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**Economic Commission for Africa  
Committee on Regional Cooperation and Integration**

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## **Investment agreements landscape in Africa**

### **I. Introduction**

1. At its eighth ordinary session, held in Addis Ababa in October 2013, the African Union Conference of Ministers of Trade identified the need for a critical examination of bilateral investment treaties and the extent to which they may help Africa to industrialize and develop. To that end, the Economic Commission for Africa (ECA) undertook to prepare a study on the international investment agreements landscape in Africa. The present study, which is the outcome of that undertaking, seeks to contribute to the policy dialogue on bilateral investment treaties and how they can help advance Africa's economic and social transformation. It also examines regional approaches to such agreements and the need to harmonize existing legal frameworks in the context of the regional integration agendas pursued by the regional economic communities, in particular in the areas of trade and investment. The study is being submitted to inform discussions by the Committee on Regional Cooperation and Integration at its current session.

2. Africa has seen a surge in investment inflows in recent years, largely due to such factors as its growth performance over the last decade, a growing consumer market and middle class, and high rates of return on investment, coupled with its abundant natural resources, including recent discoveries of minerals, gas and oil. These intrinsic endowments have constituted significant incentives for investments against the backdrop of increasing demand for Africa's natural resources from emerging economies such as Brazil, China, India, the Russian Federation and South Africa – the BRICS economies.

3. These processes notwithstanding, the perception of Africa as a risky investment destination remains deeply ingrained in certain quarters. To overcome this perception, many countries have reduced regulatory barriers to foreign investment. For example, a number of laws governing foreign investment have been overhauled to allow greater freedom and protection for investors. Other efforts to improve the investment climate include the setting up of one-stop shops for investors, together with efforts to strengthen the protection of intellectual property rights. Last but not least, African countries have signed numerous bilateral investment treaties, in particular since the 1990s.

4. The impact of bilateral investment treaties on economic and social development in Africa remains debatable. There is no conclusive evidence regarding the effect of these treaties on foreign investment. Furthermore, it is often argued that

they confer more protection and rights on foreign investors, skewing conditions to the detriment of domestic or third party investors and reducing potential benefits for Africa, while also exposing host countries to the risk of legal disputes. Against this backdrop, the continent finds itself at a time of reflection on how it may equip itself best for a process of transformation.

## **II. Overview of international investment treaties in which Africa participates**

5. The world has been witness to a flurry of international investment agreements over the past decades. Various legal instruments have been developed at the bilateral, regional and even global levels. Although the scope of these instruments varies significantly, they all share elements of investment protection and promotion, and are mostly geared to attract foreign direct investment. This section provides an overview of the major types of investment agreements that regulate foreign direct investment at the multilateral, regional and bilateral levels with relevance for Africa.

### **A. Agreement on Trade-Related Investment Measures**

6. The Agreement on Trade-Related Investment Measures continues to play an important role in today's multilateral trading system, although its scope of application is limited to investment measures affecting trade in goods. Accordingly, any investment measure that may harm internal trade or trade in services is not covered by the agreement. In addition, investment made in the form of what is referred to as "commercial presence" and investors in the form of "presence of natural persons" are covered by the General Agreement on Trade in Services (GATS). All members of the World Trade Organization (WTO) are bound by the investment provisions of the Agreement on Trade-Related Investment Measures and also by GATS.

7. In particular where GATS is concerned, the degree to which members are liberalizing their services sectors is defined by their commitment schedules. Currently, all 42 African member countries have included sectoral or horizontal commitments in their schedules in the form of "commercial presence" or "presence of natural persons". The level of commitment differs from country to country, however, as defined by their limitations on market access and national treatment.

### **B. Investment-related instruments and initiatives under the Organization for Economic Cooperation and Development**

8. The Declaration on International Investment and Multinational Enterprises of the Organization for Economic Cooperation and Development (OECD) is a formal commitment to improve the investment climate, promote the social and economic contribution of multinational enterprises to society and reduce the constraints faced by these entities. The Declaration is an open agreement, adopted by all 34 OECD countries along with 12 non-members, including three African countries – Egypt, Morocco and Tunisia.

9. Another important OECD document is the Code of Liberalization of Capital Movements, which is a legally binding instrument. The code comprises rules stipulating the progressive and non-discriminatory liberalization of capital movements, the right of establishment and current invisible transactions (services). In 2012, the OECD Council adopted a decision delegating full decision-making powers to the Investment Committee, which will be enlarged to include non-members willing and able to meet the standards of adherence.

10. Furthermore, there are soft law instruments emanating from OECD, which have a bearing on investments in Africa. For instance, the Policy Framework for

Investment emphasizes the fundamental principles of rule of law, transparency, non-discrimination and the protection of property rights and is intended to assist governments in the design and implementation of policy reforms to improve the investment climate. African countries that have participated or are participating in the Policy Framework for Investment include Egypt, Morocco, Mozambique, Senegal, South Africa and the United Republic of Tanzania. The framework is also a basis for the Africa Investment Initiative of the New Partnership for Africa's Development (NEPAD) and OECD, which entails investment policy reviews.

### **C. Other multilateral investment frameworks of relevance to Africa**

11. In all, 53 African countries are members of the Multilateral Investment Guarantee Agency, and 45 have ratified the Convention of the International Centre for Settlement of Investment Disputes (ICSID). African countries are also represented in the United Nations Commission on International Trade Law (UNCITRAL).

12. There is also a set of guidelines, principles and draft instruments which deal with the policy dimension of investment. Such instruments are not binding, and are mainly designed to assist countries in designing investment policies or building governance elements into existing policies and regulations. Examples of such instruments include the United Nations Code of Conduct on Transnational Corporations, the United Nations Guiding Principles on Business and Human Rights, the Tripartite Declaration on Multilateral Enterprises of the International Labour Organization (ILO), the World Bank Investment Guidelines and the Investment Policy Framework for Sustainable Development of the United Nations Conference on Trade and Development (UNCTAD).

## **III. Intra-African investment treaties and double taxation treaties**

13. African countries are making great efforts to improve their investment climate. Among others, bilateral investment treaties and double taxation treaties are being used as tools to attract investment. Traditionally, African countries have tended to sign such agreements with third countries. More recently, however, an increasing number of bilateral investment and double taxation treaties have been signed between African countries.

14. Africa accounts for a significant share of bilateral investment and double taxation treaties around the world: out of 2,750 bilateral investment treaties and 2,894 double taxation treaties, 783 and 459 respectively were concluded in Africa. Of those, 145 and 60 respectively are intra-African treaties.

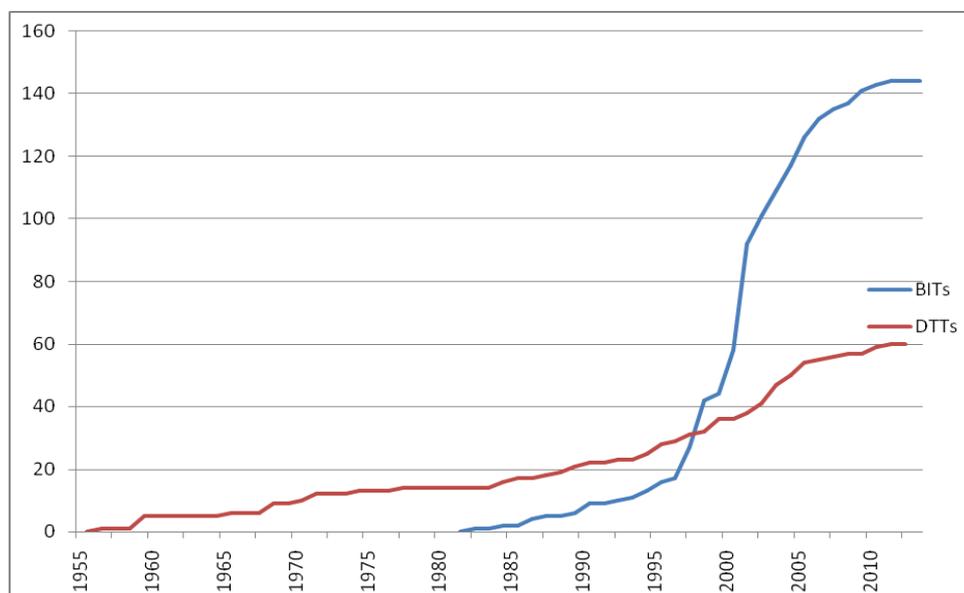
15. The first bilateral investment treaty between two African countries was signed in 1982 by Egypt and Somalia. By then, African countries had already signed 110 such treaties with non-African countries. The underlying objective of signing these first generation bilateral investment treaties for most of the non-African partners was to ensure that investments made in strategic sectors in former colonies were protected. For African countries, the signing of these agreements, particularly in the aftermath of their independence, was primarily to assert their status as sovereign States. The desire for such self-assertion prevailed over the need to establish investment provisions that met the investment concerns of the young African nations.

16. Although the initial push for these agreements did generate an important number of bilateral investment treaties between 1960 and 1980, it was only in the late 1990s that such agreements gained currency among African countries, following the global trend (figure 1). In this second phase, bilateral investment treaties between African countries mainly responded to two types of motivation: the formal endorsement of like-minded States sharing a common objective of regulating

investment both through domestic and international law-making, and the recognition of investment regulation as a means to attract greater investments, deepen regional integration and foster development.

Figure 1

**Number of bilateral investment treaties and double taxation treaties signed between African countries (1955–2013) (cumulative by date of signature)**



Source: Constructed with data from the UNCTAD database of DTTs and Investment Policy Hub.

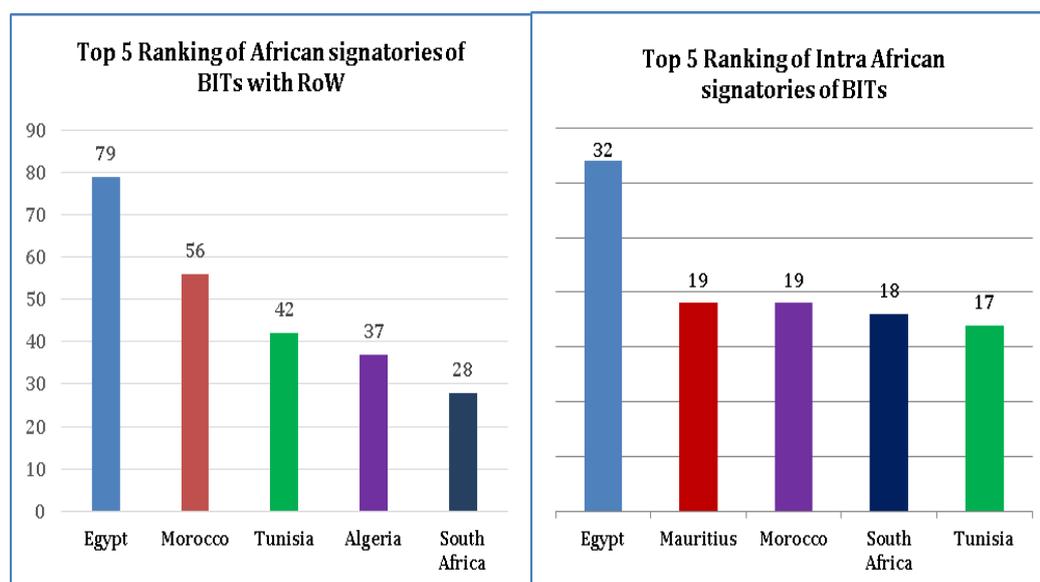
17. The signing of double taxation treaties among African States started in 1956 with an agreement between South Africa and Zambia. Similar to the trend of bilateral investment treaties, once independence had been gained by African countries, double taxation treaties served the dual purpose of setting in place a regime that would allow for the repatriation of capital without double taxation, while at the same time strengthening recognition of the State personality of newly independent African countries.

18. The number of intra-African double taxation treaties doubled between 1992 and 2002. The notion of promoting investment from multinational companies gained ground in the 1990s in Africa. For this purpose, a set of measures aimed at improving the business environment were implemented. Some countries went as far as offering tax rebates and facilitating the repatriation of capital from the proceeds of investment. To accompany such measures, double taxation treaties that allowed firms to decide to pay their taxes either in the source or host country became prominent and are still viewed as a means of attracting investment by multinational firms.

19. Regulatory loopholes in these agreements give rise to undesired practices such as tax evasion, mispricing of activities to bloat operation costs and benefit from tax rebates, and transfer pricing to benefit from differences in taxing structures across countries. The magnitude of illicit financial flows stemming from such practices in Africa is yet to be fully assessed, but there is evidence that some \$50 billion are lost to Africa as a result of mispricing in natural resources alone.

20. Egypt has signed by far the most intra-African bilateral investment treaties (29) and South Africa ranks in first place for intra-African double taxation treaties (19), as shown in figure 2 below. There are 33 African country pairs which have both a bilateral investment treaty and a double taxation treaty.

Figure 2

**Top five African signatories of bilateral investment treaties**

Source: ECA Survey on Investment Agreements Landscape in Africa, 2014.

#### IV. Africa's involvement in investment disputes

21. It is standard practice for bilateral investment treaties to contain provisions for the settlement of investment disputes. Some of the first generation bilateral investment treaties only allowed for State-to-State dispute settlement. More recent treaties also incorporate investor-to-State arbitration, which allows private investors to submit a claim against the host country of the investment.

22. Between 1972 and 2014, Africa has been recorded as participating in 111 cases representing about one fifth of all those documented, which are treaty-based. In all, 68 cases have resulted in an award, have been settled or have been discontinued and are considered concluded, while 43 cases are pending, some dating as far back as 2004.

23. Among African countries, Egypt is respondent in the largest number of cases (25) and ranks third globally in terms of ICSID dispute settlement. It is followed by the Democratic Republic of the Congo (8), Algeria (6) and Guinea (5).

24. ICSID is the venue of 107 of the 111 cases; and tribunals established under UNCITRAL rules dealt with three cases. The other forums included the Southern African Development Community (SADC) Tribunal and the arbitral panel of the Unified Agreement for the Investment of Arab Capital in the Arab States.

25. Assessing the potential liability of the State in the context of bilateral investment treaties is difficult and subject to discretionary interpretation of tribunals. Several high profile cases have been held in which the right of a government to regulate in the public interest appears to have taken second stage to private investor rights, in particular on issues relating to expropriation. Investor-vs.-State dispute settlement also remains a contentious area since it is one-sided, in the sense that it allows a private investor to take a State to international tribunals, but does not allow the opposite.

26. Given the recent case law and the potential financial implications of investment disputes, countries such as Morocco and South Africa are renegotiating and even terminating their bilateral investment treaties. This concern is shared by other developing countries in the light of the high costs of litigation. Some countries have gone as far as to withdraw from international arbitration mechanisms such as

ICSID (e.g., the Plurinational State of Bolivia, Ecuador and the Bolivarian Republic of Venezuela), on the grounds that litigation outcomes often appear as arbitrary or unjustified, going beyond the intended objectives of the bilateral investment treaties.

## V. African regional investment treaties and instruments

27. A number of regional economic communities have signed regional agreements or developed model laws that relate to investments.

28. In SADC, the Protocol on Finance and Investment came into force in 2010. The Protocol is a comprehensive document covering all areas typically covered by bilateral investment treaties, along with a number of additional issues included in its annexes. According to the Protocol, investments in signatory States are protected against uncompensated expropriation. Investors are also guaranteed most-favoured-nation treatment, but not national treatment. The Protocol grants investors the right to employ key personnel from any country. In terms of free movement of capital, the Protocol is worded rather cautiously, calling on State parties to “encourage the free movement of capital”. According to the Protocol, investor-State disputes are first to be referred to a competent court in the host country, and may then be referred to international arbitration at the SADC Tribunal, ICSID or an arbitration panel according to UNCITRAL rules.

29. In a further move to harmonize investment policies in the SADC region, the SADC model bilateral investment treaty was completed in 2012. One important way in which the SADC model treaty differs from many existing treaties is that it does not recommend including most-favoured-nation treatment. Where investor-State disputes are concerned, the SADC model treaty does not recommend including provisions that give investors the right to initiate arbitration. The SADC model treaty aims to reflect a balanced approach between the member States’ development objectives and investor interests. Thus, while it contains substantive provisions to protect investors, it also includes a number of obligations for investors, in such areas as corruption, environmental and social impacts, transparency, and human rights and labour standards.

30. In the Economic Community of West African States (ECOWAS), Supplementary Act A/SA.3/12/08 on the Common Investment Rules for the Community was adopted in 2008. As is customary in bilateral investment treaties, the Supplementary Act includes protection against uncompensated expropriation. In addition, ECOWAS investors are guaranteed free transfer of assets, which includes in essence all payments related to the investment. In the case of investor-State and State-State disputes, the parties may refer their case to a national court or tribunal, or to the ECOWAS Court of Justice. The Supplementary Act differs from most bilateral investment treaties in that it contains a specific chapter on the obligations and duties of investors. These include a provision for an environmental and social impact assessment prior to the initiation of a project – i.e., at the pre-establishment stage. The investor obligations also include a number of post-establishment requirements, including the protection of human rights and respect for fundamental labour standards. Some of these investor obligations are mirrored in the subsequent chapter on host State obligations, which also calls on member States to refrain from competing against one another in the area of investment incentives. The Supplementary Act is noteworthy in that it calls on member States to renegotiate existing investment agreements that are not consistent with it.

31. In the Common Market for Eastern and Southern Africa (COMESA), the Investment Agreement for the COMESA Common Investment Area (CCIA) was adopted in 2007. This agreement grants national and most-favoured nation status to COMESA investors. Furthermore, COMESA investors have the right of free transfer of payments. Expropriation is only admitted in the public interest and subject to prompt, adequate and effective compensation. The agreement also defines rules for dispute settlement for State-State and investor-State disputes. In the case of State-State disputes, these prescribe that a decision may be sought from a tribunal

constituted under the COMESA Court of Justice. In the case of investor-State disputes, an investor from a COMESA member State may submit to arbitration by the competent local court or the COMESA Court of Justice, or to international arbitration. The CCI agreement was designed to attract higher levels of investment both from within and from outside the region. It has not entered into force, however, since the required threshold of ratification by at least six member States has not been reached. Entry into force of the agreement would have been an important vehicle for the promotion and facilitation of investment in COMESA.

32. In the East African Community (EAC), the East African Model Investment Code was adopted in 2006. This document is not legally binding, but serves rather as a reference guide for the design of national investment policies and laws. The aim of the code is to improve the business climate in the EAC region and to harmonize investment laws and policies of member States. The code provides for national treatment and non-discrimination of foreign investors. In addition, the code includes provisions for the free transfer of assets and protection from uncompensated expropriation. According to the code, investors may apply to the designated national investment agency for an investment certificate. If a certificate is granted, investors may elect to include a provision that allows them to submit any disputes with the host State of the investment for international arbitration according to ICSID rules.

33. In a further step towards market integration, the Protocol on the Establishment of the East African Community Common Market entered into force in 2010. The protocol provides for freedom of movement of goods, labour, services and capital (sometimes referred to as “the four freedoms”), and contains a number of provisions regarding investments, including the protection of investments and the harmonization of tax regulations with the aim of promoting intra-EAC investments.

34. The existing regional initiatives seem to belong to two distinct spheres. First, they cover the issues typically found in bilateral investment treaties, i.e., reciprocal exchange of guarantees and rights to foreign investors. Second, regional investment initiatives are designed to harmonize the rules and regulations of national investment policies. It is not clear whether a regional approach would be advantageous in tackling the issues belonging to the former sphere, which in principle could be – and in practice are – also dealt with at the bilateral level. The latter sphere – regional integration – clearly calls for a regional effort. Regional integration must be enhanced if Africa is to become more attractive as an investment destination. All too familiar problems of fragmented markets, small market sizes and heterogeneous regulatory environments can be overcome by harmonization and integration processes. In addition, cooperation at the regional level can help avoid harmful practices such as the “race to the bottom” in the area of investment incentives.

35. Finally, removing obstacles to intra-regional investment flows can help further unlock the potential for intra-African investment flows, which today already account for 23 per cent of foreign direct investment projects on the continent. At this point it seems too early to assess the extent to which regional investment agreements can contribute in practice to an attractive investment climate at the regional level. It is likely that we will continue to see investment agreements and initiatives at both regional and bilateral levels, and perhaps these are indeed complementary. What seems clear is that the further deepening of regional integration – including in areas such as payment systems, capital markets and trade barriers – is essential if investments in Africa are to be more attractive for investors.

## **VI. Analysis of the survey findings**

### **A. Foreign direct investment flows in Africa**

36. The continent’s share of global foreign direct investment reached a record high of 5.7 per cent and the total value of foreign direct investment projects in Africa increased by 12.9 per cent in 2013. Table 1 below provides an overview of foreign direct investment flows to the 10 largest African recipients.

Table 1

**Africa's top 10 recipients of foreign direct investment inflows, 2008–2013**  
(in billions of dollars)

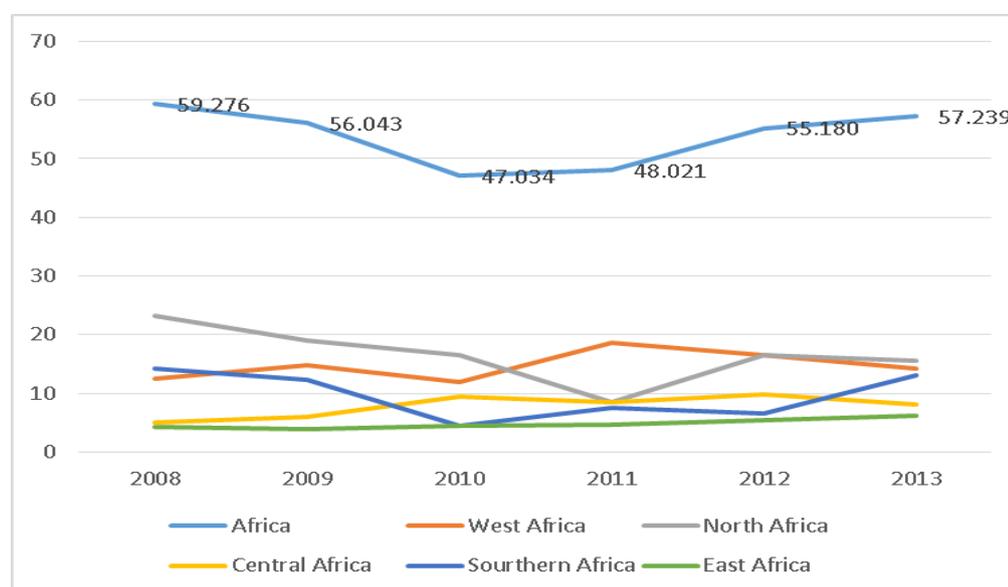
	2008	2009	2010	2011	2012	2013
Nigeria	8.249	8.650	6.099	8.915	7.127	5.609
South Africa	9.209	7.502	3.636	4.243	4.559	8.188
Algeria	2.632	2.746	2.301	2.581	1.499	1.691
Dem. Rep. of the Congo	1.727	0.664	2.939	1.687	3.312	2.098
United Rep. of Tanzania	1.383	0.953	1.813	1.229	1.800	1.872
Mozambique	0.592	0.893	1.018	2.663	5.629	5.935
Morocco	2.487	1.952	1.574	2.568	2.728	3.358
Sudan	2.600	2.572	2.894	2.692	2.488	3.094
Ghana	1.220	2.897	2.527	3.222	3.293	3.226
Zambia	0.939	0.695	1.729	1.108	1.732	1.811

Source: ECA compilation using UNCTAD, World Investment Report 2013.

37. At the regional level, North Africa had the highest share of foreign direct investment inflows in 2013 (27 per cent) followed by West Africa (25 per cent) and Southern Africa (23 per cent). Figure 3 below shows foreign direct investment flows to Africa by subregion during 2008–2013

Figure 3

Foreign direct investment trends for Africa and its five regions 2008–2013



Source: ECA compilation using UNCTAD, World Investment Report 2013.

## B. Investment agreements and investment policies

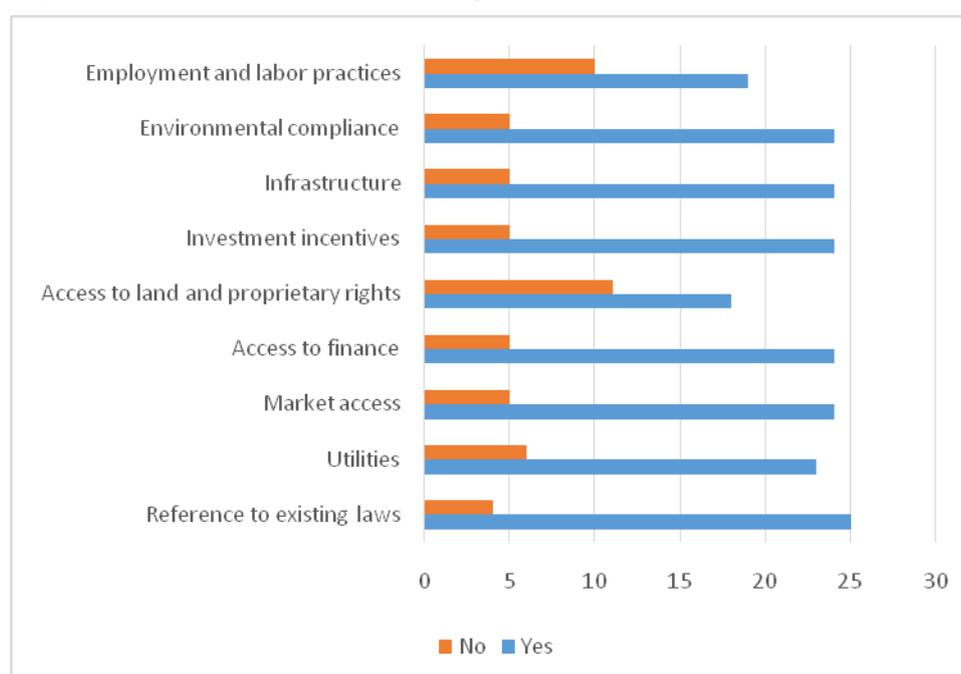
38. Many respondents indicated that investment treaties do not necessarily bring the much-needed investments in their countries. Sound policies need to be put in place in order to attract investments. Many respondents pointed out that a number of bilateral treaties are politically motivated, and more investments are originating in

countries without such treaties in place (for example, investments by China in Africa).

39. According to survey respondents, investment agreements need to include key areas such as market access, access to finance, access to land and proprietary rights, investment incentives, infrastructure, environmental compliance, and employment and labour practices (figure 4). Regarding employment and labour practices, some 34 per cent did not see the importance of including this issue in the investment agreement. The reasoning behind this was that all investors need to acknowledge and respect the existing employment and labour laws in the host country. There is no doubt that land issues are complicated in a number of African countries, and access to land is a great challenge. Thus, 11 of the 29 countries responded that investment agreements should not include issues relating to land because of its complexity.

Figure 4

#### Key areas to be included in investment agreements



Source: ECA Survey on Investment Agreements Landscape in Africa, 2014.

40. The creation of investment promotion agencies in a number of countries has contributed significantly to improving the business climate. Lack of coordination and competence has meant, however, that not all of these agencies have effectively delivered on their mandates. Challenges remain in linking government ministries responsible for policy formulation with investment agencies. Furthermore, many investment promotion agencies are not true one-stop shops where investors can settle all the administrative procedures necessary to prepare and implement their projects.

41. Most respondents were familiar with the basic investment policy framework of their countries. Their level of knowledge about their ministries and institutions varied, however, from institution to institution. In addition to national investment policies, respondents are also more familiar with regional than continental investment policies.

### C. Investments, international trade and global value chains

42. Most respondents were of the view that at present there is little connection between investments in Africa and global value chains. Many African countries are suppliers of raw materials and most of their finished products are processed outside

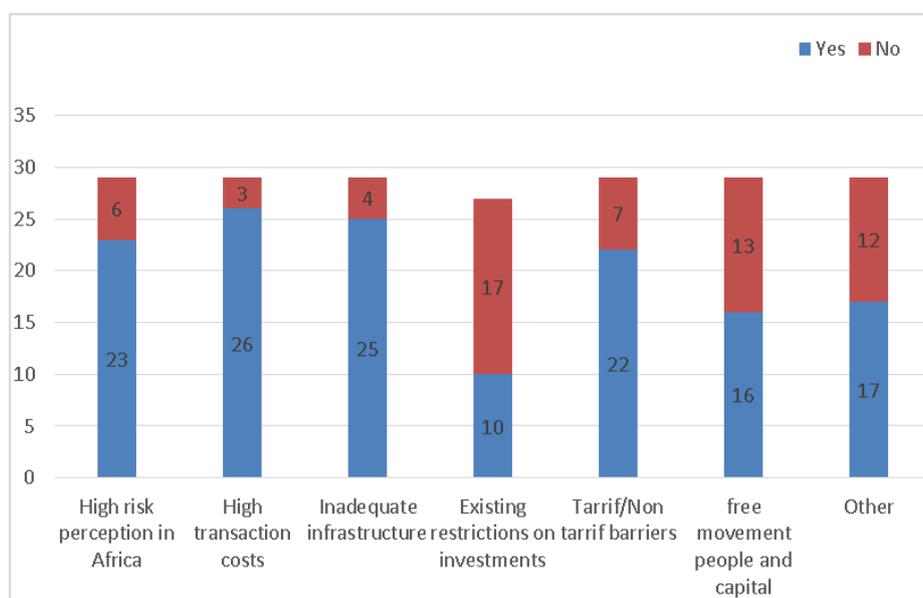
the continent. In all, 69 per cent of the respondents indicated that their countries were at the bottom of the value chain, 23 per cent saw their countries at the intermediate level, and only 8 per cent considered their countries to be at the higher end of value chains.

#### D. Investing in Africa: promises and challenges

43. Africa has in the past been associated with high levels of poverty, conflict, corruption, and heavy dependency on aid. This perception is now changing. For instance, five of the twelve fastest growing economies in the world are in Africa; foreign direct investment is five times what it was a decade ago, and there is an emerging African middle class. Consequently, according to global business leaders, Africa is now the second most attractive investment destination in the world. Survey respondents still feel, however, that the perception of Africa as a high-risk destination continues to impede foreign investments.

Figure 5

##### Challenges for investments in Africa



Source: ECA Survey on Investment Agreements Landscape in Africa, 2014.

44. Figure 5 above summarizes the respondents' views on the biggest challenges for investments in Africa. A significant majority of respondents cited high risk, high transaction costs, inadequate infrastructure, and tariff and non-tariff barriers as the main challenges affecting investments on the continent. A total of 17 countries did not believe that existing restrictions on investments were a major challenge to investments. Regarding free movement of capital, there was division among respondents: 44 per cent indicated that free movement was not a major issue for investments in Africa, while the 56 per cent majority held the opposite opinion.

#### E. African continental investment agreement and regional investment codes in Africa

45. Respondents viewed regional integration as an important vehicle for improving the investment climate. A great majority of respondents were of the view that an African continental investment agreement would provide helpful guidance for the negotiation of investment agreements, including bilateral investment treaties. An agreement of this nature should, however, take into consideration such existing initiatives as the SADC Protocol on Investments and Trade, the COMESA

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Investment Agreement for the Common Investment Area, the EAC Model Investment Code and the ECOWAS Community Investment Code.

## VII. Conclusions and policy recommendations

46. The main motivation for African countries to sign bilateral investment treaties has been their wish to attract higher volumes of foreign direct investment. Hence, in assessing the potential benefits of bilateral investment treaties, a key question to ask is whether and to what degree they actually contribute to foreign direct investment flows. The basic narrative of the link between these agreements and foreign direct investment is quite simple: international investors are hesitant to invest in African countries since they perceive a high level of risk attached to economic, regulatory, administrative and political conditions. Hence, bilateral investment treaties are needed in order to attract foreign investments since, de facto, they insure against some of these risks. For instance, by giving foreign investors access to international investor-state dispute settlement (ISDS), the risk of expropriation is mitigated. This and other guarantees typically included in BITs attract foreign investments that would not have taken place in the absence of a bilateral investment treaty.

47. There is a substantive body of literature that has analysed the accuracy of the above narrative. Although some recent econometric studies have detected a correlation between bilateral investment treaties and an increase in foreign direct investment, by and large empirical research has failed to demonstrate, consistently and reliably, that developing countries signing bilateral investment treaties receive substantially more foreign direct investment as a result. This means that, from the standpoint of evidence-based-policy, these treaties cannot be recommended as instruments to attract foreign direct investment, simply because the evidence base is not strong enough. This, of course, does not prove the opposite (bilateral investment treaties do not attract foreign direct investment). Where far-reaching and – at least over the medium term – irreversible steps such as the signing of bilateral investment treaties are concerned, however, no general recommendation can be derived from the existing body of evidence.

48. Even if bilateral investment treaties increase foreign direct investment and the investments induced by such treaties contribute to host-country development, it is not clear whether the benefits of these incremental investments outweigh their costs. While the benefits of bilateral investment treaties may seem somewhat elusive, their costs – particularly those related to litigation risks in the context of investor-State disputes – are manifest and significant. The original intention of investor-State dispute provisions in bilateral investment treaties was to protect foreign investors from arbitrary expropriation. In practice, however, these provisions have become a tool for foreign investors to challenge a broad range of host-government policy decisions affecting their profit expectations, and also a highly profitable operating field for specialized law firms.

49. While there does not seem to be much evidence to support the claim of certain staunch opponents of investor-State dispute provisions that the system is inherently unfair and tilted against State respondents – (the majority of cases are decided in favour of the State, and awards tend to be much lower than the compensation sought by investors) – investor-State disputes have been a costly exercise for African countries in terms of awards and legal fees. In addition to the financial costs of such disputes, a perceived lack of consistency, transparency and legitimacy of arbitral decisions has led to some degree of uncertainty and uneasiness among African governments. For instance, South Africa has reviewed its bilateral investment treaties and decided to terminate a large number of them and not sign any new ones, except for compelling reasons.

50. Some of the concerns shared by African countries and possible solutions to the current situation faced by the continent where bilateral investment treaties are concerned may be summarized as follows:

51. The focus of bilateral investment treaties has mainly been on protecting investors and their investments. Although there are numerous such treaties in force and many have been signed, it is widely accepted that these treaties alone do not bring development gains and that there is no definitive evidence that they have attracted foreign direct investment.

52. African governments are also worried about their responsibility and the potential liability derived from existing agreements. They fear that, in the event of conflicts or other cases of force majeure, they can be sued by investors for changes in conditions that are beyond the government's control. This is perceived by governments as a serious risk.

53. It is important to understand what type of dispute settlement provisions exist in bilateral investment treaties. Indeed, major points of divergence between the parties negotiating such treaties often relate to the national law (i.e. local remedies) that is to be invoked in the event of a dispute – whether it is to be that of the host country or that of the source country. African countries are of the view that the law of the host country where investments are to materialize should prevail.

54. There is also an emerging consensus that, rather than relying exclusively on bilateral investment treaties, African countries should consider the possibility of having regional approaches, to assist in the development of a legal framework for foreign investment. Legal positions on the interpretation of existing treaties, for instance at the level of regional economic communities, would also help avoid disputes that disadvantage member States of a common region and would strengthen their bargaining power in the event of a dispute.

55. Equally, a joint African agreement on investment disputes could be a standard for interpretation and would not necessarily have to focus on all aspects of the treaties.

56. For the development of an African strategy, it is important to take stock of the existing African cases, and also of the outcome of treaty negotiations and renegotiations. In the past, treaties have been terminated and developing countries have even withdrawn from the ICSID Convention because countries have not explored the option of renegotiation, whereby many bilateral investment treaties have provisions allowing renegotiation.

## **Policy recommendations**

57. Given these concerns, African countries need to consider developing a framework to navigate the reality of bilateral investment treaties and dispute settlement. What type of provisions do countries need to craft in order to curb their potential liability resulting from changes in investment policy?

(a) In essence, countries need to look at the wording of the provisions being negotiated with their counterparts to ensure that a balance is struck between protecting the investor and giving the government sufficient policy space to achieve development objectives. Useful guidelines in this exercise may be provided by existing models and policy frameworks, such as the SADC, COMESA and EAC models, the International Institute for Sustainable Development model, and the UNCTAD Investment Policy Framework for Sustainable Development model.

(b) In addition, attention must be paid to avoid crowding out or discriminating against domestic and regional investors, which often face unfair conditions as a result of the comparatively favourable treatment which foreign investors obtain from bilateral investment treaties. Since the continent is receiving more intra-African investment, which will be conducive to better integration, it is particularly important to level the playing field for this type of investment.

(c) Termination is not a new approach. Some countries – such as Morocco and South Africa – have terminated bilateral investment treaties in the

recent past. This has set a precedent for other African countries, as a means of opening the door for renegotiation.

(d) The continent could also consider a pan-African solution, such as an African court of justice. In the context of the proposed continental free trade area that is to be established in 2017, the possibility of having a redress mechanism for trade disputes arising within that free trade area is already being discussed as a viable alternative.

(e) Lastly, Africa needs to sketch out a strategy for investment regulation. This strategy needs to restore the balance between investment protection and the legitimate right of a State to act in accordance with its development needs and objectives. Among the options that African nations may consider to curb the negative impact of bilateral investment treaties on their development goals, countries may opt:

- (i) Not to negotiate new investment treaties;
- (ii) To renegotiate and amend existing agreements in order to narrow the scope of misinterpretation and reduce potential liability;
- (iii) To communicate a legal position on the interpretation of existing agreement;
- (iv) To seek alternative avenues for legal redress.