



African Continental Free Trade Area: Phase II negotiations

The ultimate objective of the ongoing negotiations on the African Continental Free Trade Area (AfCFTA) is the creation of a single market for goods and services, facilitated by the free movement of persons. The trade liberalization agreed in Phase I of the AfCFTA negotiations, however, is not in itself sufficient to power African prosperity. Liberalization must be buttressed by improvements to economic governance on the continent. For this reason, and building on the momentum of Phase I, African negotiators are set to commence Phase II negotiations on investment, competition policy and intellectual property by the end of 2018.¹ This negotiation process is expected to give rise to three separate sets of rules that, upon their ratification, will supplement the current protocols.

Phase II issues will have profound direct and indirect effects on the private sector and African society at large. It is imperative that advocacy activities and stakeholder engagement accompany the negotiation process in order to ensure that the negotiated outcomes are well-designed to support African prosperity and have legitimacy for subsequent ratification and implementation.

Investment

African economies need investment to industrialize. In addition to their national laws, most African countries have included international investment agreements to counter the perceived risk linked to investing in their countries. The Pan-African Investment Code provides a non-binding model that can serve as an appropriate starting point for the foundation of the investment chapter of the AfCFTA. Inspiration can also be drawn from other protocols and model treaties on the continent and beyond.

The investment chapter should establish clear, coherent and predictable rules on investment with a view to encouraging investment activity on the continent. There needs to be a balance between the rights and obligations of investors and host States to ensure that the accumulation of productive assets translates into tangible development outcomes.² This would provide sufficient policy space for host States to introduce policies and regulations to propel development without undermining legal assurances for investors. Creation of a level playing field between investors and States would also lead to a more efficient allocation of resources across African economies.

The investment chapter would provide harmonization and coherence to Africa's investment landscape, which is fragmented by a wide and overlapping net of bilateral and regional treaties and protocols. The figure below demonstrates the complex and diverse experiences of African countries with bilateral investment treaties. Several regional

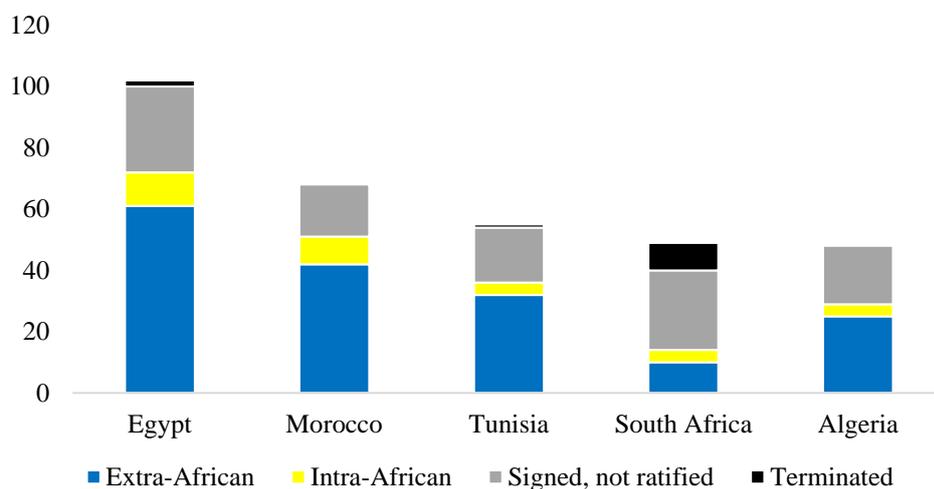
¹ The technical groundwork on Phase II negotiations has already begun. At present, ECA, UNCTAD, African Development Bank, and African Union Commission are working on the ninth edition of *Assessing Africa's Regional Integration*, which will explore the key policy issues, opportunities and challenges of the Phase II negotiations.

² See, UNCTAD, *World Investment Report 2016: Reforming International Investment Governance* (Geneva, 2015).

organizations, including the Common Market for Eastern and Southern Africa (COMESA), the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC), have also developed rules on investment.

Figure

The top five African countries with the most bilateral investment treaties in 2017



Source: UNCTAD: Investment Policy Hub 2017 (see <http://investmentpolicyhub.unctad.org/>).

The investment provisions should combine elements of investment protection and investment facilitation and reflect the shift towards sustainable development considerations. Legal articles need to be properly worded so that their meaning and scope of application are clearly defined to ensure a more predictable investment environment. Detailed language, exceptions and carve-outs can be useful in that regard. Investment facilitation, for its part, should simplify the administrative procedures to set up and expand investment projects in the host economy.

Competition

Africa has become an increasingly attractive market for both businesses and consumers. It is, however, essential that free and fair competition is maintained to attract responsible investors and benefit consumers. An effective competition policy is indispensable if trade liberalization benefits are not to be eroded by monopolistic practices.³ At the same, sufficient policy space needs to be maintained to promote targeted industrial policies.

There is a large variety in approaches to competition on the continent due to differing legal cultures, governance systems and capacities of the public sector, along with political and policy priorities and socioeconomic realities. This means that a single case may be concurrently challenged by multiple agencies operating under different sets of rules and timelines, which increases uncertainty and costs for the private sector.

³ James A. Levinsohn, "Competition Policy and International Trade", NBER Working Paper No. 4972, (1994). Available at <http://www.nber.org/papers/w4972>. Accessed on 12 September 2018.

Not all African countries currently have competition policies; for those that do have such policies in place, the latter are not necessarily backed up effectively with enforcing bodies. Regional authorities have also taken different approaches to cross-border competition policy in Africa. COMESA operates a well-developed competition policy complemented by a multilayered enforcement apparatus; in contrast, enforcement of the competition policy in the SADC region is predicated on the voluntary cooperation of national authorities.

The objective of the competition protocol is to guard the integrity of markets, foster economic efficiency, empower economic agents and, ultimately, contribute to the transformation process on the continent. Given its continental scope, the protocol would harmonize rules on corporate conduct on the continent, facilitate policy cooperation and consultation, and serve as a platform to coordinate competition and sectoral policies on different levels. The new institutional framework should also promote transparency of both competition and industrial policies on the continent. Moreover, the AfCFTA protocol needs to take into account existing World Trade Organization (WTO) rules and the rules in various bilateral trade and investment treaties. Existing commitments may have an impact on the ability of a given country to ratify or incorporate the protocol into its national bodies of law.

The protocol on competition policy is expected to have a scope of application that is general, but some sectors may be exempt or addressed through strategic sectoral policies. To make it truly effective, it is essential that the protocol encompasses the entire range of restrictive behaviour, including price-fixing cartels, abuse of market dominance and predatory behaviour, mergers creating (quasi-) monopolies and private restraints of trade. It should also deal with public procurement, which can be used as a tool to drive industrial innovation, but at the same time raise important questions of transparency and corruption. Moreover, the mandate for Phase II should be expanded to encompass consumer protection. Finally, a strong enforcement architecture for competition policy will be crucial. The institutions that already exist on the continent should be leveraged to capitalize on existing expertise and experience.

Intellectual property

Intellectual property rights have the potential to stimulate innovation and promote foreign investment, trade and technology transfer. Intellectual property can thus boost the African manufacturing sector and accelerate a shift towards a knowledge-based economy. The internationally prevailing approach to intellectual property of strengthening individual rights may not be particularly appropriate for Africa, which is still building its industrial sector and where many innovative processes take place at the grassroots level, in the informal sector, and are of a relatively low-tech nature.

Currently, the African regulatory intellectual property regime is marked by fragmentation, weak institutions and a relatively low adherence to rules. At the national level, there is a wide disparity among African countries in their national legal frameworks and monitoring and enforcement capacities.⁴ There are also two apex African institutions dealing with intellectual property: the African Regional Intellectual Property Organization; and the Organisation africaine de la propriété intellectuelle, whose mandates are not always clearly aligned with the regional integration agenda. At the moment, COMESA is the only region with

⁴ For additional information, see Michael Blakeney and Getachew Mengistie, "Intellectual property and economic development in sub-Saharan Africa", *The Journal of World Intellectual Property*, vol. 14, No. 3-4 (2011), pp. 238–264; and Vanessa Ferguson and Marius Schneider, "Enforcement of intellectual property rights in Africa", *Journal of Intellectual Property Law and Practice*, vol. 10, No. 4 (2015), pp. 269–279.

an overall intellectual property policy and in the process of working on its implementation. The East African Community and SADC are considering models for their member States.

The international intellectual property landscape is to a large degree shaped by the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The Agreement contains specific flexibilities to (temporarily) protect the policy space of developing countries, including exceptions and transition periods. African countries should make use of these flexibilities. Within the space delineated by TRIPS obligations, the new intellectual property right regime should be designed to reflect the developmental stage and institutional context of the African countries, and facilitate context-appropriate technological advancement through both innovation and technology transfer.

African countries have to define their priorities as well as their competitive interests and advantages based on careful assessment. The needs and priorities may be different for individual countries and regions and across the various types of intellectual property. A case could be made for a more balanced approach than is currently the case for patents and copyrights. In addition, the rules on trademarks could be reformed to account for less conventional types of trademarks, such as community trademarks. Matters for consideration include how geographical indications (which are particularly relevant for agriculture and trade) and traditional knowledge (an important resource on the African continent) may be harnessed for economic development.

The protocol would also set the benchmark for international negotiations with external partners. Commitments on intellectual property protection are sometimes included in trade and investment treaties and these provisions are more stringent than what is required by TRIPS.

Questions for discussion

1. What mechanisms should be set up to ensure that the linkages among the individual AfCFTA protocols are fully accounted for?
2. What would be the best strategy to ensure that the AfCFTA investment protocol introduces coherence in the rules on investment on the continent?
3. Should the investor-State dispute settlement mechanism be included in the protocol? If so, in what form?
4. Public subsidies for companies may have both national and cross-border competition implications. To what extent should government policy supporting certain market players be dealt with through competition policy?
5. What would be the best strategy to approach intellectual property protection in view of the current and future development needs promoting a free flow of goods and services across the Free Trade Area?
6. How can second phase negotiations be used to establish institutional arrangements for cooperation on e-commerce?