



Book Review Symposium II: The African Continental Free Trade Area Agreement: Legal and Policy Frameworks (Routledge, 2024)

By:

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1. Introduction

Ajibo's [The African Continental Free Trade Area Agreement: Legal and Policy Frameworks](#) offers a comprehensive analysis of the African Continental Free Trade Area (AfCFTA) Agreement, its challenges, prospects, and recommendations for future directions. The book equally explores the AfCFTA Agreement's expected impact on economic growth, regional integration, and legal harmonisation, together with its Protocols, thereby serving as the go-to text for students, researchers, and legal practitioners interested in the ambitious goals of the AfCFTA Agreement. Although other textbooks have been written about the AfCFTA, Ajibo painstakingly adds some twists to this text as he examines the AfCFTA Agreement together with its protocols, such as the

Protocols on Trade in Services, Trade in Goods, Investment, Intellectual Property, Rules on Dispute Settlement, and Competition Policy.

As an African attempt to create a single market for goods and services across the continent, the AfCFTA Agreement joins in the ever-growing number of regional free trade agreements, especially the likes of the [European Free Trade Association](#), the [North American Free Trade Agreement \(the United States-Mexico-Canada Agreement \(USMCA\)\)](#), and the [Association of Southeast Asian Nations Free Trade Area](#). While these other free trades are ambitious in the goals they set to achieve, the AfCFTA Agreement is particularly unique in its attempt at [promoting intra-African trade and economic growth](#) in addition to paying special attention to the protection of human rights. As pointed out later in this review, these unique features of the AfCFTA Agreement, especially as contained in the Protocol on Investment, point to what has been described as the “Africanisation of international investment law” by [Akinkugbe](#) and [others](#). But before delving into this aspect, it is pertinent to look at how Ajibo organises this book.

The book is divided into sixteen chapters of 297 pages. Chapter One dwells on regional trade agreements and how the AfCFTA Agreement finds justification in the UN Charter, Agreement on Tariffs and Trade (GATT), and Article V General Agreement on Trade in Services (GATS). In Chapter Two, the author, while pointing out the institutional framework of the AfCFTA, also examines the challenges, impediments, and factors which undermine and are likely to impact the successful implementation of the AfCFTA. While Chapter Three is dedicated to Non-Discrimination and Market Access standards as fundamental to regional and global trade, their general and specific exceptions, as mostly contained in Part VIII of the Protocol on Trade in Goods and the AfCFTA Protocol on Trade in Services, form the basis for Chapters Four and Five. Chapter Six examines the liberalisation of intra-African trade through tariff reduction and the elimination of quantitative restrictions. Furthermore, Chapter Seven discusses how the successful management of border and behind-the-border measures is vital to the elimination of non-tariff barriers in intra-African trade and achieving the objectives of the AfCFTA. Ajibo equally delves into technical barriers to trade and sanitary and phytosanitary measures as incorporated in Annexes Six and Seven of the AfCFTA Agreement, respectively, in Chapter Eight. Continuing, while Chapter Nine identifies the rules of origin contained in the AfCFTA

Agreement, Chapter Ten assesses the AfCFTA trade remedies regime exemplified by antidumping and countervailing measures, subsidies and safeguard measures. Furthermore, Chapters Eleven to Fifteen are on the Protocol on Trade in Services, the AfCFTA dispute settlement framework as contained in the Protocol on Rules and Procedures on the Settlement of Disputes, the Protocol on Investment, the Protocol on Intellectual Property Rights, and the Protocol on Competition Policy. Finally, Ajibo concludes the book with some reflections on key areas of the AfCFTA Agreement.

2. The Protocol on Investment and Investor Obligations

Although Ajibo uses a simple grammar structure in this book, thereby rendering each chapter easily readable, I have decided, for the purposes of this review, to restrict my analysis to the Protocol on Investment in Chapter Thirteen. The reason for this is that, as pointed out in the Introduction, the Protocol on Investment contains unique features peculiar to Africa. It is an effort to codify into a single document both hard and soft investment law instruments in Africa. For instance, innovative provisions are embodied in earlier investment instruments, like the AU Pan-African Investment Code (PAIC) and the ECOWAS Supplementary Act on Investment. However, while the PAIC is a model agreement with no binding effect, the ECOWAS Supplementary Act on Investment is only for ECOWAS countries. So, once the Protocol on Investment enters into force, it will replace around 173 intra-African bilateral investment treaties (BITs) that currently exist.

International investment regimes are fraught with an asymmetry of investor-state obligations. The imbalance between corporations and host states manifests in investors being granted numerous rights with little or no obligations towards the environment and human rights, while states remain obligated to protect those investments. A critical look at the old generation of BITs or any investment treaty reveals the enormous protection states are to extend to investors and their investments while largely silent on investor obligations. This regime is a product of the international law norm of states as the [primary addressees of human rights obligation](#), especially the host state. As an example of the new generation of investment treaties, the Protocol on Investment imposes human rights and environmental obligations on investors, such that a breach of these obligations impacts on the level of protection the

host state is expected to accord to investors. In other words, as Ajibo points out, the Protocol on Investment provides that “investors and their investments must comply with and respect national and international law; business ethics, human rights and labour standards; environmental protection; the rights of Indigenous peoples and local communities; socio-political obligations; anti-corruption; corporate social responsibility; corporate governance; and taxation and transfer pricing.”

The environmental protection obligation of investors under Article 34 has been described by [Kidane](#) as “the most impactful provision” of the protocol. This is because of how the obligation is couched to include both the obligation to respect the environment and the stricter requirement on the obligation of investors to protect the environment. Worth expanding is the obligation regarding Indigenous peoples. It requires investors and investments to respect the rights and dignity of Indigenous peoples and local communities as protected under domestic and international law; the obligation to respect legitimate tenure rights to land, water, fisheries, and forests; the obligation of investors and their investment to submit their environmental and social impact assessments to the competent authorities and make them available and accessible to local communities and Indigenous peoples. Incidentally, the Protocol on Investment seems to be the only regional investment instrument that recognises the need to impose obligations on investors to respect the rights of Indigenous peoples. This is an improvement on the PAIC that provides that investors shall respect the rights of “local populations” and desist from land grabbing of “local communities” and avoiding mentioning “Indigenous peoples.” Although the [2015 draft of the Indian Model BIT](#) contained a provision that “Investors and their Investments should recognise the rights, traditions and customs of local communities and Indigenous peoples of the Host State,” [the final version of the Model BIT](#) omits this obligation.

In this book, Ajibo enumerates these obligations without pointing to their novelty or relating them to the Third World Approaches to International Law (TWAIL) as [Akinkugbe](#) did. However, Ajibo further discusses the negative impact of these obligations on local investors who may not have “the money, technology and wherewithal to comply with the obligations.” To salvage the situation, he suggests that the threshold of turnover and asset value should serve as the basis for imposing obligations. In other words, “[a] lower threshold

should attract lower obligations and vice versa.”

3. The Protocol on Investment and Expropriation and Compensation

Just like any other investment treaty, the Protocol on Investment prohibits direct and indirect expropriation except for a public purpose, in accordance with due process, in a non-discriminatory manner, and against fair and adequate compensation within a reasonable period of time. In his analysis of this provision and other provisions regarding compensation for expropriation, Ajibo contends that lawful and unlawful expropriation attracts compensation under the Protocol on Investment as a general rule of international investment law. The usual exception to the prohibition of expropriation is with regard to the issuance of compulsory licenses granted in relation to intellectual property rights. This is expressly provided in Article 14.8(5) of the United States-Mexico-Canada Agreement (USMCA), Article 14(5) of the Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement, and other regional free trade agreements. The essence of this exception is to allow States to fulfil their obligations under the TRIPS Agreement.

In addition to the above exception, the Protocol on Investment adds another unique exception, which is largely absent in other regional free trade agreements. It provides in Article 20(2) that “Non-discriminatory regulatory actions by a State Party designed to protect legitimate public policy objectives, such as public morals, public health, prevention of diseases and pests in animals or plants, climate action, essential security interests, safety and the protection of the environment, labour rights or to comply with other international obligations, shall not constitute indirect expropriation.” This provision appears to have been lifted from the PAIC.

Another important provision is Article 24 on the right of the host State to regulate investments to make them consistent “with the goals and principles of sustainable development and with other national environmental, health, climate action, social and economic policy objectives and essential security interests.” Measures taken to achieve this do not constitute a breach of the Protocol on Investment nor “give rise to any claim by an investor for compensation.” What if an investment is indirectly expropriated while a State exercises its regulatory powers under this Article, like in [*Compania del*](#)

[*Desarrollo de Santa Elena, S.A. v Costa Rica*](#), [*South American Silver v Bolivia*](#) and [*Tecmed v Mexico*](#)? As I concluded [elsewhere](#), “...it should be understood that Article 24 of the AfCFTA Protocol on Investment is innovative and makes it clear that measures undertaken for the legitimate purpose of protecting the environment, the climate, and public health cannot give rise to compensation.” While Ajibo’s analysis is reflective of the general principles of international investment in relation to expropriation-compensation, it is important to point out this unique aspect of the Protocol on Investment.

4. Conclusion

The significance of Ajibo’s work in Africa cannot be quantified, as it adds to the few existing textbooks on the nature of the AfCFTA Agreement. The work stands out in how the various aspects and Protocols were analysed against the general principles of international investment law. What this review has achieved is to expatiate on the investor obligations and the expropriation-compensation regime of the Protocol on Investment as inherently unique to Africa. This uniqueness can be attributed to TWAIL and Africa’s attempt to resist a situation where the legitimate exercise of their regulatory power is termed indirect expropriation and, therefore, gives rise to compensation. This has also been described as the Africanisation of international investment law and a reflection of the principles of TWAIL. Just like Ajibo argues, it remains to be seen how African countries will conform to the provisions of this Protocol, given the low development dynamics that bedevil African States.

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