment, can play in achieving the country's development and in promoting sustainable development. Increased investment and private sector feature prominently as objectives in Vision 2020 and the Programme for Accelerated Growth and Employment (PAGE), and the New National Development Plan (NDP) medium-term plans formulated to operationalization. It also adopted a Private Sector Development Strategy 2015-2019 aims to make The Gambia, "the investment haven of choice in the ECOWAS region" and acknowledges that "a growing private sector allows new investments that increase the flow of goods and services, creates employment and increases incomes, which in turn is

important for improving the quality of life. The Government emphasized the important of mainstreaming the SDGs into the country's new national development plan (NDP), exploring innovative private sector financing and increasing the attractiveness of the investment environment. Aside from its financing role, policies also recognize FDI's potential to contribute to economic diversification by fostering employment, and the transfer of knowledge, skills and technology.

With the above recognized role of FDI, and the recognition that the needs of investors and the challenges of development changes with time, the Government of The Gambia for the last 22 years carried out series of reforms in its domestic investment legislation starting from the repealed of Development Act in 1994 to the enactment of GIFZA Act 2001. This Act was also repealed in 2010 and replaced by GIEPA 2010, which is currently replaced by a new GIEPA Act 2015.

The GIEPA Act 2015 and the other applicable legal texts do not contain restrictions on entry of FDI, except for common provisions on investments that violate the laws of the land, are prejudicial to national security, or are detrimental to the natural environment, public health or morality. However, the Act provide the possibility of introducing discretionary limitations on private ownership generates legal uncertainly. This involve the right of the Government to own some or majority of shares in an investment in a strategic industry such as mining, petroleum exploration and refinery activities. This equity ownership is not a problem in itself if properly regulated. Also the power of the Minister to formulate a list of sectors that are fully or partially closed to foreign is seen discriminatory.

The GIEPA Act 2015 covers the entry and establishment of investment as well as its treatment and protection. It also includes provisions on dispute settlement and incentives as well as a precise definition of FDI. Although there is no explicit provision on National Treatment, only few differences in the treatment of foreign investors exist such as investment threshold, access to land and in procumbent. The Act also contains some obligations on the part of investors which include granting trade union representation, social security and welfare programmes to employees. It also requires them to comply with environmental, health and safety standards, payment of taxes, and laws and regulations of the country. The GIEPA Act also includes provisions on protection against expropriation, which is prohibited except for a public purpose. Transfer of funds is free but conditional on the fulfillment of legal requirements and the availability of foreign currency. Although it provides the use of conciliation and mediation before international arbitration, it contains provisions that make reference to the use of ICSD.

Chairperson

In the area of international investment agreements, The Gambia has signed 15 BITs with traditional IIA features, 6 of which are in force. The BITs are largely old-generation treaties, with broad asset-based definition of investment only with few exceptions like BIT with Turkey. Five of the BITs include a definition of investor, protecting investors in a contracting party whilst five other BITs require that investors be established under the laws of the host state and that their headquarters be located in the territory of that

contracting party. Four of them also condition the definition of investor on the exercise of substantial business activities in the territory of that contracting party. The BIT with Spain excludes dual nationals from the scope of the treaty.

All of the BITs provide for fair and equitable treatment, and nearly all provide for national and most favoured nation at the post –establishment phase. They also include a clause on direct and indirect expropriation. However, what constitute indirect expropriation is not clarify. They grant foreign investors the right to freely transfer investment –related funds into and out of the host country, only few include exceptions to this clause. In addition, they include provision on ISDS except the one with Turkey which excludes disputes over property and real estate rights from ISDS.

The Gambia has signed a number of regional treaties with investment provisions. As a member of ECOWAS, the country has signed the Trade and Investment Framework agreement with the United States (2014), which establishes an institutional framework for monitoring trade investment relations, and ECOWAS Energy Protocol (2003), which includes substantive protection provisions. In addition, The Gambia signed the Partnership Agreement between the Members of the African, Caribbean and Pacific (ACP) Group of States and the EU (Cotonou Agreement) (2000), which includes a favourable investment environment. The Gambia is also a party to the investment protection agreement of the Organization of the Islamic Conference (1981), which includes substantial investment protection provisions that are typical for so-called “first-generation” treaties.

Chairperson

With all these investment related legislations both bilateral and regional levels signed and ratified by the Government, the Gambia has not undertaken any review of these treaties. The recent IPR has revealed a lot of gaps relating to our investment policy and legislative and we will request UNCTAD to assist the Government of The Gambia in closing the gaps to enhance the competitiveness of the investment environment. This would include the review of our BITs and the overlapping roles and functions of different institutions relating to investment promotion with the view to having an intergovernmental committee on investment.

In conclusion, I would like to than UNCTAD once again for their support and also the excellent work they are doing in shaping the global investment environment in support of sustainable development. UNCTAD support to the developing is immense and I urge them to continue the good work