Nairobi International Financial Centre – NIFC

Peer Review Meeting

Venue: Norfolk Hotel, Nairobi, Kenya

Date: 24th November 2016

Introductory Remarks – Kiama Kaara

The meeting started with introductory remarks for Mr. Kiama Kaara the East Africa tax and Governance Network (EATGN) Steering Committee Chairperson. Mr. Kiama began by welcoming the participants and followed it with a round of introduction from the participants who were drawn from civil society, academia and the private sector.

Overview of the NIFC – Jared Maranga

Jared Maranga, Tax Justice Network – Africa (TJN-A); Tax and Investment Policy Lead, began by situating the discussions of the Nairobi International Financial Centre on the driving forces for its set up. The Government of Kenya has touted Nairobi as being best placed to be a financial gateway for the region and a driving force for the realization of Vision 2030 (the development blueprint for the state). The Panama Papers thrust International Financial Centers into the limelight in 2016 by drawing attention to the facilitatory role they play in the movement of capital both legitimate and illegitimate. Mr. Maranga highlighted findings from the Africa Union High Level Panel Report (AU HLP) on Illicit Financial Flows (IFF), offering details on the vast resources being lost from the Africa continent. In conclusion, he pointed to the participants the correlation between domestic resource mobilization as a core component for sustainable development and its interplay with investment vehicles such as international financial centres.

Nairobi International Financial Centre (NIFC) – Matthew Magare

Mr. Magare tethered his presentation on the Nairobi International Financial Centre (NIFC) Bill 2016. Some of the key features proposed under the NIFC Bill 2016 which are consistent with other international financial centres include:
- Built in incentive structures – Section 36 (b)
- Flexible incorporation and licensing – Section 32
- Flexible regulatory environment – Section 33, 36

The broad powers of the NIFC extend to developing regulations that override other laws and regulations to allow for the NIFC to operate optimally. Firms therein have no time limit on the privileges enjoyed with implications on the ability to resource domestically (freedom to repatriate profits, cannot be nationalized or expropriated, freedom to expatriate workers, uncapped ownership of firms to name but a few).

In addition, Mr. Magare outlined the secrecy component of the NIFC both on the operating persons (concept not clearly defined in the Bill) and the punitive measures on exposing officers and agents of the NIFC. This component of secrecy proposes particular powers to the Cabinet Secretary of Treasury to prescribe regulations for information on the NIFC.

An initial analysis of the structures for operation for the NIFC: the Council, Board and Authority, it was noted that these are prone to manipulation and exhibit overlaps in mandate with potential conflict of interest from the executive arm of government.

Feedback Session

It was noted that the NIFC heavily borrowed from the Qatar IFC model providing heavy concessions both for doing business and in the regulatory environment. A hybrid system is proposed for the NIFC which allows for the interaction of both international and local firms. This raised the question, what kind of Foreign Direct Investment (FDI) is being sought and whether the provisions embedded in the NIFC present the potential for erosion of domestic revenue. It is also not clear whether the NIFC is service transaction oriented or deposit transaction oriented? In Mauritius for instance, the firms are completely non-resident which means that they do not enjoy some of the benefits of resident firms such as provisions of Double Taxation Agreements (DTA), but the firms are obligated to maintain the principle account within the country.

In addition, the discretionary powers of the Cabinet Secretary (CS) to issue regulation that allow for the operation of the NIFC are not explicitly spelled out within the Bill and is worrisome. The vagueness in the provisions of the Bill embeds opportunities for abuse.
Participants proposed that case studies for benchmarking be cited so as to address some of the inherent challenges of the Bill in its current form, for instance streamlining of the regulatory environment. Participants felt that the Bill had an Elite-Political/Economic capture in its drafting that provided a blank cheque for operations in as far as who was allowed to operate as a NIFC firm, the incentives structures offered and the regulation of the firms. Given the intended purpose of the NIFC, participants felt it was curious that the Kenya Revenue Authority (KRA) was not involved either as a regulator or in an advisory capacity. A proposal was ventured to consider a regional mechanism that can host the IFC and regulated at the East Africa Community (EAC) level.

It was noted that the dispute resolution mechanisms proposed under the NIFC, i.e. the Tribunal, had a narrow mandate and not designed to address more complex disputes that would touch on the specific operations of firms. It was proposed that an international arbitration center be set up rather than a tribunal with an optional recourse to the high court for dispute resolution.

Furthermore, the NIFC Bill's provision contravenes Kenya's international obligations; for example the Organisation for Economic Cooperation and Development (OECD) Rules on Transparency for Tax Purposes which it is party.

Currently, the NIFC through its structures provides an avenue for illicit financial flows and is glaringly subject to the whims of the ruling regime. The Bill is evidently political in nature and any engagement with the same needs to be cognizant of the political economy. Participants felt that the Bill in its current form undermines the very principles it purports to champion and should be quashed. Moving forward, an advocacy strategy should be developed to advocate against the passing of the Bill. This will include generating further evidence that stipulates the social and economic ramifications of the Bill especially if passed into law. Developing strategies for engagement based on the audience, institutions targeted and the outcomes envisioned. This would include identifying allies and generating sufficient interest in the content of the Bill, from the grassroots level to the policy arena. Participants felt that it was important to keep in the mind the linkages at both local and international levels for instance the interplay of global capital with local processes such as large scale financing for agriculture which could potentially be routed through the NIFC.

Recommendations

Participants felt that it is crucial to:

- Fight the Bill in its present form from becoming an Act
- Engage with professional bodies such as the Law Society of Kenya (LSK) and the Institute of Certified Public Accountants of Kenya (ICPAK) who will be directly affected by the operations of the NIFC (professional outfits will have members pre-qualified if they are to provide services in the NIFC.
- Engage with Labour Unions (no cap on expatriates) to build a critical mass.
- Engage with legislators and policy makers to influence the Bill process key are is the actors include the Senate, Council of Governors and the Finance Parliamentary committee
- Public participation as a threshold for the enactment of legislation needs to be ascertained as the bill has seemingly been the preserve of a select few.
- An advocacy issue can be picked up around the NIFC especially on its potential to funnel illicit financial flows. Issues that the NIFC can be pegged to include grand corruption and terrorism financing.

Way Forward

Participants felt that the report needs to be finalized and to draw on case studies that cited its potential impacts. As a way forward participants felt that it was important to:

- Determine the stage and progress of the Bill
• Identify opportunities for engagement with the Bill by looking at the Parliamentary Calendar
• Conduct a scoping of the level of engagement of the parliamentary committees with the NIFC Bill
• Establish contacts with treasury and the revenue authority to ascertain the level of engagement with the Bill
• Given that the NIFC is a flagship project of Vision 2030, it would be prudent to engage with the Secretariat of Vision 2030 to establish their level of input and understanding
• Draft an Advocacy Strategy for the engagement with the draft NIFC Bill.
• Come up with contingency measures of engagement with the NIFC Bill depending on where the Bill is on its way to become an Act.