

REPORT OF
THE HIGH LEVEL OIC EXPERT MEETING ON
“INVESTMENT OBSTACLES IN AFRICA: CHALLENGES AND
OPPORTUNITIES”

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Casablanca, Kingdom of Morocco
24 – 25 January 2018

I. INTRODUCTION:

1. In implementation of the agreement between H.E. the Secretary General of the Organization of Islamic Cooperation (OIC) and H.E. President of the Republic of Cote d’Ivoire, during the OIC 44th Council of Foreign Ministers held in Abidjan in July 2017, to organize an OIC Conference on Obstacles and Facilitation of Investment in Africa, the Islamic Center for Development of Trade (ICDT) took the initiative of organizing a High Level OIC Expert Meeting on “Investment Obstacles in Africa: Challenges and Opportunities” which was held on 24-25 January 2018 in Casablanca, Kingdom of Morocco.
2. The main objectives of this Meeting are to share international, regional and national perspectives on main obstacles, to propose better solutions to Investment in Africa in one hand and on the other hand to prepare the draft Conference Declaration and the draft OIC Investment Guidelines that will be presented for the consideration of the 2018 OIC Africa Investment Conference in Abidjan, Republic of Cote d’Ivoire.
3. ICDT organized the meeting in partnership with the Investment Division of the United Nations Conference on Trade and Development (UNCTAD). The following OIC Member States and OIC institutions participated in the meeting (Attached list of participants):
 - Department of Legal Affairs of the OIC General Secretariat.
 - The Islamic Centre for Development of Trade (ICDT)
 - The Islamic Corporation for the Insurance of Investment and Export Credit (ICIEC).
 - The Statistical, Economic and Social Research and Training Center for Islamic Countries (SESRIC).
 - United Nations Conference on Trade and Development (UNCTAD).
 - Kingdom of Morocco.
 - Kingdom of Saudi Arabia.
 - Republic of Turkey.
 - Federal Republic of Nigeria.
 - Republic of Senegal.
 - Republic of Côte d’Ivoire.
 - International Expert, University of Geneva.
 - International Expert, University of East Anglia.

II. PROCEEDINGS OF THE MEETING:

4. The meeting was structured into four working sessions in addition to the opening and the closing sessions. The four working sessions addressed the following topics:
 - Setting the Scene I: International and Regional Perspectives on Main Obstacles to Investment in Africa.
 - Setting the Scene II: National Perspectives on Main Obstacles to Investment in Africa.
 - Expert Roundtable on the Draft OIC Guiding Principles for Investment Policymaking.
 - Expert Roundtable on the Draft Declaration of the Forthcoming OIC Investment Conference in Africa.
5. The main interventions made by the experts in their presentations regarding obstacles to investment in Africa can be summarized as follows:

The share of OIC Countries in the world FDI flows is about 7% which is below the potential, Foreign Direct investments flows to Africa recorded a decreasing trend recently due to many factors that hamper the smooth movement of capital to Africa; the experts mentioned many obstacles like the political instability and political risk, the business climate which is not adequate to attract investment in sectors other than mining, oil and gas.

FDI flows to Africa continued to slide, reaching \$59 billion in 2016, down 3 per cent from 2015, mostly reflecting low commodity prices which have diminished investor interest in the subregion. The legal framework for FDI in Africa consists of 840 treaties bilateral investment treaties (BITs) of which 155 are intra-African treaties, regional agreements dealing with investment (COMESA, SADC, EAC, ECOWAS, Maghreb Union, Tripartite FTA, Continental FTA), as well as national investment laws and regulations. Challenges arising from the current African legal framework include negotiating BITs without having sufficiently analyzed the implications of these treaties on the right to regulate of the State; vague drafting of key provisions e.g. fair and equitable treatment (FET) and indirect expropriation which resulted in disputes against states because of their "all-encompassing" nature; and a lack of transparency, domestic consultation and feasibility studies when engaging in BITs.

These old generation treaties, mostly having vague and broad provisions, and unbalancedly focused on investment protection make states vulnerable to risk of being used by investors under investment arbitration.

Therefore, led by UNCTAD, many states underwent a reform process of their model treaties and started to negotiate new treaties that are drafted more clearly and having a more balanced focus between investment protection and states' right to regulate.

These new generation treaties offer the prospect of a more balanced, better integrated, and more effective international investment law regime.

New African regional investment agreements and instruments include key features of the so called "new generation" provisions. These agreements include among others, the Pan African Investment Code, the COMESA-EAC SADC Tripartite FTA; the Continental Free Trade Area (CFTA); the COMESA Common Investment Area (CCIA); the SADC Protocol on Finance and Investment; and the EAC model.

The challenge remains the risk of further fragmentation arising from parallel and overlapping negotiations and dealing with the existing stock of first generation treaties. The fate of the African "first generation" BITs remains uncertain. Where the new regional African IIAs under negotiations do not entail the replacement of older BITs, the result is the multiplication of treaty layers, making the network of international investment obligations even more complex and prone to overlap and inconsistency. African countries should carefully synchronize, align and strategize their investment agreements reform efforts at all levels (continental, regional and national).

It is against this backdrop of a dynamic, changing and challenging investment policy landscape that UNCTAD together with the ICDT developed the draft OIC Guiding Principles for Investment Policies. The Principles seek to translate the challenges of investment policymaking into a set of "design criteria" for investment policies. They call for integrating investment policy in overall development strategies, enhancing sustainable development as part of investment policies, balancing rights and obligations of States and investors in the context of investment protection and promotion, including CSR into investment policymaking, and encouraging international cooperation on investment-related challenges.

In line with South-South and intra-OIC cooperation, the Principles can help OIC Countries develop a coherent, consciously designed and consolidated approach towards policymaking. They are in no way a set of rules per se. They are not designed to be legally binding on OIC countries, and are not designed to add any additional layer of commitments on them. After sharing their views, the experts fully agree on the text of the Guiding Principles and recommended their endorsement by the competent authorities.

Additional key obstacles identified by the experts are the following:

- a) Poor business environment: the continent is at the lower-end of the "doing business indicators" rankings, due to corruption, poor regulation, lack of policy coherence and consistency and institutional weaknesses.
- b) Infrastructure deficiency: Only one-third of the population in Africa has reliable access to power and 30 out of the 54 total countries in the continent suffer from constant power shortages. A World Bank study put the investment demand for Africa at US\$ 93 billion annually over a decade.
- c) Deficiency of skilled labour.
- d) shortages of business intelligence and credit history information.
- e) But by far the most important obstacles to FDI in Africa is country risk.

A special focus was put on the legal framework which is fragmented, at many levels bilateral, regional, continental and at the level of the OIC, the content of many treaties is also little bit imbalanced and it doesn't defend the interest of the population, the environment and the sustainable and inclusive development of the host country. That's why many emerging countries are reluctant to sign Investment treaties and prefer investment and facilitation agreements, while developed countries are still pushing to include investment and trade issues in the agenda of WTO.

At the OIC level, the OIC Agreement for the Promotion, Protection and Guarantee of Investment among Member States of The Organization of the Islamic Conference is still relevant and up to date, nevertheless its effectiveness shall be enhanced especially regarding the provisions related to dispute settlement and arbitration.

6. The following institutions and experts submitted working papers (the agenda and the list of participants are attached in annex n° 2):
- Kingdom of Morocco;
 - Kingdom of Saudi Arabia;
 - Republic of Turkey;
 - Federal Republic of Nigeria;
 - Republic of Senegal;
 - Republic of Cote D'Ivoire;
 - Department of Legal Affairs of the OIC General Secretariat;
 - The Islamic Corporation for the Insurance of Investment and Export Credit (ICIEC);
 - The Statistical, Economic and Social Research and Training Center for Islamic Countries (SESRIC);
 - United Nations Conference on Trade and Development (UNCTAD);
 - Mr. Makane Moise Mbengue, Professor of Public International Law, University of Geneva;
 - Mr. Tarcisio Gazzini, Professor of International Law, University of East Anglia.

Besides, two special sessions were devoted to the examination of the draft "Draft OIC Guiding Principles for Investment Policymaking" and "Draft Declaration". (the said documents are attached at annex n°)

III. KEY RECOMMENDATIONS PRESENTED BY THE EXPERTS TO ADDRESS INVESTMENT OBSTACLES IN AFRICA:

7. After extensive, fruitful and dynamic discussions, the participating experts presented the following key recommendations to address Investment Obstacles in Africa:
- a) Encourage OIC Member States to accede to and complete the ratification process of OIC investment agreement;
 - b) Establishing an OIC Dispute Settlement Body in accordance with Article 17 of OIC Investment Agreement;
 - c) Establishing a joint mechanism between the OIC General Secretariat and the Islamic Development Bank and all relevant partners to oversee the implementation and modernizing the agreement;
 - d) Establishing an OIC Portal and Database on foreign Direct Investment;
 - e) Create Investment Promotion Agencies (in one Stop Shop format);
 - f) Review national IIA regimes and be an active partner in the ongoing IIAs debate both at the regional and international levels.
8. In addition, the experts have examined two draft documents, prepared by ICDT in close collaboration with UNCTAD, to be submitted to the 2018 OIC Investment Conference in Africa; "Draft OIC Guiding Principles for Investment Policymaking" and "Draft Declaration of the Conference".

9. The “Draft OIC Guiding Principles for Investment Policymaking” and “Draft Declaration” shall be endorsed by the OIC General Secretariat before their submission to the Forthcoming OIC Investment Conference in Africa” and to the OIC Member States. The said documents are not binding and remain of indicative nature as long as they are not officially adopted by the relevant decision-making body at the OIC.

IV. VOTE OF THANKS:

At the end of the Meeting, participants extended their deepest thanks and gratitude to the Government of His Majesty MOHAMED THE SIXTH, King of Morocco, MAY GOD ASSIST HIM for the unstinted care he bestows on the OIC and the activities of the Islamic Centre for Development of Trade and for His continued support to strengthen Intra-OIC cooperation and commitment to the Joint Islamic Action.

The Participants also conveyed their deepest thanks to His Excellency Dr. Yousef bin Ahmad AL-OTHAIIMEEN, the Secretary General of the Organisation of Islamic Cooperation for his continuous support to promote trade and investment cooperation among OIC Member States and achieving goals of the Ten-Year Programme of Action OIC-2025.

They also expressed their gratitude to Mr. James Zhan, Director of Investment Division of UNCTAD and to H.E. Dr. El Hassane HZAINI, Director General of ICDT and their staff for the preparatory work, facilities and assistance which were provided to ensure the success of this workshop and to all representatives of the OIC Member States and International Experts in this Meeting.

Done in Casablanca on 25 January 2018