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The New Landmark African Investment Protocol: A Quantum Leap for African Investment Policy Making?

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Negotiations on the Investment Protocol of the African Continental Free Trade Area (AfCFTA) are set to start later this year. An AfCFTA Investment Protocol would provide significant opportunities for African countries. However, the negotiations will be complex, taking place amidst a backdrop of existing African international investment agreements (IIAs) already negotiated at the bilateral and regional level. Since 1961, African countries have signed 861 bilateral investment treaties (BITs), of which 171 are intra-African. These agreements are in addition to regional agreements dealing with investment such as the Southern African Development Community Protocol on Finance and Investment and the Economic Community of West African States Supplementary Act on Investments. All of these international and regional investment commitments build on existing national laws and regulations on investment in force in most African countries. Indeed, the bulk of the network of IIAs signed over 30 years ago include provisions drafted in a broad and unspecified manner with an eye to maximizing investor protection while inadvertently constraining the ability of governments to put in place national safeguards, notably in relation to the regulation and implementation of public policy measures. This is of special concern today in the wake of the global COVID-19 pandemic, which has required bold and rapid action on the part of governments to mitigate the pandemic's impact on national economies and on public health.

The global COVID-19 pandemic has highlighted how commitments found in IIAs may come into play in relation to policy responses taken by governments in times of crisis. Broadly drafted investor protection clauses in existing agreements can lead to perceived violation of commitments in these existing treaties which may result in expensive investor-State dispute settlement (ISDS) proceedings. To date, African countries have responded to some 121 (ISDS) claims. This issue is particularly important in the African context, where many governments lack the necessary financial, technological, and human resources to deal with crises of such magnitude. There is a real risk that measures adopted by African countries to address the health and economic impact of the COVID-19 pandemic may be challenged by foreign investors through arbitration proceedings under IIAs.

But it isn't all bad news. Over the past 5 years a number of African countries and regional economic organizations have been working hard to reform their IIA regimes in order to make them more conducive to sustainable development, and less prone to ISDS. This trend is evident in the increasing number of countries reviewing their stance on BITs, new methods of drafting BIT models, and the adopting of alternative approaches, notably through regional investment initiatives.

However, these developments have created a new challenge – African countries are reforming their existing investment treaties unilaterally, without conferring amongst themselves. While some countries have opted for BIT termination or a moratorium on the conclusion of new treaties, others are engaging in the renegotiation of existing treaties or favoring regional approaches to investment treatymaking. In terms of substantive content, there is little or no consultation among African countries as to how best to approach individual IIA provisions. While these initiatives all seek to make the IIA framework more balanced and oriented towards sustainable development, the lack of coordination risks creating a fragmented approach to IIA reform, with each country favoring a different approach.

It is against this challenging backdrop that the new Investment Protocol of the AfCFTA presents an exceptional opportunity for Africa. In the best-case scenario, the Investment Protocol could result in a "quantum leap" for Africa by effectively modernizing, consolidating, and harmonizing the international legal framework of investment in Africa. Below is a brief overview of such a best-case scenario.

A modern continental investment framework

The AfCFTA Investment Protocol has the potential to include clear and precise provisions ensuring a balance between investment protection and the right of African states to regulate their public interests. This includes options to refine and narrow down the definition of investment to only cover assests that contribute directly to the economic development of African countries; to clarify or circumscribe key protection standards (e.g. most-favoured nation (MFN) treatment and indirect expropriation); to balance State commitments with investor obligations and promoting responsible investment; and to strengthen the right to regulate (e.g. exceptions for public policies). In doing so, the protocol would move away from the traditional "investment protection only" model prevalent in the 1980s and the 1990s in favor of a more modern approach that places sustainable development at the core of investment policies. The COVID-19 pandemic could also influence negotiators to include stronger general exceptions provisions, especially those relating to the protection of public health.

A consolidated and less fragmentated framework

The AfCFTA Investment Protocol has the potential to streamline the complex framework of intra-African investment by replacing the existing 171 intra-African BITs with a single treaty that would regulate all intra-African investments. Recent EU agreements with third parties have included a provision noting that upon entry into force of the new agreement, the BITs between the parties, including the rights and obligations derived therefrom will cease to have effect, and shall be replaced and superseded by the new agreement. See for example Article 4.2 of the EU – Viet Nam Investment Protection Agreement (2019). A similar approach would create a more manageable network of commitments between African countries and encourage intra-African FDI flows and broader continental economic integration. It remains to be seen how the Investment Protocol would interact with existing African regional IIAs. The inclusion of clear relationship clauses would be important to avoid possible contradictions and to establish a hierarchy of obligations arising from regional African IIAs.

A harmonized and coordinated approach to investment policymaking

Once concluded, African countries could use the AfCFTA Investment Protocol as a basis for future IIA negotiations, including for agreements with non-African countries. In this way, the Investment Protocol would be an important benchmark agreement that could be used to formulate and facilitate a common African approach to international investment policymaking. Such a framework would also allow for more regular and structured consultations among African countries on issues related to IIAs. To do so in an effective manner, the negotiators should consider the establishment of an institutional framework or a committee to ensure that the agreement operates properly; to supervise and facilitate the implementation and application of this Agreement, and to create a regular dialogue among African countries on investment policy issues.

Landmark international treaties are negotiated and concluded in exceptional times. The global COVID-19 pandemic has highlighted the incongruity of the current international investment system with measures needed to respond quickly and effectively to crises of a global magnitude. The ongoing legitimacy crisis of the system will deepen if ISDS claims begin to emerge as a result of measures taken for the protection of public health. Furthermore, other global challenges relating to climate change and the stability of the global financial system are also creating a sense of urgency for a comprehensive and holistic reform of the IIA regime. African countries can and should seize this opportunity to negotiate a landmark continental Investment Protocol that places sustainable development and the right to regulate in the public interest on an equal footing with investment protection.

The views are those of the author and do not necessarily represent those of UNCTAD.

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