



Investment and the African Continental Free Trade Area




Businesses and individuals invest in other countries mainly to access new markets, resources or inputs. Countries, on other hand, seek to attract investment with the objective to achieve economic growth, job creation, and access advanced technology and know-how, among other benefits.

Countries have traditionally signed investment treaties to promote and protect foreign investment. However, there is no empirical evidence that demonstrates a positive connection between investment treaties and investment flows.



Traditionally, developed countries (mostly European countries and the United States) were the capital-exporting (home) countries, while developing countries (mostly Africa, Asia and Latin America) were capital importing (host) countries. However, recently, investment flows between developing countries have grown. South-South investment treaties have also proliferated over the years.

In the absence of a multilateral treaty on foreign investment, bilateral and regional investment agreements have become the primary sources of international investment rules. Today, there are approximately 3 300 international investment agreements (IIAs) including bilateral and regional investment treaties, and treaties with investment provisions concluded worldwide.¹



In recent years, conventional international investment law has been a subject of intense debate for, *inter alia*, being biased towards investors and limiting the policy space for States. There is a paradigm shift towards a new approach to international investment law through a

¹ UNCTAD. 2022. “International Investment Navigator”. Available at <https://investmentpolicy.unctad.org/international-investment-agreements/by-country-grouping>

new generation of investment treaties. This approach seeks to promote the sustainable development of host economies, balance the rights and obligations of investors and States, and safeguard the States' right to regulate.

Investment has always been identified by African countries as one of the tools needed for their development. African governments have devised laws, policies and strategies, at bilateral or regional levels, to attract investments into their economies. Over the years, foreign direct investment (FDI) flows to Africa have increased. In 2021, the value of FDI to Africa was US\$83 billion (113% increase from 2020), accounting for only 5.2% of global FDI inflows.² The largest investors in Africa are mostly from Europe (especially the United Kingdom and France) and the US.

Investment is among the areas covered in the scope of the African Continental Free Trade Area (AfCFTA) and is negotiated as part of AfCFTA Phase II negotiations, along with intellectual property rights (IPRs), and competition policy. Investment negotiations will develop a Protocol on Investment to the Agreement Establishing the AfCFTA. Overall, the Protocol on Investment is expected to stimulate intra-African investments and fulfil the development objectives of the AfCFTA. The negotiations are ongoing and were expected to conclude by September 2022.

A Draft Protocol on Investment in the AfCFTA³ has been developed. The Draft Protocol seeks to promote, facilitate and protect intra-Africa investors and investments that foster sustainable development in State Parties while safeguarding the right of State Parties to regulate. The Draft Protocol is aligned to the new generation of investment treaties that are designed to deliver on the sustainable development objectives of the State Parties and which attempt to balance the rights and obligations of investors and States.

The Draft Protocol contains, among others, an enterprise-based definition of investments; non-binding investment promotion and facilitation provisions; binding investment protection standards (excl. the controversial Fair and Equitable Treatment (FET));⁴ investor obligations; State-State Dispute Settlement mechanism administered in accordance with the AfCFTA Protocol on Rules and Procedures for the Settlement of Disputes; and consent-based Investor-State Dispute Settlement arbitration. The Draft Protocol also provides for termination of intra-African bilateral investment treaties (BITs) and alignment of the Regional Investment Agreement with the Protocol on Investment, and the establishment of a Pan-African Trade and Investment Agency.

² World Investment Report 2022 available at <https://unctad.org/webflyer/world-investment-report-2022>

³ [Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area - Zero Draft, November 2021](#)

⁴ FET has recently been subjected to intense criticism because of its ambiguity, "catch-all nature" or lack of its exact meaning in international law, and has been broadly interpreted by arbitral tribunals.

The Draft Protocol provides for the protection intra-Africa investors and investments, i.e., natural persons or firms from one State Party investing in another State Party with substantial business activity in the Home State.

African countries need responsible and sustainable investors and investments that can contribute to the development of the continent. The Draft Protocol contains several obligations that investors are expected to adhere to when they invest in other African countries. Investor obligations in investment treaties are critical to enabling Host States to hold investors to account for investment-related human rights violations under international investment law. Investor obligations are also an attempt to balance the rights and obligations of the States and investors in international investment law. International accountability of corporations remains a subject of intense debates within the international community.

The establishment of a Pan-African Trade and Investment Agency is necessary for the effective and efficient implementation or operation of the Protocol. This Agency should be independent of governments, and its functions must be clearly outlined in the constituent instrument. Investors and investments are dissuaded by uncertainty, red tape and inefficiencies. The Agency must address these issues.

African countries have concluded investment treaties among themselves (bilaterally or regionally)⁵ or with third parties and enacted national laws applicable to both domestic and/or foreign investments. These regimes, in some instances, overlap or contradict. The relationships of these legal regimes must therefore be harmonised, where possible, or clarified to avoid inconsistent and overlapping obligations that will create uncertainty and unpredictability in Africa's investment governance ecosystem. Terminating intra-African BITs and aligning regional investment agreements and future investment treaties with third parties to the Protocol on Investment could be the best solution. It is also important that investors and investment can directly enforce their rights.

The Protocol on Investment is important for improving investment governance at the continental level. But investment treaties do not automatically attract investors and investments or bring about the benefits associated with foreign investment. Improving the business environment, rule of law and investment governance at the national level, may be more effective at attracting more substantial foreign investments. Furthermore, domestic policies and strategies are necessary to leverage the benefits of investments in the local economy.

⁵ African countries have concluded about 1 018 IIAs, 319 of which intra-Africa and 93 of intra-Africa IIAs are in force.

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