# Investment Regulation at the African Continental Level

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The African Continental Free Trade Area (AfCFTA) recently came into force after reaching the minimum number of 22 ratifications. The agreement is a flagship program of the African Union towards an African Economic Community. The agreement covers trade in goods, trade in services, competition, investments and intellectual property rights. The negotiation of the agreement was divided into two phases. Phase one issues focused on trade in goods, services and dispute settlement. Phase two issues include competition, investments and intellectual property rights. As the agreement is gearing towards implementation for Phase one while simultaneously preparing for negotiations on Phase two issues.

As the continent is in the process of framing their own continental investment code - what shape will this continental framework take and what type of measures will be included? The increase in global financial flows makes it imperative for Africa to have its own investment regulatory framework to complement the AfCFTA agreement and the two protocols in Trade in Goods and Services. Thus far, the continent has never had a continental framework on investments. To date investments in Africa have been regulated by various domestic and regional investment instruments. The proposed AfCFTA protocol on investments gives Africa an opportunity to craft and determine their own investment laws.

At the regional level, there are many regional frameworks that can be used as building blocks for the AfCFTA protocol on investments. These include the SADC Protocol of Finance and Investment, the Pan-African Investment Code, COMESA Common Investment Agreement, Organisation of the Islamic Conference, EAC Model Investment Code, the Protocol on the Establishment of the EAC Market Protocol and the ECOWAS Supplementary Act on the Common Investment Rules for the Community and the Tripartite Free Trade Area (TFTA). As Adeleke contends in his book, 'various regional investment regulations across Africa allow African states with similar economic interests to determine suitable investment policies that protect the state right to regulate in the public interest as well as define the applicable rules for investment by being rule makers rather than rule takers. The regional investment agreements in Africa adopt favourable rules that protect the interests of African states, such as ensuring the state right to regulate, the use of domestic courts to resolve disputes, the imposition of obligations on investors and adherence to human rights norms.' (p. 158)

An Africa-wide Continental Free Trade area has a combined population of more than one billion people and combined gross domestic product of US2.5 trillion. It is expected that the AfCFTA will provide access to larger markets, promote regional value chains, increase competition and improve the mobility of citizens. This has implications on investments in Africa. In order to achieve the goals of regional integration and doubling intra-African trade by 2022, African Member States would require sustained inflows of Foreign Direct Investment (FDI). As the markets get bigger and the demand for goods increases, interested stakeholders particularly businesses will need to forge meaningful relationships with foreign investors to take advantage of regional value chains, expand their domestic production volumes and open new industries that can produce diverse goods in order to exploit the new and bigger African common market. FDI is a critical mechanism to accelerate economic and social development.

The African Union has been at the forefront and instrumental in driving the regional integration agenda at the continental level. The proposed Protocol on Investments can be used to frame the dispute settlement mechanism for future investors at a continental level. Bilateral investment treaties (BITs) have been the main tool for investment protection on the continent. Many States in Africa have concluded BITs either with the rest of the world or within the continent. As Adeleke argues, 'not too many African power blocs have used their economic dominance to their advantage when concluding BITs with other African countries.

As a result, the expected public policy exceptions that states are clamouring for in recent times have not featured prominently in intra-African BITs. The BIT regimes of most African states are distorted because they often reflect the agenda of a developed country treaty party' (p 156). With the growing dissatisfaction with BITs among African Union member States with some members (South Africa, Tanzania and Namibia) signalling their intention to cancel BITs, the Protocol on Investments creates an opportunity to craft a mechanism purely designed for the continent and addresses their developmental objectives and design a Model BIT framework for African Member States.

In addition, the Protocol on Investments could create an international investment arbitration body. This body would be tasked with adjudicating all the investment disputes. Currently, there are many examples where the African Union can take lessons and design an arbitration body suited to the needs of the continent.  At the international level, forums dedicated to settling investment disputes include ICSID, PCA, SCC, LCIA and the ICC. At the regional level there are two forums - ECOWAS Court of Justice and the COMESA Court of Justice. The arbitration of investment disputes can be expanded and not just include investor-state dispute resolution (ISDS). The arbitration body can be expanded to include other forms of arbitration such as state-to-state dispute settlement, domestic arbitration (like in South Africa with the Protection of Investment Act) and diplomatic protection.

The conclusion of the AfCFTA comes in the wake of global trade facing a lot of uncertainty, with more countries becoming more protectionist and the global world trade order facing collapse due to rising tensions. Despite all this, Africa's regional integration agenda remains at the core. The Protocol on Investments is meant to be continental wide project to protect and promote investments in Africa. The ultimate goal for the AU's regional integration objectives should be to have one investment framework to regulate the whole continent.

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