Chapter 3 The AfCFTA Investment Protocol: Reshaping the African investment regulatory landscape for sustainable development

Responsible investment fuels structural transformation and socioeconomic development (chapter 2). In Africa, foreign direct investment (FDI) has become increasingly important for development, given insufficient private domestic investment, unpredictable official development assistance and volatile portfolio investment. The long-term prospects of a continental market of 1.2 billion people in the African Continental Free Trade Area (AfCFTA) have reinforced the continent's attractiveness as an investment destination. Recognizing these facts, African policymakers have endeavoured to promote inward investments through changes in domestic regulations and international agreements.

Investment activity has risen, but the overall capital investment level remains low (chapter 1). Although economic determinants are crucial to investment inflows,[186] institutional and regulatory frameworks also influence them.[187] Investment progress is hampered by structural issues and perceived risks reducing investors' expected payoffs.[188] Different countries' disparate policy processes have induced a complex and disjointed regulatory regime[189] that hinders integration, bemuses investors[190] and raises concerns over possible negative impacts of investment on host communities. As a result, investment protection can be at loggerheads with other public policy objectives and has often disadvantaged African companies.[191]

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With negotiations over the AfCFTA Investment Protocol slated to begin in 2021, investment policymaking in Africa is entering a new stage. The Protocol, crowning the continental investment regulation landscape, is expected to be informed by the Pan-African Investment Code (PAIC),[192] a 2017 non-binding guiding instrument,[193] while also building on innovations adopted by African countries and best practices in making investment treaties since the PAIC was concluded.[194]

The Investment Protocol is likely to have four interrelated pillars—investment promotion and facilitation, investment protection, investors' obligations and other state commitments—which later parts of this chapter will consider.[195] It could be a building block in a strategy to create a new equilibrium across the interests of key stakeholders—private investors and host countries, but also home economies, local communities and the wider business community operating in host economies. The protocol will embody a quintessentially African response to global investment

issues, with the first three pillars, along with efforts to reformulate investment protection, harking back to ground-breaking regional treaties and some bilateral treaties in Africa. All four pillars entail specific but interrelated implications for the policy options of host countries (table 3.1).

Table 3.1 Key policy objectives and risks of four pillars suggested for the African Continental Free Trade Area Investment Protocol

PILLARS	POLICY OBJECTIVES	RISKS
Investment promotion and facilitation	Lower transaction costs for investors in finding, seizing and exploiting investment opportunities Avoidance of conflicts between host states and investors	Lower socioeconomic and environmental standards required of investors
Investment protection	Boosted investor confidence through legal safeguards against political risks	Narrowing of available domestic policy space
Investor obligations	Entrepreneurial initiatives aligned with sustainable development outcomes for host countries and communities	Investors deterred or induced to invest through third countries by onerous or unclear obligations and compliance processes
Other state commitments	A virtuous circle between investment and sustainable development ensured by international obligations on states to prevent a damaging race to the bottom	Legal levers to ensure compliance hollowed out by weak commitments or enforcement mechanisms (which could be complemented by international pressure) Buy-in deterred by an inflexible approach threatening states with weak institutional infrastructure or an economy reliant on low-cost models of production

Source: ECA

This chapter begins by mapping the linkages between the forthcoming AfCFTA Investment Protocol and other layers of investment regulations on the continent. It then reviews existing national and regional investment policies and treaties. The central parts of the chapter explore the four pillars that could underpin the Investment Protocol and discusses ongoing reform processes of the international investment regime and their implications for these pillars. Policy recommendations conclude the chapter. Throughout, the chapter discusses salient issues for levelling the playing field for African investors.

Impact of the Investment Protocol on the African investment landscape

The AfCFTA Investment Protocol will transform investment rules on the continent. It will likely be oriented towards sustainable development, not just towards investment protection.[196] In the Investment Protocol, a modern, consolidated, harmonized and coordinated approach[197] could simplify the existing regulatory regime, embody an African answer to the challenges of attracting development-oriented investment, tackle the perceived legitimacy crisis of the international investment regime and level the playing field for operating businesses.[198]

The Investment Protocol's overarching policy objectives are to foster the continent's structural transformation, harness private initiatives' business potential and translate it into sustainable outcomes for host communities. By establishing a clear, predictable and equal playing field for all private actors it will encourage an efficient and competitive private sector to flourish.

Even so, although domestic and foreign investors face the same rules, the former might be supported by targeted assistance to boost business development and long-term competitiveness. Countries will need to preserve the policy space to pursue development, including trade and industrial strategies tapping local static and dynamic comparative advantages for types of production with more added value (chapters 1 and 7).[199] The challenge facing policymakers is to adopt a policy framework that is clear and predictable yet offers some flexibility for developmental policies.

On the international plane and in the African context, treaty drafters must determine the relation between the AfCFTA Investment Protocol and existing (or future) regional and bilateral investment agreements. The protocol, built around the know-how accumulated at bilateral and regional levels, could replace all the overlapping agreements. That would rationalize the regulatory environment, foster an equal playing field and best match Africa's single market ambition, since the same set of rules would apply across the continent. That approach was officially adopted by 23 (of 27) European Union (EU) countries for intra-EU treaties following a decision of the European Court of Justice that found bilateral investment treaties between EU countries incompatible with EU law.[200]

Other models, providing multi-speed or multi-level integration, are also possible.

Other models, providing multi-speed or multi-level integration, are also possible. Other regional or bilateral treaties could continue to function with the Investment Protocol prevailing in case of inconsistency or filling gaps. Like the AfCFTA agreement, the protocol could set a common ground but allow subregions to pursue bespoke paths.[201] For instance, the Economic Community of West African States Common Investment Code currently takes precedence over other regional integration treaties, including future ones.

Such approaches would do less to harmonize investment rules at the international level than an overriding Investment Protocol would. Efforts would be needed to prevent the regulatory regime from becoming even more complex, and poorly coordinated rules could lead to unclarity and unpredictability. Multiple types of commitments for states regarding investment, treaty shopping by foreign companies and parallel dispute proceedings would increase the burden on public institutions. The most-favoured nation clause, often used in arbitral practice to import and apply provisions from other treaties, could be used to level up state obligations, while each country's obligations would differ, depending on its stock of treaties in force. The scope of the most-favoured nation clause could be curtailed in the design of the Investment Protocol. But for existing treaties, particularly bilateral ones that do not contain such safeguards, interpretation notes would have to be issued.[202]

Even if the AfCFTA Investment Protocol fully rationalizes the investment landscape on the continent for African investors, international agreements with other economies will remain intact.

Market access for firms depends how the playing field has been moulded by sovereign states.[203] The AfCFTA Investment Protocol could make anti-discrimination commitments for establishing a business so entry rules will be the same for all actors, independent of nationality. Negotiators could also agree on a list of sectors outside the treaty's scope and rules for adding sectors to that list. Alternatively, anti-discrimination clauses could kick in during an investment's operational phase. The first, more liberal approach fosters a level playing field by liberalizing the rules and is more in tune with the AfCFTA's single market ambition, whereas post-establishment obligations would leave states more discretion over investment policy.[204] Pre-establishment disciplines can be found in some regional agreements, such as that of the Association of Southeast Asian Nations (ASEAN), and in bilateral African investment treaties, notably some with Canada, Japan and the United States. But all REC-sponsored regional treaties (except the original Common Market for Eastern and Southern Africa treaty) and the vast majority of concluded African bilateral investment treaties follow the post-establishment approach.

Even if the AfCFTA Investment Protocol fully rationalizes the investment landscape on the continent for African investors, international agreements with other economies will remain intact. Most of them belong to the old generation of treaties with possible repercussions for policy space. Regional treaties spanning both African and non-African parties straddle the internal and external dimensions, and policymakers will have to assess how they fit into continental integration. To the extent that the Investment Protocol's protective standards are lower or include additional investor obligations, investors from outside Africa will have an advantage and African businesses might even find incentives to restructure their operations by changing countries of incorporation to enjoy protection under a parallel treaty with another jurisdiction.

The Investment Protocol is expected to cover all the 55 AU Member States that have also signed the AfCFTA Agreement. International investment treaties generally cover natural and judicial persons of the states that are parties, so applying the protocol exclusively to African investors would follow the pattern of a future African single market. But broadening the treaty to all qualifying investors, as suggested in the PAIC, could prove useful in bridging the gap with the external domain. All investors, guided by the protocol's common conceptualization of responsible investment, would enjoy the same level of protection, benefit from improvements in the business environment, have access to at least some investment facilities and have to observe identical international obligations. As the playing field gets flatter, incentives for corporate restructuring and treaty shopping fall.

It would be unusual to turn an economically integrating region into a global investment area—a common investment area where firms from even non-African, non-party states could enjoy the benefits of treaty protection.[205] The ability of policymakers to formulate specific policies for Africa would be constrained by other parts of the AfCFTA architecture and likely have implications for it, warranting careful design of the Investment Protocol. Incorporation of the same standards of treatment of investors, agreed at the continental level and possibly expressed in the Investment Protocol, could take place at the national level. Effective investment promotion and facilitation—coupled with improvements in domestic institutions and the domestic business environment—could serve African investors well and blunt incentives for purposeful restructuring to obtain better treatment.

Ownership rules present a continuum of options—such as whether the place of incorporation of the investing company in an African country (or control through such as a company) is sufficient to qualify for investment treaty protection. If so, what requirements, if any, of economic linkage with that country's economy are needed? Is the nationality of its (minority) shareholders, if they are not African nationals, relevant to treaty coverage?[206] Since the Investment Protocol is also likely to stipulate investor obligations, the precise scope of treaty coverage becomes more important.

In Africa, the path of extending treaty coverage to investors from non-party states was followed by the first South African Development Community (SADC) investment treaty and potentially offered by the first Economic Community of West African States (ECOWAS) investment treaty.[207] However, extending protection to investors from non-party countries was left out of their next iterations of those treaties, indicating dissatisfaction with this possibility.

If treaty coverage is limited to African nationals and companies, policymakers will have to decide how to address treaties with countries outside the continent. The AfCFTA Investment Protocol can outline principles for engaging and disentangling existing treaty obligations.[208] Unilateral cancellation of treaties is another option, but the termination of their protective cover usually takes years, sometimes more than a decade.[209]

Interplay between international and domestic investment laws

The Investment Protocol, like international treaties more generally, represents just one dimension of the rules and regulations applicable to foreign investment (table 3.2). The most important and immediately applicable source of law to investors, both foreign and domestic, is national law.

Table 3.2 The three dimensions of investment laws

DIMENSION	LEVEL	QUALIFYING INVESTORS
International	Continental (AfCFTA)	African investors meeting the definitional criteria of the Investment Protocol.
	Regional treaties	Regional investors and, less often, investors from outside the region meeting the criteria of the treaties.
	Bilateral investment treaties	Investors from the two contracting parties meeting the criteria of the treaties.
Domestic	National legislation	All domestic and international investors accepted under national law and recognized as such by authorities.
Contractual	Contracts between states and investors	Individual domestic and international investors (or consortia of investors) involved in specific projects.

Source: ECA

Treaties between states are on the international dimension, with sovereign countries expected to assume the resulting obligations voluntarily. A government measure harming an investor could be legal under national law but in breach of an applicable international treaty (or vice versa). States cannot use domestic law to justify international wrongdoing. The precise relationship of international treaties with a specific country's national legal order hinges on the country's constitution. Even so, national law remains relevant in arbitration (box 3.1). An increasing number of commentators argue that more reliance on domestic law could rebalance the international investment regime.[210]

Box 3.1 Interactions between international and domestic law in disputes between investors and host states

Treaties and domestic law—distinct sources of obligations for investors and states—can overlap in international arbitration. Investment treaties, unless tailored, apply to all aspects of investment.[1]

Investment arbitrators interpreting international investment agreements are usually mindful of national law, and some attention to domestic law by international arbitrators is inescapable.[2] The host state's national law of may be relevant (if not always decisive), for instance, to applying treaty standards,[3] allowing shareholders to also submit claims,[4] evaluating the conduct of investors during the operation of the investment,[5] considering breaches of contracts typically concluded under domestic law,[6] attributing to the home state acts committed by para-statal organs and state-owned companies,[7] establishing or recognizing property rights investors claim have been harmed (including contracts and intellectual property),[8] and ascertaining the (corporate) nationality of investors (particularly under the law of the country of incorporation).[9] Domestic law can also serve as applicable law,[10] but treaties are commonly imprecise in offering guidance on this.[11]

Tribunals have been inconsistent in their approach to national law. They have come under increased scrutiny since they have been found to pay scarce attention to municipal law.[12] Douglas (2003), for instance, criticized the tribunal in Wena Hotels v. Egypt,[13] which ruled against the host country after its authorities seized two hotels without considering whether the investor had breached the underlying lease agreement giving rise to property rights under national law.

Tribunals also sometimes assess whether an investment meets the criteria for legality under domestic law without a specific reference to such effect in the invoked treaty, or they may look beyond the criteria in national law when they assess the nationality of investors.[14] In Salini v. Morocco,[15] revolving around an alleged failure to pay for a newly built highway between Rabat and Fès, the tribunal, in its decision on jurisdiction, rejected Morocco's argument that the Société Nationale des Autoroutes du Maroc was a private entity disposing of its own assets, since it was in fact controlled by the state (the case was ultimately settled).

The linkages between international arbitration tribunals and domestic courts also vary. Foreign investors may have recourse to domestic courts due to the financial costs and the nature of the dispute or entity in question but, if dissatisfied, submit the case for international arbitration.[16] The procedural options available to investors at the time of filing can be regulated by treaty. There may be an overlap in competence between a domestic court and an international arbitration tribunal when the same dispute can be submitted to both or when part of the dispute has already been considered or decided by domestic courts. In some cases, a tribunal has stayed proceedings when parts of a case were pending in a host country court. International tribunals can also review the conduct of domestic courts, particular in

relation to claims of denial of justice. Finally, the domestic law of the country where the tribunal is located may allow domestic courts to review non–International Centre for Settlement of Investment Disputes (ICSID) awards, and host country courts can sometimes refuse to recognize and enforce arbitration awards.[17]

Some tribunals have held that investors must seek redress domestically over a substantive question (rather than a procedural standard).[18] In contrast, where investors have exhausted local remedies, with the measure in question upheld by local courts,[19] they have found their chances in arbitration diminished, since tribunals appeared reluctant to review the measure against the treaty, leaving them with no clear course of action. Tribunals seem more willing to review local courts' conduct of cases than their substantive decisions.[20]

1. Dolzer, 2005.
2. Stephan, 2014.
3. Hepburn, 2017; Salacuse, 2013; Sasson, 2017.
4. Salacuse, 2013; Sasson, 2017.
5. Sornarajah, 2017.
6. Douglas, 2003, Schreuer, 2010.
7. Sasson, 2017.
8. Salacuse, 2013; Sasson, 2017; Schreuer, 1996; Sornarajah, 2017.
9. Sasson, 2017.
10. Douglas, 2003.
11. Atanasova, 2019.
12. Douglas, 2003; Hepburn, 2017; Sasson, 2017; Stephan, 2014.
13. ICSID Case No. ARB/98/4.
14. Sasson, 2017.
15. ICSID Case No. ARB/00/4.
16. Gáspár-Szilágyi, 2020.
17. Douglas, 2003.
18. Schreuer, 2010.
19. Such as Helnan v. Egypt, ICSID Case No. ARB/05/19.
20. Wehland, 2019.

A somewhat different course is charted by Liberia, which favours concluding individual investment contracts over international investment agreements.[211] Investment contracts are usually concluded between states and private investors to cover large-scale infrastructure or mining projects. While governments usually pursue a host of public policy objectives and considerations, investors focus on the business proposition and stability over time. Investors may be hesitant to conclude state contracts under the law of the host state if they are afraid of changes that could harm them, so they could prefer the law of a different jurisdiction or even international law or vague industry customs.[212] Similarly, investors tend to seek stabilization or freezing clauses in their contracts to insulate themselves from future legal changes, particularly if treaty protection is insufficient.[213]

Contracts typically contain dispute settlement mechanisms—often domestic courts or international arbitration. A jurisdictional conflict, however, can arise between a domestic court and a treaty-based international arbitration mechanism over claims related to a contract. Some tribunals have entertained contractual claims regardless of the dispute settlement clause agreed in the underlying contract.

Numerous investor–state disputes stem from claims of contractual breaches. Of all publicly known claims against African states lodged by investors at the World Bank's International Centre for Settlement of Investment Disputes, 66 alleged broken contracts—compared with 88 invoking international investment treaties and 28 invoking national investment laws. Since contracts tend to be complex (such as those for privatization and public-private partnerships), state capacities and legal and regulatory frameworks need to be sufficiently robust to ensure clear, appropriate and comprehensive distribution of risk and liability.

International investment treaties, designed to protect investments, have not traditionally enabled host countries to bring claims against private companies to arbitration tribunals. And disputes over the breach of obligations under domestic law are usually entertained by local courts. Even so, African governments displeased with company performance have initiated contract-based arbitration proceedings.

The international, domestic and contractual levels of investment rules can overlap and, in some cases, apply at the same time (see box 3.1). For example, under different regional treaties, Libya and Egypt have faced different levels of responsibility to investors under different investment treaties for damages suffered in the turmoil of recent years.[214] At the bilateral level, African countries have largely followed more conservative templates of investment treaties with terser and less specific language.[215] Such bilateral treaties sometimes advantage non-African investors over domestic and other African peers. The 2016 Nigeria–Morocco treaty has been hailed for its focus on sustainable development but may also reveal difficulties in anchoring such a treaty model.[216] South Africa has cancelled investment treaties with many Western peers for their impact on its own domestic policymaking but maintains treaties with similar or identical provisions with African and other countries outside the region.[217]

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Various factors may explain divergent standards of treatment across different investment policy tools. They include negotiating power and capacities[218] and the size of the class of affected investors, which can run from one or a small group in a contract to all qualifying investors under domestic law. Even so, coherence across the regulatory dimensions is desirable.[219] Normative and institutional misalignments between various sources of law distort the playing field and spur uncertainty. Investors can have access to different standards of protection and dispute settlement mechanisms, depending on which legal regime is invoked. Inconsistencies between the different legal levels can thus create incentives for treaty shopping.[220]

Legal regimes and investment policies at the national level

States design investment policies to their own liking under customary international law. Unless there are international obligations to the contrary, they are not compelled to allow foreign investment in their economies.[221] National investment frameworks have two objectives: to promote foreign investment by providing incentives and property rights guarantees and to control foreign investment through restrictions and obligations.[222] Foreign investment is then expected to promote economic development, with the exact channels depending on prevailing policy, ideological attitudes and national priorities. The Ethiopian Investment Proclamation in April 2020 offers a case in point. The new law seeks to promote "socially and environmentally responsible" investment, enhance competitiveness, generate more, quality job opportunities, foster internal investment linkages and "exploit and develop natural, cultural and other resources." It also seeks to encourage the role of the private sector in the economy. Due to persistent foreign exchange shortages, specific objectives include raising exports and fostering the domestic production of import substitutes.

African countries demonstrate great diversity in their legal systems.

African countries demonstrate great diversity in their legal systems. National idiosyncrasies have been shaped by history, ideology and the competition of various interest groups, including the private sector and international organizations. Most African states are unitary, and they devolve power to subnational levels in different ways, as do Ethiopia, Nigeria and Sudan. African national legal systems have been shaped or influenced by civil law (derived from Belgian, French or Portuguese tradition), common law (in the Commonwealth),[223] Islamic law (especially in Northern and Western Africa) or a combination.[224] Alongside formal law, some countries may also apply indigenous law or customary dispute settlement mechanisms, including Ethiopia and Rwanda. Indigenous law often regulates access to land. For instance, more than 90 per cent of land in Zambia is administered by traditional chiefs.

The common law countries tend to be characterized as monist, meaning that upon ratification international treaties are incorporated into national law. Common law countries belong to the dualist group that requires an intermediate step of translation, typically through a legislative act. British and French legal systems also conditioned early arbitration laws, though later the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration gained importance.[225]

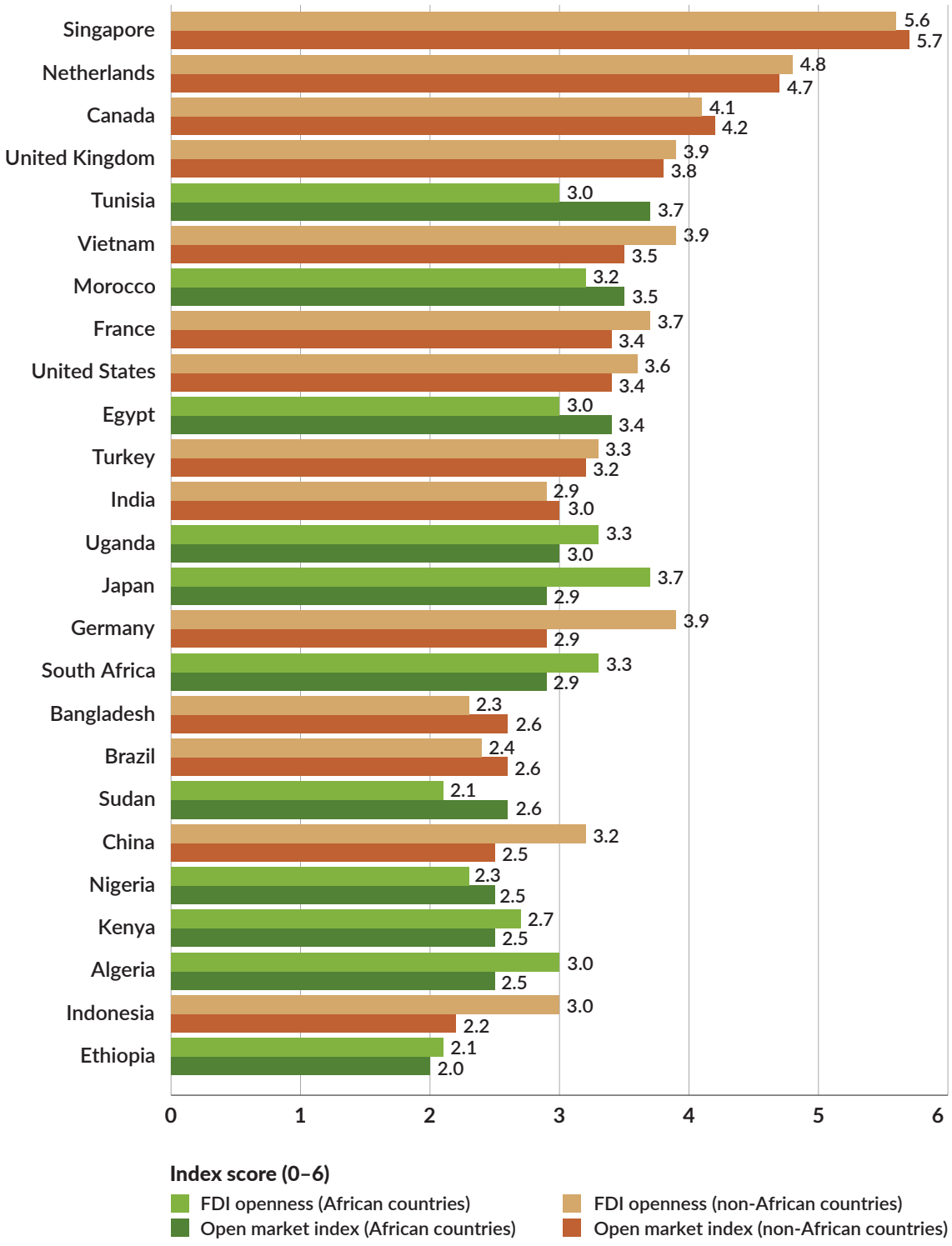
Pursuing economic transformation through industrialization, African countries assigned the state a strong role in the economy, limiting and conditioning the access of foreign capital in the early years of decolonization (though sometimes also incentivizing it through fiscal benefits).[226] Countries identifying or sympathizing with the socialist camp commonly nationalized companies or whole industries later—in many instances companies related to extraction and financial services[227]—and reserved parts of the economy to their own nationals.[228] Since the late 1970s,

African countries have put more emphasis on market forces. Internal and external liberalization—including abolishing or relaxing price controls, reducing trade and investment barriers and privatization—was ratcheted up in the structural adjustment programmes of the 1980s and 1990s.[229] Improved FDI frameworks were often complemented with double taxation and bilateral investment treaties.[230]

Opening domestic markets creates conditions for increasing capital stock and associated enhanced economic efficiency and competitiveness, paving the way for labour-absorbing industrialization. Integration into regional and global economic architectures can act as a vector of development, but liberalization can also cause shocks to the economy. The premature removal of barriers can entrench static comparative advantages, hampering progress towards value-added production when potential local producers cannot keep pace with international competitors.

There is currently no reliable, publicly available, comprehensive international appraisal of openness to FDI across all African countries. On the market openness index compiled by the International Chamber of Commerce, focusing primarily on trade, the African countries covered usually rate "average" or "below average." Africa countries also tend to score low on openness if FDI is the sole focus—both the regulation of FDI and its relative weight in the domestic economy. But Egypt, Morocco and Tunisia—the three North African states captured in the index—display FDI openness comparable to that of some of the fastest developing countries of recent years (such as Turkey and Vietnam), as well as the industrialized economies of France and the United States (figure 3.1).

Figure 3.1 Market and FDI openness, world comparison, 2017



Source: ICC, 2017.
Note: The open market index is a weighted composite index covering trade openness, trade policy, FDI openness and trade enabling infrastructure.

Barriers to foreign investment can take various more or less explicit forms. Fencing some markets off from foreign investors may be a key plank of domestic economic policy, for instance, to foster specific sectors or protect formal jobs (chapter 7). Domestic statutes also typically allow changes in investment entry rules based on national security or public moral grounds. Such arguments may prove malleable, and some discretion may be desirable or even necessary. But clear and transparent rules, complemented by accountability mechanisms, minimize the risks of capture by interest groups that might harness arguments against liberalization to fend off competitors, while also keeping malpractice and corruption from affecting the local business climate.

Many investment codes of African countries—including those of Burkina Faso, Guinea-Bissau and Morocco—have fully opened their economies to foreign investors. Sometimes they can be overridden by specific regulations. In Ethiopia as of 2020, after the restrictions were lifted on some sectors—including broadcasting and financial services—foreign investors could access all sectors, "unless contrary to law, morals, public health or security." In Nigeria, foreign investors cannot access specific sectors: narcotics, weapons and ammunition production, and military and paramilitary clothing. Some countries reserve certain professions to domestic nationals, such as being a pharmacist in Chad.

Several African countries limit equity ownership in domestic companies, either across the economy or in targeted sectors, to support domestic entrepreneurs or limit financial outflows. This type of restriction has been on the wane since the 1990s.[231] In 2018, Namibia annulled ownership and management quotas for black Namibians for mining exploration licenses.

Bucking the trend, Algeria adopted a law in 2009 capping foreign investors' stake in Algerian companies at 49 per cent, reserving the majority stake to local partners. Tanzania requires that local partners hold a 30 per cent stake in mining and insurance firms and a 51 per cent stake in aerial broadcasting.

Bucking the trend, Algeria adopted a law in 2009 capping foreign investors' stake in Algerian companies at 49 per cent, reserving the majority stake to local partners. Tanzania requires that local partners hold a 30 per cent stake in mining and insurance firms and a 51 per cent stake in aerial broadcasting. Tendering public projects in Angola often requires foreign firms to partner up with local para-statal enterprises to be allowed to bid. In 2018 Angola abolished local partnership requirements still applicable in tourism, logistics, the extractive sector, the financial sector and information communications and technology.[232] In the Republic of Congo, the state reserves 10 per cent ownership for itself in all mining projects.

Entry into the economy or specific segments of it can also be regulated on the input side, if policy aims to promote the local economy and local participation in value chains. Companies active in the defence sector in South Africa,

for instance, must demonstrate that black ownership is at least 30 per cent and must source at least 60 per cent of defence material locally.

Additional rules for screening or government approval can be another way to select which investments are allowed in highly regulated sectors. FDI projects in Morocco do not need governmental approval, but Chad requires approval in specific regulated sectors, such as tourism, telecommunications and hydrocarbon mining. In Guinea-Bissau, mining and cashew production projects require government licences. In Central African Republic, specific regulations apply to tourism, mining and forestry.

Overall institutional structures matter, and African countries need further improvements. Strong rule of law, though subject to various definition, is a prerequisite for protecting investors' property rights: since it decreases transaction costs and reduces uncertainty, and so the potential for conflict, foreign investors welcome it.

Access to land, a key production input, is often curtailed in African countries to protect local communities from land grabs that could threaten their sociocultural heritage and means of subsistence.[233] In Nigeria, foreign investors are required to team up with a local partner to purchase land. In Ethiopia, foreigners can only lease land. In South Sudan, leases on private land are limited to 99 years, and communal land gets allocated by communal authorities, sometimes with the involvement of the state.

Credible and predictable regulatory frameworks, robust and responsive institutions, and impartial enforcement reduce risks and increase the chance of capital commitments. If investors consider their assets vulnerable to state interference reflecting extractive instincts,[234] unfair competition from other companies in the economy (chapter 4), or exploitation without authorization (chapter 5), they are unlikely to commit their assets to the host economies.

Overall institutional structures matter, and African countries need further improvements. Strong rule of law, though subject to various definition, is a prerequisite for protecting investors' property rights: since it decreases transaction costs and reduces uncertainty, and so the potential for conflict, foreign investors welcome it.[235] Inadequate governance structures also hamper a state's abilities to articulate and apply appropriate policies and regulatory frameworks.[236] In an international comparison by the World Justice Project, African countries tend to receive middling scores on rule of law, with Botswana, Mauritius, Namibia and Rwanda faring better and Cameroon, Democratic Republic of Congo, Egypt and Mauritania, which rank towards the bottom.[237] On balance, African countries perform better on order and security but struggle with criminal justice and corruption.

Regional and bilateral investment treaties in Africa

The Investment Protocol, like the rest of the AfCFTA architecture, will follow the strategic roadmap laid out in the 1991 Abuja Treaty. It will build on the body of rights and obligations accumulated for integration in the regional economic communities (RECs) to set up a pan-African single market. The Pan-African Investment Code represents the most comprehensive expression of the continental view on making investment treaties to date but requires further refining. Africa's existing regional investment treaties both recapitulate regional rules and regulations and reveal underlying trends and approaches.

Investment flows are recognized as a significant vector of regional integration in African treaties. Some RECs, going beyond investment-related provisions in their founding treaties, have developed investment treaties to complement the existing regional trade agreements, some of which have been recently updated.[238] Regional investment treaties in Africa include:

- The 1990 Arab Maghreb Union Investment Agreement (not in force).
- The 2007 Common Market for Eastern and Southern Africa (COMESA) Investment Agreement (COMESA Protocol; not in force), which is to be replaced by the Amended Revised Investment Agreement for the COMESA Common Investment Area (awaiting the signatures of regional political leaders).
- The 2018 Supplementary Act A/SA.1/12/18 adopting the ECOWAS Common Investment Code (in force), complementing the 2008 Supplementary Act adopting community rules on investment and the modalities for their implementation within the ECOWAS (in force).
- The 2006 SADC Protocol on Finance and Investment, amended by the 2016 SADC Agreement Amending Annex 1 (Co-Operation on Investment) of the Protocol on Finance and Investment (in force).[239]

Several African states have also taken part in regional initiatives sponsored by organizations not restricted to the African continent. The treaties attest to regional integration historically extending beyond pan-Africanism for some African countries. The most prominent regional investment agreements involving African countries include:

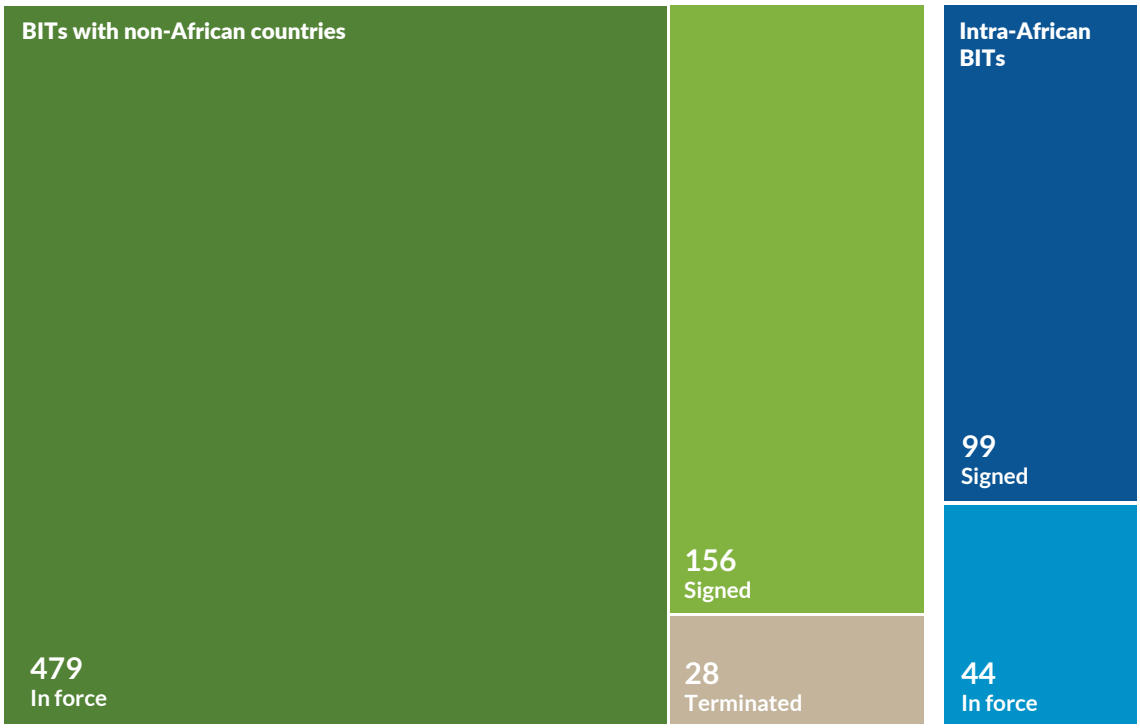
- The 1980 Unified Agreement for the Investment of Arab Capital in the Arab States (in force) and the 2013 Unified Agreement for the Investment of Arab Capital in the Arab States (Amended), concluded under the auspices of the Arab League.
- The 1981 Agreement on Promotion, Protection and Guarantee of Investments among the Member States of the Organization of Islamic Cooperation (OIC, in force).

The African investment regime remains fragmented, with overlaps and inconsistencies among rules at various levels. A country belonging to multiple regional blocks can encounter conflicts between the substantive provisions of investment treaties.[240] African regional treaties are heterogeneous "in terms of structure, purpose and substance."[241] Unlike regional treaties, intra-African bilateral treaties are often conservative, without modern features promoting sustainable development.[242]

Some 20 African countries belong to two African regional investment treaties, 8 countries to one, and Libya to four. But 5 countries—Central African Republic, Republic of Congo, Equatorial Guinea, São Tomé and Príncipe and South Sudan—are not parties to any.[243]

Most African countries have concluded bilateral investment treaties, mostly with outside peers and less often with African counterparts (figure 3.2). In February 2021, African countries had more than 10 times as many bilateral agreements in force with other countries (479) as among themselves (44). In part, regional processes have largely displaced intra-African bilateral ones, and intra-African investment treaties have frequently had a primarily diplomatic function, with many and never entering into force. South Africa, shifting its investment policy in recent years, has terminated 11 bilateral investment treaties, though some apparently never entered into force.

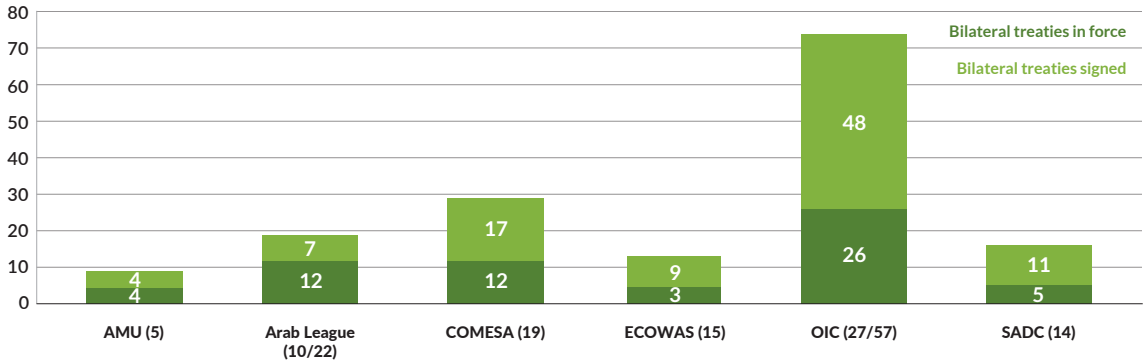
Figure 3.2 Bilateral investment treaties negotiated by African countries



Source: UNCTAD, 2020b.

All regional investment treaties in Africa include some participating states that also have bilateral agreements between them. The OIC, with the most members and with many Northern African members with a propensity to enter bilateral investment treaties (particularly Egypt and, less, Morocco), has the most overlap, followed by COMESA (to which Egypt also belongs) (figure 3.3).

Figure 3.3 Overlaps between regional investment treaties and intra-African investment treaties



Source: UNCTAD, 2020b.
Note: In parentheses: number of African member State Parties and, where applicable, total number of State Parties.

The African regional investment regime is jumbled. Arab League and OIC agreements, compared with REC-sponsored investment agreements, take a more traditional approach centred on investment protection. For instance, one of the highest publicly known arbitration awards (more than $900 million) was issued in 2013 against an African state for damages to investors due to the expropriation of their investment in a claim submitted under the 1980 Unified Agreement for the Investment of Arab Capital.[244]

Substantive differences remain among REC-sponsored investment treaties. The Organisation for the Harmonisation of Corporate Law in Africa (OHADA)—comprising mostly Francophone countries in Western and Central Africa—encourages the use of arbitration, whereas Eastern and Southern African regional treaties are moving away from arbitration.[245]

Even so, a quest for investment for sustainable development can be increasingly discerned as responsible, with states creating space to establish and enforce appropriate rules and to redistribute obligations among key stakeholders.[246] That trend is subject to exceptions and to underlying regional differences. Signs of cross-fertilization among regional (and to some extent bilateral) treaties abound. The recent development of investment treaties by COMESA and ECOWAS kept an eye on the PAIC and on forthcoming Investment Protocol negotiations. Some convergence is also apparent between the new ECOWAS treaty and the more recent SADC treaty. And Ghana has reportedly postponed review of its investment law until the Investment Protocol has been concluded.[247]

Investment promotion and facilitation

Investment promotion reduces the transaction costs of identifying investment opportunities, and investment facilitation, the transaction costs of taking advantage of the opportunities.[248] Both activities can be used to harness development-oriented investment.

Investment promotion covers policies, strategies and initiatives endorsing the host economy's investment opportunities and drawing attention to its comparative advantages, such as its skills base, labour costs, logistics and natural endowments. Investment promotion is often enhanced by fiscal incentives. Its activities include image building and servicing incoming investors.[249] It uses today's near-ubiquitous digital tools and presence on social media to complement traditional communication channels—representation at trade fairs and in target countries, business missions, business matchmaking and media advertisement.[250] This shift to digital communications accelerated amid the COVID–19 health crisis.[251] Most investment promotion activities are conducted at country level, but regional initiatives exist, such as investment forums and online platforms, for example in COMESA and SADC.

Investment facilitation makes the administrative environment more investment-friendly. Common measures include streamlining procedures, increasing the transparency of investment laws and procedures, enhancing the predictability of rules and their application, boosting public administration accountability and administrative efficiency and nurturing relations between investors, host countries and other stakeholders through e-government, e-regulation, dispute prevention, corporate social responsibility and enhanced communication channels.[252] Depending on their modalities, these measures can be implemented unilaterally or in coordination with partner countries.

Investment promotion and facilitation dovetail. And improved governance raises investment attractiveness and enables a seamless process from the first contact with potential investors to the establishment of a production plant.[253]

Investment facilitation makes the administrative environment more investment-friendly.

Successful support services to investors result in higher investment flows through both greenfield investments and the expansion of existing projects.[254] Downstream, investment promotion agencies (IPAs) can direct some investment flows into priority areas, especially if they cooperate with other public entities on maintaining an attractive portfolio of bankable projects.[255] Upstream, investment promotion agencies can help economies boost positive spillovers by fostering strategic linkages between small and medium-sized enterprises and multinational corporations by promoting policies, mapping opportunities, matching investors with local companies and developing local skills.[256] Combined trade and investment promotion and facilitation can unlock cost-saving synergies that would particularly help export-oriented investors as long as coordination challenges are resolved and a balanced approach to promotion and facilitation is upheld.[257]

Investment facilitation can be tailored to the local economy; it does not necessarily entail changing laws or making high public expenditure.[258] Stakeholder engagement and alliances are part and parcel of investment facilitation. Aftercare services supporting launched projects boost reinvestment and project expansion, reduce disinvestment, allow authorities to forge local partnerships and linkages to drive local development and foster innovation, and collect feedback from investors that can be used in policy advocacy.[259] Fostering stakeholder engagement and better and more consistent social, human rights and environmental impact assessments promote the wide sharing of benefits and the long-term viability of investment projects.[260]

The AfCFTA Investment Protocol will emerge against an evolving international backdrop.

The AfCFTA Investment Protocol will emerge against an evolving international backdrop. Structured discussions about a prospective multilateral investment facilitation framework have begun in various international forums, most notably at the World Trade Organization (WTO) in March 2018. Some 70 countries requested the WTO discussions, and by 2020, more than 100 had joined.[261] Their mandate, following the advice of numerous commentators, includes transparency, predictability, cooperation, streamlined administrative procedures and support for developing countries, among others.[262] These activities are meant to promote investment and insertion in regional and global value chains but stop short of developing market access, investment protection or investor–state dispute settlement.[263]

The negotiations on a multilateral agreement on investment facilitation could lead to legal obligations (binding and best endeavour) towards other states (typical for trade agreements) rather than investors (typical for investment protection).[264] An agreement could also promote good practice benchmarks, guide technical assistance, match private investments with social benefits, help national policymakers push through reforms and strengthen developing countries in promoting transparency.[265] African participation has so far been limited to five West African countries that are also among those that would need to implement the most reforms.[266] Nigeria in particular has been active in the Friends of Investment Facilitation group and hosted a multi-stakeholder event in November 2017 on investment facilitation in the context of the WTO and AfCFTA, co-organized with ECOWAS and other members of the group.

Some developing countries have met investment facilitation at the WTO with suspicion, including over conceptual ambiguity.[267] They argue that it could reduce policy space, particularly if the current mandate is broadened.[268] Summarizing a 2018 seminar of national experts from 13 SADC countries, Mann and Brauch (2019) emphasize that the participants considered the WTO an inappropriate setting for negotiations—as opposed to national, regional and multilateral negotiations. The national experts also stressed the centrality of technical assistance, best-practice benchmarking for quality regulations, collaboration with investors and collaboration among states. Advocates of the WTO approach argue that countries currently staying out of the negotiations often have small FDI inflows and so stand

to gain the most. The advocates propose offering those countries differentiated treatment or longer implementation timelines, pursuing commitments from capital-exporting countries for them and helping them with capacity building and raising broad stakeholder engagement.[269]

If the WTO's structured dialogue maintains its momentum, globally agreed binding practices could result, shaping legal, regulatory and institutional facilities for transboundary investment around the world. Even countries currently sitting out the negotiations would be in some way affected by this global initiative and might feel compelled to align their investment regimes to not miss out on global value chains.

Investment facilitation, which has emerged in different configurations around the world, can serve as inspiration for Africa. Among notable recent examples are Brazilian investment treaties strictly focused on investment facilitation (as opposed to investment protection) and underpinned by state-to-state cooperation and alternative dispute resolution.[270] That approach also inspired the 2017 Mercosur Investment Agreement in South America, the 2014 Additional Protocol to the Framework Agreement of the Pacific Alliance, the 2008 non-binding Investment Action Plan of the Asia-Pacific Economic Cooperation, and the EU-wide service SOLVIT.[271] Several recent treaties applied discipline to investors' home countries to help the investors with capital exports and technology transfer.[272]

Investment facilitation, which has emerged in different configurations around the world, can serve as inspiration for Africa.

The Mercosur agreement, for instance, set up a commission to supervise implementation and discuss related topics, which can engage with the private and non-profit sectors for their opinions. Investors also have access to both home- and host-country ombudspersons who could assist them in an amicable resolution of issues, preventing further antagonism and obviating a need for dispute settlement.

Investment facilitation in African regional treaties can be traced back to the original COMESA and SADC treaties[273] and, to a limited degree, to the Arab Maghreb Union treaty (where national treatment, requiring that foreigners receive the same treatment as locals, only covers pre-establishment procedures).[274] The treaties negotiated by North African countries, whether among themselves or with partner countries outside Africa, typically incorporate fewer such provisions. Existing African regional treaties contain numerous elements of investment facilitation (table 3.3), boding well for work on the Investment Protocol. Commitments to improving the domestic business environment—sometimes linked to applying existing laws—include intra-state cooperation and alternative dispute settlement mechanisms, such as conciliation and mediation, so investors can avoid escalation that would result in arbitration court or in cases. Some provisions are also innovative, such as a facility to assess for investors the legal status of their assets. The REC treaties also strengthen existing institutional frameworks.

Table 3.3 Investment facilitation provisions in African regional treaties

TYPE OF PROVISIONS	ARAB LEAGUE (2013)	AMU (1990)	COMESA (2018)	ECOWAS (2018)	OIC (1981)	SADC (2016)	AFRICAN UNION´S PAIC (2016)
Investment climate improvements	a	a, b		c	d	b	b
Removal of bureaucratic impediments				e			
Facilitation of investment permits							
Facilitation of entry and sojourn of personnel							
Transparency							f
Capacity building on investment issues							
Investment financing					g		
Foreign investment insurance programmes					g		
Pre-establishment investor servicing				f			
Post-establishment investment aftercare							
Relations with investors/ private sector	g						
Cooperation and treaty bodies on facilitation							
Access to local labour							
Recognition of documents and qualifications							
Exchange of information on investors							
Domestic sector encouragement							
Negotiation of double taxation treaties							
Alternative dispute mechanisms	h	i					
Technical cooperation between states							
Harmonization of investment rules							d
Collaboration on investment promotion							

Binding obligations Non-binding obligations

a) States may provide additional privileges to covered investors. b) Admission of investments in accordance with domestic laws. c) Applies to special economic zones. d) Applies only to incentives. e) Relates to fiscal matters. f) Investors can get assessed the legal status of their assets. g) Through regional bodies. h) Conciliation constitutes a pre-requisite for arbitration. i) Conciliation forms an alternative to arbitration.
Note: The African Union's PAIC is a model investment agreement.
Source: Regional investment treaties; first twelve categories developed by Polanco Lazo (2018)

In general, investment facilitation features more prominently in REC-sponsored treaties than in those involving non-African countries or in the PAIC (which nonetheless contains provisions on visas, work permits, central bank cooperation and the integration of payment systems). Investment facilitation provisions in REC treaties commonly accent sustainable development, investor obligations and bottom-up approaches to develop and implement country-by-country legal changes within a common framework.[275] In contrast, investment promotion provisions are rare in world investment treaties.[276]

Investment promotion agencies (IPAs) typically perform the bulk of investment promotion and facilitation functions. These specially dedicated agencies are usually public, semi-autonomous, or joint private-public, attached to the presidency, prime minister's office, some ministry or ministry department or, in some countries, to special economic zone administrations and municipalities pursuing particular objectives. IPAs seek to attract investments to the local economy at the national, regional or city level. They often represent the country abroad, help companies set up and operate by navigating existing regulations and establish and nurture relations through post-investment aftercare services for investors who find the conditions right for expanding production with greater value addition.[277] They can also serve as matchmakers between domestic and international firms to facilitate production or research cooperation.[278] IPAs usually manage single windows simplifying administrative procedures, saving time, improving transparency and so increasing the trust of investors in local authorities.[279] Such single windows can be integrated in investment portals.

Investment promotion agencies (IPAs) typically perform the bulk of investment promotion and facilitation functions.

Investment focal points can double as one-stop centres facilitating investment (box 3.2) and helping investors establishing companies with company registration and tax registration, necessary approvals, environmental impact assessments, security permits and securing land and utilities. One-stop investment centres and the institution of an ombudsperson can also link investors with public authorities to help the investors identify and clarify applicable laws and rules—for instance, labour and tax obligations—and dissipate contentions before they escalate. IPAs can also advise governments on policy, building on insights gathered from the business community. In concert with other public bodies, an IPA can resolve investors' pending issues. It is crucial that ombudspersons be sufficiently empowered and enjoy political commitment and that mechanisms for cooperation and governance be put in place.[280]

Box 3.2 Investment promotion and facilitation in Rwanda

Rwanda has continually revamped investment promotion and facilitation through the Rwanda Development Board (RDB) and related institutions, capitalizing on the country's administrative capacity and business-friendly environment. The government has implemented many policies proposed in the East African Community Model Investment Code, along with a new investment code oriented towards investment facilitation.[1]

The Rwanda Development Board is a government body mandated to fast-track Rwanda's economic development. It offers a suite of one-stop-shop services to investors, including processing investment certificates, issuing visa and work permits, arranging connections with public utilities such as water and electricity, assisting with applying for tax exemptions; collecting non-fiscal revenues and applying for environmental impact assessments.

A large part of the activities is online. The RDB operates dedicated investment promotion websites with features to simplify and expedite investment registration by providing essential forms and documents and links to websites operated by other relevant authorities, including those of immigration and revenue. The RDB website also gives access to online applications for investment and procedures essential for the environmental impact assessment. Since 2013, the Rwandan investment promotion agency has been operating an iGuide providing investors with essential information about the investment opportunities, including a step-by-step guide to investment procedures to enhance transparency.

In 2015, Rwanda enacted the Law Relating to Investment Promotion and Facilitation, which gives investors certain rights, including to engage in economic activities of their choice, to recruit or dismiss employees, to market goods and services, to freely establish business management methods and to use property. It also offers fiscal incentives. National treatment, requiring that foreigners receive the same treatment as locals, is applicable to both the incentives and investment facilitation. The law aims to facilitate investment by clearly setting out the requirements and procedures for investment registration and providing timeframes for the issuance of investment certificates. The RDB both facilitates investment and requires investors to properly implement their investment proposals, store financial and accounting records of their investment, provide data on the operations of their investment, respond in a timely manner to queries from the RDB, register with the tax administration and file timely tax returns.

Finally, the RDB connects the public and private sectors. It engages with the Private Sector Federation, a professional organization, supported by the government of Rwanda, representing and advocating for private sector concerns.

1. Baruti, 2017.

Since the 1980s, African countries have been setting up IPAs to help investors navigate the regulatory environment and deliver pre- and post-investment services.[281] Recent developments include Angola's 2018 establishment of the Private Investments and Export Promotion Agency (following a merger of three different state entities as part of a wider investment policy overhaul) and Uganda's 2019 designation of the Uganda Investment Authority as a one-stop shop for investors. Central African Republic is the only African country that does not actively attract foreign investments through an IPA or a dedicated ministry (UNCTAD, COMESA, Trade Invest Somalia). By December 2020, 32 national IPAs were listed as members of the World Association of Investment Promotion Agencies (WAIPA), which facilitates networking and capacity building. Recent projects—for some of which IPAs won United Nations Conference on Trade and Development awards—include investments in large-scale horticulture in Lesotho, a smart city in Mauritius and waste recycling and smartphone manufacturing in South Africa.[282]

Digital single windows for investment are much less common. Only Benin and Cameroon currently operate the eRegistrations system developed by the United Nations Conference on Trade and Development as an off-the-shelf platform for developing and emerging countries.

IPAs are often constrained in serving investors and their economies. A survey of world IPAs showed that, in low-income countries, their budget averaged $2.4 million, but in their high-income counterparts, $30.6 million. Globally, the most serious impediments to IPA performance are budget (70 per cent), human capacity (64 per cent) and bureaucracy (58 per cent).[283] African IPAs often lack sufficient resources, hampering their actions and increasing staff turnover—which compounds the issue. They may also be insufficiently empowered to deliver in their role facilitating investment. After initial enthusiasm surrounding an IPA's establishment, political commitment may fade, diminishing its clout. Dated, unwieldy or non-existent national or regional digital promotion platforms can be tell-tale signs of insufficient institutional capacities for prospective investors, who may infer that detailed research on African IPAs' remit, functions, budget and organization is warranted. And since investment facilitation cuts across different levels of the state, implementation can be challenging even when activities are centralized in a single contact point.[284]

The role of IPAs in investment facilitation has qualitatively shifted towards "ecosystem brokerage," supporting local development, forging alliances, promising value and improving social and environmental impact.[285] "Smartlining"— rather than simply cutting regulations—can back investment facilitation's support of sustainable development. A network of national investment agencies in any AfCFTA economy could assist African investors and service providers regardless of size resolve their problems before they fester into disputes with host states.

The Investment Protocol could thus establish a common framework for cooperation on which State Parties could further build additional measures. States would probably owe such commitments to each other rather than directly to investors, which could ramp up their responsibility.

Investment promotion and facilitation, backed by an appropriate level of investment protection, can increase flows of responsible investment to benefit development and local companies,[286] so they should be part of any holistic rethink of FDI and development.[287]

African countries' uneven capacities discourage prescribing strict, uniform rules for investment facilitation.

African countries' uneven capacities discourage prescribing strict, uniform rules for investment facilitation. Building their technical capacity and helping them financially to articulate, negotiate and implement investment facilitation is vital. Policymakers, possibly supported by RECs, should create a network supporting peer learning, identifying lingering barriers to intra-African investment and jointly promoting investment projects strategic for regional development. Those policymakers could also pursue further regulatory harmonization to support sustainable investment benefiting from scale and standardization—for instance to promote circular economy aimed at eliminating waste and continually using and reusing resources.

Investment protection

Investment treaties' primary and, thus far, typically main objective is to reduce political risks for foreign investors. Foreign investors' uncertainty about the future of assets depresses their expected returns and so the attractiveness of investing in the host economy. Steps to compensate them for losses due to political risks are thought to improve investors' view of the economy.

Three broad issues have been addressed by standards of treatment in investment treaties.[288] First are policy changes that would dramatically reduce or wipe out the value of an investment. In response, treaties' lynchpin and original purpose is protection against uncompensated expropriation, usually complemented by other, sometimes even more exacting, obligations on states.[289] Second is discrimination against foreign investors by national authorities. Investment treaties, along with trade law, seek to reduce that. Third, investors want to bring in and to repatriate funds. Investment treaties typically open the capital account to allow such transfers. Further, to mitigate investors' misgivings over domestic courts (perhaps seen as slow, unreliable or incompetent) or over diplomatic protection by investors' home states (maybe unavailable in practice), investment treaties usually allow for investor–state dispute settlement through arbitration.[290]

The traditional investment regime rooted in investment protection has become mired in controversy, spurring a global rethink in the mid-2000s. The worth of the grand bargain between state sovereignty and inward investment flows inherent in investment protection appears muddy in practice. Although recent econometric studies have supported a link between investment treaties and inward investment flows, they are prone to methodological weaknesses with results that lack robustness.[291] And concern has arisen that the regime is tilted in favour of protecting foreign investors' private property at the expense of host states and their legitimate public policies and regulations.[292] Although some authors maintain that the international investment regime suffers from deep-rooted imbalances manifested in intertwined procedural and substantive deficiencies,[293] others praise the record of investor–state dispute settlement (ISDS) in balancing private and public interests, though specific complementary changes and safeguards are needed.[294]

The concerns over the prevailing international investment regime (and ISDS specifically) are myriad and generally reinforce each other. Investment protection is insufficiently linked to other international legal regimes such as human rights and international environmental law. Yet, investment tribunals may have to review measures for sustainable development and weigh developing nations' societal concerns against foreign investors' interests.[295] Concerns about the current ISDS regime include transparency;[296] inconsistent interpretation[297] even if the argument is not universally accepted;[298] incorrectness of decisions;[299] potential bias and conflict of interest of adjudicators;[300] poor inclusiveness in gender, ethnicity, professional and educational background and nationality—for instance, in African or developing countries; a propensity to repeated appointments of arbitrators;[301] marginalization of local communities in the process;[302] treaty abuse and frivolous

claims;[303] funding of claims by third parties;[304] potential for hefty awards[305] and the weaponizing of the system in dealings with host governments.[306] These contribute to the worry that arbitration can encroach upon the ability of states to serve citizens through legislative and regulatory action.[307] Springing from these issues are also contradictory and disputed claims of partiality towards claimants and developed countries,[308] though the success of defending countries may be mediated by the strength of public institutions[309] or even reach outcomes more favourable to defending states.[310] Further, issues such as interpretive inconsistency, lengthy procedures[311] and the high costs of arbitration[312] affect states and investors alike.[313]

States may be liable for policy changes made in exceptional circumstances. Some companies are reportedly mulling submitting claims to arbitration over host country measures responding to the COVID–19 health crisis.[314] Some such legal challenges could be hidden from the public eye. Policymakers facing these uncertain prospects could fall victim to regulatory chill and so underregulate, increasing the wider anxiety about a race to the bottom for foreign investment.[315]

Whether investment treaties have an undue impact on policymaking is difficult to evaluate.

Whether investment treaties have an undue impact on policymaking is difficult to evaluate. Research indicates that arbitrators have generally become increasingly sympathetic to environmental legislation.[316] Even so, outlier awards can occur with severe repercussions for host states.[317] And although some decisionmakers may be oblivious to investment treaties' existence and effects, anecdotal evidence suggests that an arbitration threat can affect domestic decisionmaking.[318]

Developed and developing countries alike have debates and policy innovations related to investment protection, prompted by a string of controversial cases and fuelled by civil activism, resistance from within the industry and academic criticism.[319] The questions of reform reverberate through institutional and substantive changes.

A key global platform for investment protection discussions is the United Nations Commission on International Trade Law (UNCITRAL) Working Group III on the reform of investor–state dispute settlement, a state-led process launched in July 2017.[320] The working group, agreeing that reform is desirable, focuses on procedural issues in the following areas: the correctness, coherence, consistency and predictability of decisions (including inconsistent interpretations of substantive standards and multiple proceedings over the same claims); independence, diversity, and impartiality of the tribunal; the cost and duration of proceedings, including excessive legal costs and third-party funding, and the recovery of costs when the defending state prevails.[321] Other substantive issues, such as the definition of standards of treatment and the right to regulate, though central to the ISDS problem, have been left out of the Working Group III discussions.[322] So, some commentators and countries argue for broader overhaul for a meaningful reform.[323] The appropriateness of a multilateral forum

as the setting for such a wide-ranging reform also raises questions due to the challenges of timeliness and forging consensus.[324] Chile, Israel, Japan, Mexico and Peru have jointly proposed developing a menu of options, instead of one overreaching approach, to cater to the different interests expressed by state parties.[325]

National positions often reflect approaches that have already been used in treaties in some form.

National positions often reflect approaches that have already been used in treaties in some form. State proposals fall into four distinct categories: improving the current ISDS system (expressed in the largest number of submitted proposals, including those by Ecuador and Indonesia); establishing an appellate mechanism backstopping the one-off arbitrations backed by China; setting up a multilateral investment court, as promoted by Canada and the European Union, and moving to local courts or state-to-state dispute settlement mechanisms, as endorsed by Brazil.[326]

Three African countries weighed in on possible ISDS reform, all putting sustainable development at the core of any future change and pushing for ethical standards for adjudicators and more involvement of local institutions. Morocco prefers to reform the current ISDS system, but Mali and South Africa favour a complete departure. South Africa, though not opposed in principle to a standing investment court, dismisses current proposals as superficial and invites discussions on the role of national courts and state-to-state dispute settlement.[327]

Several countries also advocate establishing an advisory body or centre for developing countries. Fernández Masiá and Salvadori (2020) suggest that such an institution could potentially support host governments responding in ISDS cases that want to remodel their treaties, pursue alternative dispute settlement resolution mechanisms or even engage in amicable dispute resolution, facilitate information sharing and capacity building for local officials or, if the countries so desire, assist physical persons and small and medium-sized enterprises having disputes with host countries.

Concurrently with the UNCITRAL Working Group III initiative, a related reform of the International Centre for Settlement of Investment Disputes (ICSID) Rules of Procedure for Arbitration Proceedings—the leading investor–state arbitration venue—has been driven forward by its secretariat since October 2016 in consultation with its 163 Member States, of which 49 are African.[328] Overlapping issues between the UNCITRAL initiative and the ICSID reform include transparency, consistency of awards, independence of arbitrators, cost and length of proceedings, and third-party funding.[329] The African Union (2018), on behalf of its Member States, endorsed the idea of regional economic integration organizations becoming parties to the ICSID rules and highlighted the importance of diversity.

The ICSID Secretariat, in the fourth iteration of its reform proposal, developed in reaction to feedback from Member States, included disclosure of third-party funding rules to streamline and expedite proceedings, rules on alternative dispute mechanisms and default public release of awards unless one party to a dispute disagrees.[330] In May 2020, the ICSID Secretariat together with the UNCITRAL Working Group III presented a draft code of conduct for adjudicators. With the process delayed by the coronavirus, ICSID Member States in October 2020 were pondering whether to discuss the rules further or put them to a vote.[331]

A trend towards more emphasis on sustainable development and the protection of policy space has emerged in new treaties around the world.[332] New types of investment treaties have been articulated and promoted by Brazil (2015),[333] India (2015),[334] the Netherlands (2019)[335] and in the African context by Morocco (2019),[336] among other countries. Recent examples of innovative investment treaties from around the world include the investment chapters in the 2016 Comprehensive and Progressive Agreement for Trans-Pacific Partnership, the 2019 Trade Agreement and an Investment Protection Agreement between the EU and Vietnam, the 2018 United States–Mexico–Canada Agreement that replaced the 1992 North American Free Trade Agreement, the 2018 Comprehensive and Progressive Agreement for Transpacific Partnership, and the 2020 Regional Comprehensive Economic Partnership (not in force).

Compared with the rest of the world, African governments have more often settled disputes before a final award is rendered and concomitantly have less often won and, especially, lost cases with investors on the merits.

African experience evinces the increasing frequency of investor–state disputes. In known cases, African States have appeared as respondents in 127 disputes, and capital-exporting companies domiciled in Africa have launched 18 claims against host states, of which 6 were in Africa.[337] Defending states have prevailed in 31 publicly known cases and lost in 21. But a further 20 cases were settled (likely implying misconduct by states), and 10 discontinued by investors themselves. Compared with the rest of the world, African governments have more often settled disputes before a final award is rendered and concomitantly have less often won and, especially, lost cases with investors on the merits. The vast majority of investment claims against African states came from outside the region, reflecting both the relative weight of non-African investors and the denser network of valid treaties. Three North African countries have accumulated the largest number of cases, most initiated in the second decade of this century: Egypt, with 38 cases, Libya, with 18, and Algeria, with 10—all countries with a robust network of treaties. More than 40 arbitration cases are currently pending against African governments.

Except two cases from the beginning of the 21st century, all claims submitted by African companies against host governments were initiated after 2012. This growing assertiveness of African companies in international arbitration fits the

global trend. It may also reflect rising investment outflows, the involvement of African companies in large-scale projects and even the permissiveness of some treaties towards purposeful corporate restructuring. Companies based in Egypt, Mauritius and South Africa have availed themselves of international treaties to bring claims against host governments in Africa in Algeria, Lesotho, Madagascar and Mozambique and globally in Canada, India, Kuwait, Kyrgyzstan, Lebanon and Pakistan. So far, the African claimant has prevailed in one case, three have been settled and six are pending. The few known intra-African cases submitted under regional or bilateral instruments share a lack of transparency, encompassing access to documents and final awards.

The treaties sponsored by the RECs have reversed African countries' image as rule-takers coming from their previous readiness to accept treaty templates proposed by their industrialized counterparts, which often proved ill-suited to their developmental needs.[338] Amid rising unease about the impact of investment treaties, African countries have articulated new approaches, starting with the 2007 COMESA Treaty, which represented "a paradigm shift with respect to the regulation of foreign investment in Africa."[339] That trend, gathering pace, has crystallized in the new generation of treaties sponsored by RECs. The ECOWAS Common Investment Code (ECOWIC), encompassing an increased list of policy areas as relevant to investment and regional integration, appears to mark yet another paradigmatic departure that posits investment treaties as a means for comprehensive investment regulation.

To protect policy space for sustainable development policymaking, the African regional investment treaties eschew vague and broadly worded provisions with uncertain implications in favour of more precise language, sometimes setting out alternative standards of treatment, typically complemented with exceptions. The efforts pertain to virtually all aspects of investment protection, from the definitions of investors and investments enjoying treaty coverage to the guaranteed standards of treatment and to available dispute prevention and resolution mechanisms.[340] The treaties are not, however, identical and often differ in approach.

The COMESA Investment Agreement (CCIA, for COMESA Common Investment Area) and ECOWIC treaty stress the link between economic development and assets that investors can claim protection for (table 3.4). Like the new SADC treaty, they unequivocally exclude assets states do not see as central to developing the host economies—such as government debt securities or portfolio investment. The CCIA and ECOWIC also regulate which companies can access the treaty, to avoid claims enabled by corporate restructuring.

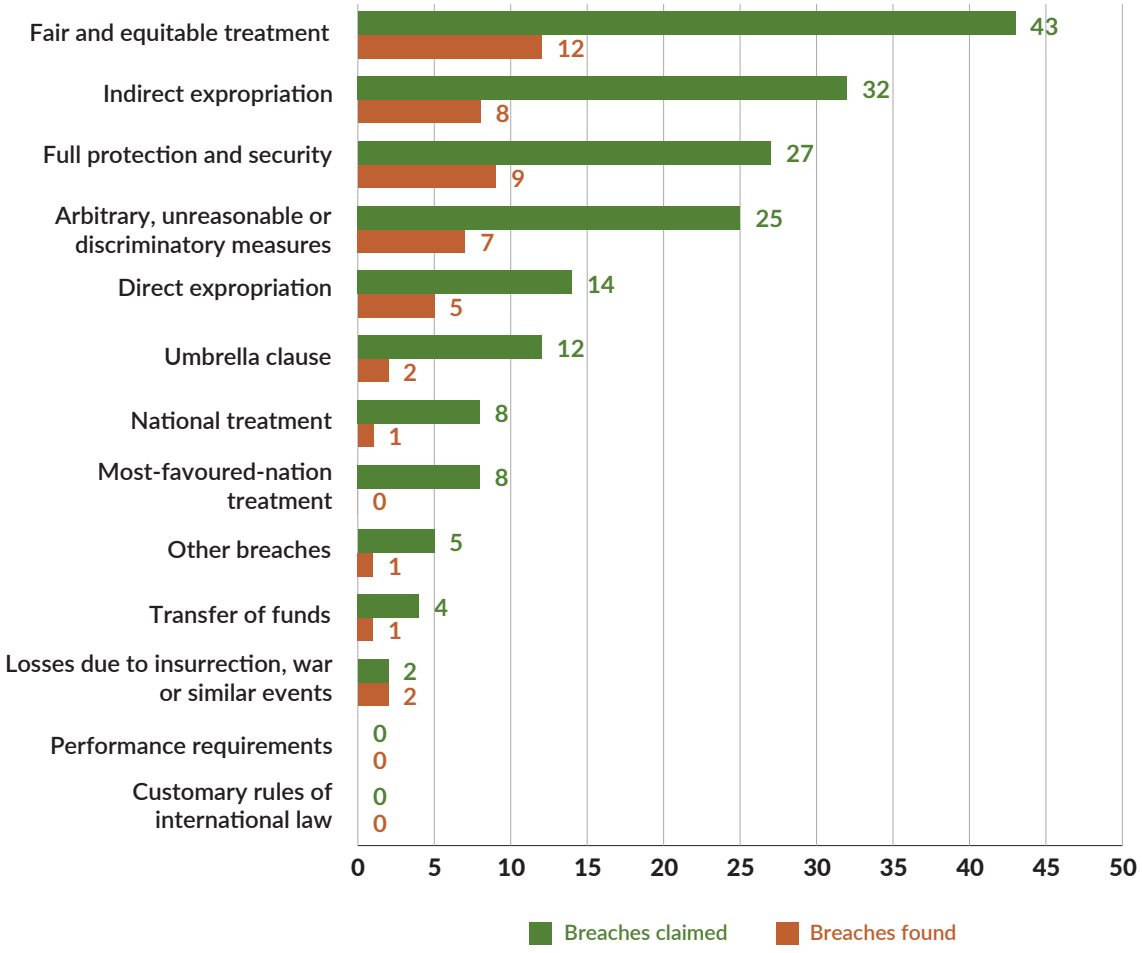
Table 3.4 Criteria for investments in the COMESA and ECOWAS investment treaties

CATEGORY	CONSTITUTIVE ELEMENTS
Substantial business activity	Amount of investment brought
	Number of created jobs created
	Effect on the local community
	Time in operation
Salini test[a]	Commitment of capital or other resources
	Expectation of gain or profit
	Assumption of risk
	Contribution/significance for host country development

[a] The Salini test, employed in the decision on jurisdiction by the arbitration tribunal in Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco (ICSID Case No. ARB/00/4) (see box 3.1), arose from applying article 25 of ICSID rules. Debates then ensued particularly over the element of contribution to development and whether the ICSID tribunals that applied it read this condition in (see Burger, 2013; Grabowski, 2014; Castro de Figueiredo, 2019). With these conditions, in the treaty, this fourth prong of the test must be applied even though questions surround its exact interpretation.
Source: COMESA and ECOWAS treaties.

The differences in substance from the older treaties are noticeable. All the new-generation REC investment treaties prevent the guarantee against discrimination against investors relative to domestic entities from being invoked to challenge policies favouring disadvantaged groups or supporting businesses through targeted public initiatives that might affect investors. Potential claims of these kinds must be considered against entities in "like circumstances" to avoid too broad an application. The references to "fair and equitable treatment" that have featured in most treaty claims and have proven particularly controversial, have been removed (figure 3.4). The CCIA, taking a leaf from the SADC Model Treaty, replaced that phrase with "fair judicial and administrative treatment." Protection against expropriation has been rebalanced, with states reserving a right to regulate in pursing development objectives and complementing it with more detailed guidance on compensation. But the CCIA and ECOWIC eliminated the notion that expropriation must not be discriminatory—a change from the prevailing practice in international investment treaties and customary international law.[341]

Figure 3.4 Breaches claimed and found in investor–state disputes against African countries



Source: UNCTAD, 2020b.
Note: Claims are mostly based on bilateral investment treaties. A claim usually alleges breaches of more than one standard of treatment. Ongoing cases are included. A tribunal may find that a standard has been violated, whether the claimant alleged that breach.

The freedom to transfer funds in and out of host countries has some heterogeneity. It also reflects a concern that countries should be able to apply national law—for instance on bankruptcy and financial regulation—and emergency measures to correct macroeconomic imbalances without triggering international responsibility. All the treaties are meant to be self-contained, and protections cannot be imported from other treaties.

With concerns over the arbitration system fuelling investment agreement reforms in Africa, all the new treaties in the RECs emphasize amicable dispute resolution to deal with investors' complaints. Regional investment agreements invariably put forward regional dispute settlement mechanisms as the main resolution venue, and such regional organs should enjoy more legitimacy than one-off arbitrations. But they can present vulnerabilities.[342] The SADC tribunal regional court was suspended in 2010 and then shut down in 2014 following several rulings against Zimbabwe. There are questions over enforcement of the ECOWAS Investment Court rulings in some countries.[343] Although REC treaties allow domestic courts and state-to-state dispute settlement, these options may not be available to investors in practice, either because local courts do not entertain treaty claims (see box 3.1) or because the host state is reluctant to allow claims to be heard in domestic courts. ECOWIC allows arbitration as a safeguard for investors once all local remedies, including the regional court, have been exhausted. Arbitration can take place at any public or private arbitration institution in Africa or elsewhere and will follow the rules of the forum. But under the SADC investment treaty, investor–state arbitration is not an option.

The AMU, OIC, and Arab League investment treaties tend to follow a more traditional path, partly reflecting the time in which they emerged. The AMU treaty offers little by way of relative standards of treatment. It limits national treatment requiring that foreigners receive the same treatment as locals to pre-establishment procedures, has no clause to establish legal parity between local firms and third-party investors but contains strong absolute standards of protection. In addition to fair and equitable treatment and expropriation, it protects against interference in "the management of the investment, its productivity, financial, employment or other policy." The 1981 OIC treaty omits the fair and equitable treatment standard[344] but contains an unusual alternative provision and a battery of other types of protective standards, and it lacks safeguards against treaty shopping and multiple arbitration proceedings.[345] Unlike the new REC treaties, its most-favoured nation clause does not preclude access to more favourable standards of treatment in parallel treaties concluded by the host state, a feature claimants have increasingly seized on (box 3.3). The 2013 Amended Arab League Investment Treaty takes the opposite direction in several ways, for instance by introducing the previously missing fair and equitable treatment standard with "limitless phrasing" that "might result in discrepancies in interpretation of its scope" and further liberalizing the transfer of funds clause.[346]

Box 3.3 Access to best available treatment via the most-favoured nation clause under the 1981 OIC investment agreement

Several arbitration cases that stemmed from the 1981 OIC investment agreement show how openly drafted investment provisions can be used to import substantive standards that were missing in the base treaty and to guide the arbitrator to follow different arbitration rules. Article 8.1 of the treaty applies most-favourite nation treatment only to third states, not to other state parties (which is unusual in regional treaties), but otherwise imparts little guidance concerning its interpretation.

In the very first known case based on the OIC treaty, Al Warraq, a Saudi national, in 2011 alleged that the bailout years earlier of a bank in which he had shares by Indonesian authorities was unlawful expropriation. He also disputed the criminal and judicial proceedings that had been led against him by public authorities.[1] Though the 2014 decision affirmed a breach of treaty by Indonesia, no damages were awarded to the claimant. In its reasoning, the tribunal "imported" and applied the fair and equitable clause from the parallel 1976 bilateral investment agreement with the United Kingdom. The defending country, though drawing on international human rights law, was found to have violated the fair and equitable standard owing to denial of justice during the trial and appeal of the charges.[2]

But the majority found that the case was inadmissible since the investor, found to have engaged in financial fraud and embezzlement, had failed to observe article 9 of the treaty, which bound him to local laws and regulations and to "refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest." A related counterclaim failed on its merits.[3] The expropriation claim was dismissed, since Indonesia was found within its right on the basis of article 10.2.b allowing "preventive measures issued in accordance with an order from a competent legal authority." It is also noteworthy that the investor's claim of breach of full protection and security collapsed, since the OIC guaranteed that standard only to investments, but not to investors.

In October 2016, DS Construction, a company registered in the United Arab Emirates, initiated an arbitration against Libya alleging that the conduct of the host state around the time of its 2011 civil war amounted to indirect expropriation, and claiming $525 million for the disruption of 19 construction contracts.[4] The details of the case are not public, but it has been reported that the responding state failed to appoint a second arbitrator. So, the investor filed a notice of arbitration with the Permanent Court of Arbitration (PCA) seated in The Hague to set up a tribunal under the 1976 UNCITRAL arbitration rules imported through the most-favoured nation clause from the 2002 Austria–Libya bilateral investment treaty.[5] The investor argued a risk of denial of justice and frustration of the effectiveness principle.[6] After the secretary-general of the PCA appointed a second arbitrator in March 2017 to fill the void left previously under the UNCITRAL rules,[7] the three-arbitrator tribunal is now complete,[8] while Libya has approached the French court for annulment.[9]

The "PCA's creative decision" to break the impasse was welcomed by some commentators "for giv[ing] effect to the existing agreement to arbitrate."[10] Since it seems the secretary-general of the OIC has not stepped into the breach left by defending states on at least six other occasions, including in cases against Egypt, the PCA approach might have implications for those cases, as well as for the future institutional arrangement under the OIC treaty.[11]

1. Hesham T. M. Al Warraq v. Republic of Indonesia, UNCITRAL.
2. Cotula, 2016; Schill and Djanic, 2019.
3. Rivas and Choi, 2015.
4. PCA Case No. 2017-21; Bennadji, 2019.
5. Escobar and De Jesús, 2017; Volterra Fietta, 2017.
6. Gharavi, 2020.
7. Perry, 2017.
8. UNCTAD, 2020b.
9. Gharavi, 2020.
10. Khattar, 2019; Escobar and De Jesús, 2017.
11. Bennadji, 2019; Escobar and de De Jesús, 2017; Gharavi, 2020; Volterra Fietta, 2017.

The 1980 Arab League treaty established the Arab Investment Court (AIC). Under both iterations of the treaty, the AIC serves as the default mechanism for investor–state disputes. The AMU treaty offers claimants the choice between "judicial authorities of the states" and arbitration, and, in direct reference to the original Arab League investment treaty, provides access to the AIC. Arbitration at a different venue is only allowed if the responding state agrees. Under the OIC investment agreement, states make a standing offer of arbitration only until a specialized "organ" has materialized.[347] The dispute between DS Construction and Libya may have fuelled efforts to establish an alternative to the AIC (see box 3.3).[348]

Standards of treatment in some cases overlap but do not fully coincide with the guarantees states proffer under their municipal laws. National treatment in Namibia (among other countries), as in its regional treaties, is subject to an assessment of "like circumstances," does not apply to "state procurement tied to development assistance or funds" and does not protect against the state "prescrib[ing] special formalities in connection with the investments of foreign investors" that do not "materially impair the rights under the provisions of the [Investment Promotion] Act." This standard of treatment, available to all investors in Namibia, is subject to interpretation by domestic courts, not international arbitrators, and may not fully match the standards in investment treaties the country has joined.

Fair and equitable treatment, which has been dropped in the new RECs treaties, figures in some domestic investment codes, for instance, in Democratic Republic of Congo, Egypt and Seychelles. The clauses on fair and equitable treatment appear as terse as those ordinarily found in international investment agreements, but their interpretation by domestic courts would normally be guided by "national legal provisions, such as constitutional norms, administrative codes, civil and criminal procedure statutes."[349] But in Democratic Republic of Congo, fair and equitable treatment is linked to the "principles of international law." Algeria, Côte d'Ivoire and other countries reaffirm the standard of treatment accorded to investors covered by investment treaties. In contrast, South Africa applies "fair and administrative treatment" to cover against legal, judicial and administrative malpractice.

In domestic legal systems, expropriation is usually addressed in the constitution and in more specific laws—typically domestic investment codes[350] and discreet land expropriation acts. As African economies opened more to foreign capital over the past decades, their legal systems evolved towards protecting against uncompensated expropriation. South Africa bucks the trend with a 2019 expropriation bill that envisages land expropriation without compensation. That option aligns with South Africa's constitution, which considers not only land's full market value, as is typical under international investment agreements, but also public interest factors followed in some international human rights jurisprudence on the right to property.[351]

National investor guarantees usually are based on investment treaties. Domestic laws in Africa typically do not protect against indirect taking as recognized in international arbitration (table 3.5). In contrast, the 2012 Mali investment code contains a provision akin to the stabilization clause in contracts, under which investors that enjoy advantages benefiting from the code will not be affected by later legislative or regulatory changes designed to eliminate or temper such advantages.

Table 3.5 Expropriation laws in selected African countries

CATEGORIES	REPUBLIC OF CONGO	NIGERIA	RWANDA	TUNISIA	ZAMBIA
Applicable law	Expropriation for Public Purpose Law (2004)	Nigerian Investment Promotion Commission Act (1995)	Law Relating to Investment Promotion and Facilitation (2015)	Tunisia Investment Law (2018)	Zambia Development Agency Act (2006)
Type of taking against which investors are protected	Expropriation of real property	Nationalization, expropriation, involuntary surrender of property or interest	Expropriation of capital and assets	Expropriation	Compulsory acquisition of property or interest
Conditions of expropriation	Public purpose, including public works	National interest or public purpose Under a law providing for compensation and court determination of compensation	Public interest	Public purpose Conformity with legal procedures Non-discrimination	Public purpose Parliamentary act Payment of compensation
Valuation method	Just and prior compensation	Fair and adequate compensation	Fair and prior compensation	Fair and equitable compensation	Market value
Transfer of compensation	N/A	Without undue delay In convertible currency	N/A	N/A	Prompt Fully transferrable at the applicable exchange rate in the currency of original investment Without deduction for taxes, levies and other duties
Notes	Congo Investment Charter (2003) makes no reference to expropriation		Fair and prior compensation is enshrined in the constitution	Judicial and arbitral decisions are exempt	

Source: National investment laws.

Mirroring overall economic liberalization, African countries have loosened restrictions on capital flows.[352] In Cameroon, only Member States of the Central African Monetary Union have the right to transfer funds. But investment treaties, by referring to national law, have become akin to national law. Niger, for instance, guarantees the right to transfer business revenues and liquidation proceeds "in conformity with applicable laws." Investors in Sierra Leone, once tax requirements are satisfied, may transfer business profits and principal and interest payments on foreign loans, and they may freely repatriate proceeds from enterprise liquidation and dispute settlement awards.

Municipal legal frameworks usually provide investors with various types of binding and non-binding dispute settlement. The increasing attention to facilitating investment and detecting and reducing problems early raises the importance of domestic institutions able to develop and maintain relations with investors. Investment promotion agencies, which may already have a rapport with investors from acting as a bridge between them and the state apparatus, can have a privileged position to supply or facilitate some of these services. Or countries can establish specialized, dedicated organs for these services, so the influence of investors with previous relations is reduced. But these new organs need time to build reputation and face additional costs, making them potentially more vulnerable to change.

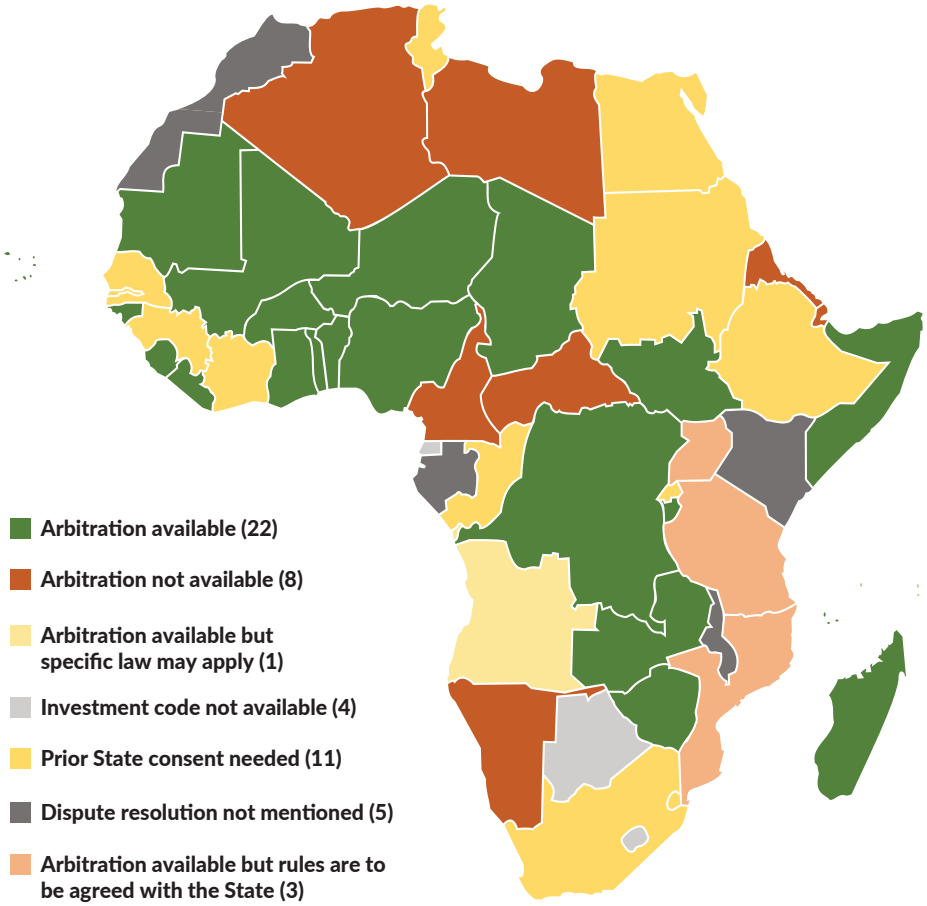
The increasing attention to facilitating investment and detecting and reducing problems early raises the importance of domestic institutions able to develop and maintain relations with investors.

If disputes are not resolved amicably, local courts are usually available to investors that believe their rights under investment codes or other domestic legislation have been violated. But mistrust of the domestic legal system was a key factor fuelling the emergence of investment treaties in the first place. In some cases, courts also interpret investment treaties (see box 3.1). Various mechanisms, including domestic courts and international arbitration, can resolve disputes related to contracts, depending partly on the nature of the dispute and whether the contract stipulates a dispute settlement mechanism.[353]

International arbitration is available to foreign investors under the investment codes of several African countries.[354] But a standing offer to arbitrate, typical in investment treaties, applies only in a minority of those countries (figure 3.5). Leaving aside international agreements and contracts, different African countries offer different routes to foreign investors in choosing between national and international arbitration. Some countries agree to international arbitration (such as Benin, Democratic Republic of Congo, Ghana and Nigeria), some give a choice between domestic and international arbitration (such as Burkina Faso and Burundi), others require specific agreement from the state for international arbitration but not for domestic arbitration (such as Zimbabwe) or for either international or domestic arbitration (such as Rwanda, South Sudan and Sudan), and yet others only allow domestic arbitration (such as Egypt). Investment treaties sometimes give access to

arbitration in economies where domestic law has curtailed it.[355] The guarantees the applicable investment code grants will guide arbitrators' interpretation. As seen above, those guarantees could be out of step with international treaties, which can apply in parallel. Demonstrating the influence of international development institutions, a review of 74 countries by Berger and St John (2020) shows that countries following best practices advice from the World Bank's Foreign Investment Advisory Service were 6.5 times more likely than others to change their domestic law to give investors access to international arbitration. Arbitration based on municipal law can suffer from the same systemic issues as treaty-based arbitration.

Figure 3.5 Availability of arbitration mechanisms to foreign investors in African countries through national investment codes



Source: National investment codes as listed in UNCTAD (2020b).
Note: For Nigeria, reference is made to the Nigerian Investment Promotion Act (2004), and for Uganda, to the Investment Code Act (2019).
Disclaimer: This figure is indicative only and should not be construed as determinative in assessing investors' right to arbitration.
The boundaries and names shown and the designations used on the maps on this map do not imply official endorsement or acceptance by the United Nations concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries.
Every effort is made to ensure this map is free of errors but there is no warrant the map or its features are either spatially or temporally accurate or fit for a particular use. This map is provided without any warranty of any kind whatsoever, either express or implied.

As of October 2020, 17 Western and Central African[356] countries belonged to the Organization for the Harmonization of Corporate Law in Africa (OHADA), which aims to harmonize their business laws under a common framework. The revised OHADA Uniform Act, adopted in November 2017, was intended to "enhance transparency, promptness and efficiency of arbitral proceedings in OHADA Member States." It entered into force the following year.

Together with the rules of OHADA's Common Court of Justice and Arbitration (CCJA), the OHADA Uniform Act opens arbitration pathways for qualifying investors under national legislation or international investment treaties.[357] The court's rules also emphasize alternative dispute settlement mechanisms, and in December 2017, OHADA members adopted the Uniform Act on Mediation. The OHADA Uniform Act takes precedence over domestic law. But there are concerns over domestic enforcement, the implementation and application of the OHADA Act and the impact of the CCJA fee rules on the availability of expert arbitrators.[358]

Approaches to investor–state arbitration vary in Africa by legal instruments and by country. Where arbitration remains an option for investors, African countries wishing to reclaim international investment law might consider encouraging local arbitration centres. Such centres must, however, be sufficiently empowered, and their rules must be effective and promote transparency.

Investor obligations

Investment treaties usually only prescribe duties for states. The regulation of investor behaviour has been relegated to host economies' municipal law. But the domestic regulation of investors comes under pressure from the obligations imposed by investment treaties and international investment law. This can create asymmetry in the legal regime, limiting the usefulness of foreign investment in contributing to sustainable development. But in a recent trend largely spearheaded by African countries, investor responsibilities have been attached to investment treaties to rebalance the current investment regime and translate the deployment of private capital into tangible benefits for host societies.[359] Teething issues in treaty drafting still need to be overcome to get the full benefit of investor obligations.

Investment treaties usually only prescribe duties for states. The regulation of investor behaviour has been relegated to host economies' municipal law.

Mirroring investment treaties' nearly universal coverage of investment protection, investor obligations can regulate key aspects of business behaviour in host economies, including the observance of human rights, labour standards, environmental protection, and taxation and anti-corruption laws and principles.[360] One way of establishing these obligations would be to anchor them to applicable domestic law.[361] That would elevate the duties of investors towards the home and host countries to the treaty level and put the content of the obligations fully under state control.[362] Investment treaties can

also contain their own, autonomous international legal obligations for investors agreed by all the participating states. Governments could also agree to implement certain shared standards in their national legislation to ensure that a normative framework is applied to all investors.

Including investor obligations following international norms would improve consistency across various legal regimes, even as the norms evolve.

Including investor obligations following international norms would improve consistency across various legal regimes, even as the norms evolve.[363] Introducing investor obligations could also guide treaty interpretations that better reflect their developmental intentions.[364] Well-recognized international instruments that could serve as the source of investor obligations include the Universal Declaration of Human Rights (1948), International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work (1998), ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2017), the United Nations (UN) Convention against Corruption (2003), and the UN Guiding Principles on Business and Human Rights (2011).

The norms, depending on the drafting, could be enforced in various complementary ways. First, fulfilling them could be made a condition for investors to accede to dispute settlement mechanisms. Second, misconduct could be considered at the merits phase and affect the amount the states must pay if found liable for a breach. Third, investor wrongdoing could be used by states to file counterclaims against investors, or it could be considered in determining compensation in an investor–state dispute.[365] So far, the practice of making counterclaims has been limited, partly because few agreements have expressed investor obligations.

Finally, and most profoundly, if investors violate their obligations, host and home states and communities could file a claim against them.[366] Treaties can engender commitments from states to ensure access to justice in their courts to host states for damages resulting from acts of investors, clearing procedural or jurisdictional obstacles. Home states could enact legislation subjecting investors to home state judicial proceedings for environmental or other harm caused by operations in host states.[367] Precautions, however, would have to be instituted to insulate investors from spurious claims, which would be unjust to the investors and could undermine the investment attractiveness of host economies.

African countries have pioneered the inclusion of various investor obligations in investment treaties (table 3.6). Such obligations appear more often in more recent REC-sponsored treaties than in those concluded under the auspices of SADC, the Arab League and the OIC.

Table 3.6 Investor obligations in African regional investment treaties

	ARAB LEAGUE (2013)	AMU (1990)	COMESA (2018)	ECOWAS (2018)	OIC (1981)	SADC (2016)	AFRICAN UNION´S PAIC (2016)
Observance of local laws	a	a					
Human rights							
Corruption							
Labour standards							
Environment/use of natural resources							
Corporate social responsibility							
Corporate governance							
Transfer/import of technology							
Skills transfer							
Transfer pricing practices							
Protection of traditional knowledge							
Sociopolitical obligations							

Binding obligations Non-binding obligations

a) Coordination of investors' activities with the host State.
Note: The African Union's PAIC is a model investment agreement.
Source: Regional investment treaties

The principle that investors must abide by local laws and regulations features prominently.[368] Investors and their investment must meet all the criteria to enjoy treaty protection and avert possible liability. In some cases, tribunals have dismissed claims when the underlying investment was not formed in accordance with applicable laws (box 3.4). The obligation to refrain from corrupt practices is also implied and is reinforced in specific provisions in the CCIA and ECOWIC. In practice, tribunals usually take corruption seriously, though inconsistently, even when this obligation to refrain from it is not spelled out in the treaty on which the claim is based.

Box 3.4 Cortec Mining, Cortec Limited and Stirling Capital Limited v. Kenya (ICSID Case No. ARB/15/29)

The dispute between Cortec Mining and Kenya sprang from the 2013 withdrawal of a mining licence for Mrima Hill, rich in niobium and other rare earth minerals. The licence withdawal was part of a nation-wide mining review by a newly elected government citing concerns over anomalies in issuing licences by the previous administration. In 2015, Cortec and related companied pursued a claim of expropriation of assets in an ICSID tribunal, pursuant to 1999 United Kingdom–Kenya bilateral investment treaties, seeking $2 billion in damages. The government disputed the legal validity of the mining licence, since a special permit was needed due to "the special protected status of Mrima Hill as a forest reserve, nature reserve and national monument."[1]

The tribunal dismissed the claim on jurisdictional grounds in October 2018. Reviewing the national laws, it found that the companies had not produced the valid environmental impact assessment study needed for the mining license. The condition that the investment must be constituted in accordance with the host country's law was not expressly stated in the award, but the tribunal held that "the text and purpose of the [bilateral investment treaty] and the ICSID Convention are not consistent with holding host governments financially responsible for investments created in defiance of their laws fundamental to protecting public interests such as the environment."[2] The tribunal also applied the so-called proportionality test, concluding that the "regulatory obligations on which the Claimants defaulted were of fundamental importance in an environmentally vulnerable area."[3] In February 2019, the claimants filed a request for annulment, submitting, among other claims, that the tribunal had manifestly exceeded its powers. The annulment proceedings are pending.

This case highlights tribunals' possible willingness to require compliance with essential planks of the legal and regulatory framework at the time of establishing the investment even if that duty is not explicitly stated in the treaty. Even so, this approach may not be uniformly applied, does not extend to breaches during the operation phase and does not make the result of a proportionality test to be applied by subsequent tribunals entirely predictable.[4]

1. Award: para. 5.
2. Award: para. 333.
3. Award: para. 363.
4. Cotula and Gathii, 2019; Harrison, 2019; Ofodile, 2019.

Investor obligations in African regional investment treaties, over and beyond compliance with host country laws, can be traced to the original COMESA and ECOWAS investment agreements. The CCIA and, especially, ECOWIC and their successors go further than the other regional treaties on the continent in establishing obligations for investors. CCIA highlights respect for human rights. ECOWIC, rather comprehensive in scope, not only covers labour and environmental issues but also introduces a host of novel obligations, for instance in relation to transfer pricing techniques (often misused for aggressive tax planning practices contributing to illicit financial flows),[369] traditional knowledge (to protect

the value of these intangible assets for the local communities stewarding them), and the transfer of technology and skills (to make the most of spillovers from investment; chapter 2). ECOWIC also specifies that investors must conform to obligations within two years from the entry into force of the treaty but that they are not created retroactively. Some provisions overlap and lack clarity or could prove onerous if applied indiscriminately to companies of all sizes. The AMU and Arab League treaties also introduce an obligation to maximize the coordination (or liaison) of investors' activities with host countries.

ECOWIC also specifies that investors must conform to obligations within two years from the entry into force of the treaty but that they are not created retroactively.

In contrast to regional treaties, bilateral treaties have made few inroads. The Morocco–Nigeria bilateral investment treaty (not in force) represents a notable exception, since it was the first bilateral investment treaty containing a clause obliging "investors and their investments [to] respect human rights." The exact nature of the human rights obligations is difficult to discern from this terse wording, though, as happened before for many substantive investment protection standards, they may be refined subsequently through jurisprudence.[370]

But vaguely defined duties could give investors pause for thought. The innovative features of the Morocco–Nigeria treaty have not been included in treaties subsequently negotiated with other African countries. That treaty also overlaps with the OIC treaty, so injured investors might circumvent the human rights provisions when filing a claim against one of those states.

States can use a failure to observe the obligations set out under the CCIA and ECOWIC in their defence against claims from investors in court or international arbitration, even if only the former treaty mentions the option expressly.[371] Nonetheless, the Morocco–Nigeria bilateral investment treaty presents a comprehensive system of enforcement and sanctions, since the investor obligations serve as a basis both for counterclaims and for lawsuits in the investor's home state if the investor's actions or decisions lead to "significant damage, personal injuries or loss of life in the host State."[372]

The ECOWIC, CCIA and PAIC often match investor obligations with concomitant state obligations. It is incumbent upon investors to familiarize themselves with their duties and obligations, but the content may be fuzzy, and enforcement can prove erratic or be weakened by public officials overstepping their authority.

Under the ECOWIC, for instance, Member States take the responsibility to fashion proper legal and institutional frameworks. Coupled with improvements in the general business environment, investment facilitation can empower investors by providing information on rules and procedures and reliable communication channels with relevant public institutions. With clarifications and help from these sources, investors can avoid unintentional transgressions and deterioration in their relations with the host state.

Modern states increasingly use civil and criminal law to regulate the conduct of companies across a whole gamut of issues. African countries are no exception. Typical obligations affecting investors relate to tax obligations; competition policy; licensing and permits; consumer protection (chapters 4 and 7); protection of intellectual property (chapter 5) and working conditions, including discrimination, social security and hiring and firing. Impact assessment laws, as part of environmental protection, have also become increasingly common in African countries.

Modern states increasingly use civil and criminal law to regulate the conduct of companies across a whole gamut of issues. African countries are no exception.

Investment codes can highlight these key issues and mould investors' business conduct to reflect their countries' vision for sustainable development. The investment code can directly set out some obligations, while specialized parts of the law can refer to others. The investment law of Mozambique (2018), for instance, alerts investors to their duty to respect the constitution and laws of the country, prohibiting interference in the internal affairs of the government, and to meet obligations related to taxation, workers' safety and the environment, among other things.

Investors can sometimes be compelled to make specific contributions to host economies. Typical obligations of this kind include creating local jobs, exporting to bring in foreign currency or importing capital (as opposed to financing through local institutions). In many countries, including Djibouti and Rwanda, investors must demonstrate difficulty in sourcing skills locally before they can bring in foreign workers. Egypt allows investors to earmark a part of their profits for social development initiatives in healthcare, culture, social care, the environment, education and research and other areas, on the condition that the earmarks do not further some hidden agenda. The government may also develop a list of suitable projects.

Other state commitments

Since investment treaties principally protect invested assets in host economies, they have not usually created obligations other than those of host states towards covered foreign investors. The uneven distribution of responsibility and of benefits has fuelled concerns over the system's legitimacy. The often exclusive focus on investment protection does not align obligations sufficiently with many aspects of sustainable development and excludes them from most international treaties, impeding a normative inclination in resolving investment disputes. Treaty drafters are free to add state obligations encompassing other aspects of investment, including some that can be extended to home economies.

State obligations beyond investment protection can be of three partly overlapping types. First, they can enhance regional integration by fostering the harmonization of policy and rules, formalizing multilateral investment promotion and facilitation.

These state obligations complement investor obligations by establishing the framework for their fulfilment and so formalize shared responsibility while undergirding market liberalization.[373]

Second, beyond economic imperatives, state obligations can impose sustainable development considerations into investment treaties, thus locking countries into a virtuous spiral of socioeconomic development—as opposed to a pernicious, and ultimately self-defeating, competition with each other for investment.[374]

Third, adding obligations derived from international agreements can promote alignment with the international legal system. From the point of view of investors, the compliance of host economies with international treaties on such issues as human rights and child labour can help protect them from reputational risks. These commitments can complement or refer to others already undertaken in different treaties.

Most of these commitments, reflecting obligations towards host state citizens and communities and preventing negative externalities for other AfCFTA states, can be excluded from the scope of dispute settlement with investors. Instead, states are expected to owe them to each other. Stakeholders and the wider society should also be empowered to assert them through national law. Since some commitments enhance the business environment, there might be merit in owing some of these obligations towards all businesses, as well.

State obligations beyond investment protection, like investor obligations, can change the international investment regime. In combination or on their own, they can add legitimacy and promote consistency in the prevalent investment treaty regime that is backed by investor–state arbitration, or they could support a move towards an altogether different system with an alternative dispute settlement mechanism allowing for a broader and more active involvement of states and communities.

African countries looking for formulas for an investment regime more attuned to their realities have experimented in their regional investment treaties with state obligations pertaining to both regional integration and sustainable development (table 3.7). But a fault line has once more appeared between the generally more comprehensive REC treaties and other treaties that extend to countries outside Africa.

Table 3.7 State commitments besides investment protection in African regional treaties

TYPE OF COMMITMENTS			ARAB LEAGUE (2013)	AMU (1990)	COMESA (2018)	ECOWAS (2018)	OIC (1981)	SADC (2016)	AFRICAN UNION´S PAIC (2016)
Regional integration		Transparency a)			Binding	Binding		Binding	
		Liberalization			Binding	Binding		Binding	
		Policy cooperation and/or harmonization			Binding	Binding		Binding	Non-binding
		Investment attractiveness			Binding				
		Home State obligations				Binding			
		Support for least-developed countries						Binding	
		Taxation			Non-binding	Binding		Binding	Non-binding
		Transfer pricing				Binding			
		Corruption			Binding	Binding			
		Entrepreneurs and productive capacities						Binding	
		Cooperation on financial regulation and supervision							Non-binding
	AfCFTA Phase I and II policy issues	Trade				Binding		Binding	
		Competition policy			Binding	Non-binding			Binding
		Consumer protection			Binding	Binding			Binding
		Intellectual property right				Binding			Binding
Sustainable development		Race to the bottom				Binding		Non-binding	Non-binding
		Social inclusion				Binding			
		Adherence to international treaties				Binding			
		Cultural and linguistic diversity							Non-binding
		Environment and natural resource				Binding		Binding	Binding
		Labour and capacity development			Binding	Binding			Non-binding
		Corporate governance			Non-binding	Binding			Non-binding
		Technology transfer				Binding			Binding

Binding obligations Non-binding obligations

a) Overlaps with investment facilitation.
Note: The African Union's PAIC is a model investment agreement.
Source: Regional investment treaties

All newer generation intra-African regional treaties cover transparency, obliging host states to inform other countries of new measures that affect investment, bolstering investment facilitation.

All newer generation intra-African regional treaties cover transparency, obliging host states to inform other countries of new measures that affect investment, bolstering investment facilitation. They also promote market opening, fitting the idea that regional treaties go beyond protecting current and future investors to serve the broader objective of integrating economies. Similarly, state commitments can provide a framework for policy cooperation and harmonization progressing towards a common market. For instance, the Ministerial Committee of COMESA would be empowered under the new COMESA investment treaty to make proposals for regional standards across several policy areas.[375] But in the treaties developed by North African countries, these additional state obligations are missing.

State obligations can complement investment protection revisions to orient investment treaties more towards sustainable development. In Africa, all the new regional treaties contain commitments to prevent states from lowering labour or environmental standards as an opportunistic strategy to improve their investment attractiveness. Even so, the strength of this particular provision differs from treaty to treaty. Unlike the ECOWIC and the CCIA, the SADC treaty does not seem to create a hard provision: instead of using the typical term "shall," the SADC treaty uses the terms "recognizes and agrees not to."

Sustainable development commitments seek to raise countries' commitments and level them, and they can relate to other social, economic and environmental issues. The ECOWIC has the broadest ambition, covering many policy areas under investor obligations, including environmental protection, labour capacity development and corporate governance standards. In contrast, the PAIC clothes many of these obligations in less stringent language.

Investment (and trade) treaties are among the many sources of international obligations that states take upon themselves in the economic realm (see box 3.3) or under other aspects of policy. Some provisions in the regional treaties deal with policy areas that come under the AfCFTA and are driven by the recognition of the importance of regional linkages between investors and other economic actors (chapter 2). Regional treaties are also influenced by the different approaches, concerns and maturities of institutions in individual countries and subregions (chapters 4 and 5). Regional treaties' provisions reveal a growing engagement with a wider set of policy areas combining trade, investment and behind-the-border issues and barriers. Eventually, protocols tailored for these areas will deal with them individually. So, not only do the individual protocols need substantive and procedural alignment with each other at the continental level,[376] but their mutual

interrelations, once the relevant regional treaties come into force, need attention.

Investment promotion can leverage a country's track record in living up to its international obligations, often contained in other international treaties. Investment protection, in contrast, can put the investment regime on a collision course with other international obligations. States may have to observe international obligations regarding corruption, health, the environment and human rights, among others. And future agreements will bring regulations of the digital economy (chapter 6), which could affect some companies' business models. These tensions underscore host states' need for a clear and reliable right to regulate, reaffirming and preserving their regulatory power without triggering liability towards investors. A recourse to state commitments could help shape this right to regulate.

Conclusion and policy recommendations

The evolving African investment regime reflects an ever-stronger emphasis on sustainable development. Different approaches between countries and regions and between regulatory layers obscure the clarity and predictability of investment rules on the continent. The differences can raise transaction costs for investors and stoke uncertainty for states. Investment rules are also insufficiently aligned with other bodies of international law, reducing their ability to promote sustainable development.

The AfCFTA Investment Protocol, building on existing regional integration initiatives, will be a new milestone of regional integration in investment. The protocol ought to aim at a robust and forward-looking regulatory regime that attracts sustainable investments and creates synergies between private and societal benefits. To simplify the current tangle of investment rules, it must clarify linkages with the other AfCFTA protocols, existing international investment agreements and other types of international law and domestic legislation.

The international legal and policy landscape surrounding continental integration must be kept in view. African policymakers should leverage their shared vision of sustainable investment and responsible investor conduct to tackle regional and bilateral treaties with third countries. The AfCFTA negotiations present policymakers a singular chance to articulate a common state-of-the-art investment policy and, based on that shared platform, engage in parallel global debates.

The AfCFTA Investment Protocol, building on existing regional integration initiatives, will be a new milestone of regional integration in investment.

Behind technical details loom strategic choices about the place of the Investment Protocol in the regulatory kaleidoscope. African countries must formulate a shared understanding of how the Investment Protocol relates to the other dimensions and levels of investment laws and the timelines of African regional integration. The AfCFTA embodies an ambitious project connecting, and ultimately liberalizing, the African markets. Rule harmonization can create a robust, transparent and enabling legal environment to lower transaction costs and attract investment. But states could need a system of flexibilities to implement approaches tailored to their local social, economic, environmental and institutional needs—essential factors in developing a functional level playing field. A shared system of flexibilities to maintain rule predictability needs to be agreed, since exceptions and opt-outs could fragment the legal environment and hollow out continental ambitions.

Both institutional arrangements and legal substance laid down by the Investment Protocol matter. Carefully designed investment protection guaranteed by accessible, speedy and reliable dispute settlement mechanisms can manage lingering perceptions of investment risk without endangering policy space. Investment law

stating investor obligations and state commitments besides investment protection can bolster other types of international obligations and create conditions in which capital commitments translate into development outcomes.

African policymakers should capitalize on the continental dialogue around the AfCFTA to forge a common vision of promotion and facilitation that could be leveraged in global negotiations. They should keep investment facilitation decoupled from investment protection to prevent the ratcheting up of obligations towards investors.[377] A common African approach could emphasize responsible and sustainable investments, with concomitant obligations for both home and host countries.[378] And other steps can support intra-African investment flows—such as standardizing information and promotional materials, holding virtual meetings for business communities, teaming up regional inward and outward promotion agencies and creating a joint online investment promotion platform.[379] African countries could consider cooperating on a single electronic window to attract and service investment inflows as regional integration and rule harmonization deepen.

African policymakers should capitalize on the continental dialogue around the AfCFTA to forge a common vision of promotion and facilitation that could be leveraged in global negotiations.

A delicate balance on investment protection is needed. If a strong or more conservative continental investment protection regime backstops investment disputes, it could raise costs for states and perhaps weaken acceptance of the entire regime. But weak protection would fail to reassure cautious investors, who might restructure their investments to take advantage of alternative treaties, try to negotiate individual contracts (possibly under foreign law), look for investment insurance or simply move on to business opportunities elsewhere.

Furthermore, if the reform efforts on investment protection at the UNCITRAL Working Group III—and to some extent those at ICSID—bear fruit, they will shape the global legal investment environment into which the AfCFTA will fit. So, Africa should harness its unique experiences and know-how to actively participate in the negotiations and to help determine a framework with a more balanced approach at its core.[380] For African interests, the UNCITRAL intersessional regional meeting on investor–state dispute settlement reform hosted by Guinea in September 2019 in collaboration with Francophonie was an important event. Some 33 African delegations exchanged views on reforms in the context of new initiatives on the continent, including the AfCFTA.[381]

Investor obligations cannot be disconnected from other key planks of investment treaties, and states need to create conditions supporting their fulfilment.[382] And state commitments, additional obligations states consent to bring upon themselves—should be unambiguous about what they contain and to whom they are owed. Investor obligations and additional state commitments that translate poorly into concrete actions can exacerbate perceived risk.

An ambitious AfCFTA Investment Protocol, revolutionizing the investment landscape in Africa, would likely lead to new legal and institutional demands on African states. The protocol, however, should not eclipse domestic institutions. In combination, the protocol and institutions can bolster attractive investment conditions, but the malfunctioning of one would undermine the other. National laws and regulations are vital in attracting, retaining and enlarging the capital stock. Without empowered national implementing institutions, cross-continental investment facilitation is impossible. Weak or unpredictable policy and regulatory regimes deter investment and raise the risks of disputes with investors. To give countries time and space to prepare, the protocol could be phased in gradually, as typically happens in trade deals. Peer learning, collaboration, capacity building and the involvement of regional bodies should be encouraged so countries build the necessary foundation for the prospective common African investment area.

Transparent and participatory mechanisms ought to be established to foster rule harmonization and the execution of an ambitious and comprehensive agenda catering to the developmental needs of African countries. That agenda should be informed by the needs of communities, businesses and other stakeholders on the continent. And strong and decisive political will is needed. If the AfCFTA Investment Protocol negotiations lose momentum, some regions may want to push ahead with deeper local integration, which could complicate continental integration down the line.

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End notes

186 Anyanwu, 2006.
187 Polanco Lazo, 2018; Sauvant, 2020.
188 ECA, 2016a.
189 ECA, 2016a.
190 Mbengue, 2016.
191 ECA, 2020a; Alvik, 2020.
192 The African Union Member State Experts recommended in their report on their Meeting on the Consideration of the Pan-African Investment Code (PAIC) and the African Inclusive Market Excellence Center (AIMEC) in November 2016 that the PAIC be used as a "reference framework document in the negotiation of the [Af]CFTA investment chapter."
193 Mbengue and Schacherer, 2017; Kidane, 2018.
194 Mbengue, 2019.
195 ECA, 2019a.
196 The African Union Member State experts recommended in their report on their November 2016 Meeting on the Consideration of the Pan-African Investment Code (PAIC) and the African Inclusive Market Excellence Center (AIMEC) that the PAIC be used as a "reference framework document in the negotiation of the [Af]CFTA investment chapter." The PAIC was adopted by African Union Member States in 2017 as a non-binding guiding instrument (Mbengue and Schacherer, 2017; Kidane, 2018)
197 Pàez, 2017; El-Kady, 2020.
198 Franck, 2005; Kahale III, 2012; Kurtz, 2014.
199 ECA, 2016b.
200 EU, 2020.
201 The AfCFTA agreement permits a deeper level of integration to persist in the individual RECs until the AfCFTA achieves a sufficiently "high level of integration" to supersede the REC's purpose in the particular competencies covered by the AfCFTA agreement. As per Article 19(2): "(1) In the event of any conflict and inconsistency between this Agreement and any regional agreement, this Agreement shall prevail to the extent of the specific inconsistency, except as otherwise provided in this Agreement. (2) Notwithstanding the provisions of Paragraph 1 of this Article, State Parties that are members of other regional economic communities, regional trading arrangements and custom unions, which have attained among themselves higher levels of regional integration than under this Agreement, shall maintain such higher levels among themselves". It is also worth noting the general objectives of the treaty in article 3, which are, among others to "(d) . . . lay the foundation for the establishment of a Continental Customs Union at a later stage" and "(h) resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes."
202 Ejims, 2020.
203 Domestic, national and municipal law will be used interchangeably in relation to host state's laws, unless otherwise specified.
204 ECA, 2019a.
205 It is not the approach pursued, for instance, by the 2013 ASEAN Comprehensive Investment Agreement, the 2017 Intra-MERCOSUR Cooperation and Facilitation Investment Protocol, the 2018 United States-Mexico-Canada Agreement, the 2018 Comprehensive and Progressive Agreement for Transpacific Partnership or the 2020 Regional Comprehensive Economic Partnership (not in force).
206 Gaukrodger, 2014.
207 Happold and Radović, 2018.
208 ECA, 2019a; El-Kady, 2020.
209 Voon and Mitchell, 2016.
210 Atanasova, 2019; Cotula and Gathii, 2019; Hepburn, 2017; Sasson, 2017.
211 Liberia has three bilateral investment treaties in force: with Germany (1961), Switzerland (1979) and France (1979).
212 Salacuse, 2013.
213 Dolzer and Schreuer, 2012.
214 Malik, 2011; Moussly, 2019.
215 De Brabendere, 2017; El-Kady and De Gama, 2019; see Avayiwoe (2019) for Ghana.
216 Ndulo and Chase, 2020; see also Ejims, 2019; Zugliani, 2019. The 2016 bilateral investment treaty between Nigeria and Morocco has not yet entered into force. While Nigeria has not concluded a similar treaty since, Morocco has signed new treaties with Republic of Congo in 2018 and Japan in 2020, which miss many of the innovative features of the treaty with Nigeria.
217 ECA, 2019a.
218 See Berge and Stiansen (2016) for international investment agreements, but their argument equally applies to contracts.
219 UNCTAD, 2014a, 2018c.
220 Ngobeni and Fagbayibo, 2010.
221 Sornarajah, 2017.
222 Salacuse, 2013.
223 Ahooja, 1964.
224 Kidane, 2017.
225 Abdel Wahab, 2019.
226 Ahooja, 1964; Lavroff, 1969.
227 Aleksandrovskaia, Matsenko and Schultz, 1976.
228 Rood, 1976.
229 Rempel, 2008.
230 UNCTAD, 1999, ECA, 2016a, 2020b.
231 UNCTAD, 1995.
232 da Cruz, 2020.
233 Anseeuw et al., 2012; see, for example, ECA (2014) for land rules in in large-scale investment; Ofodile (2014) for investment treaties, contracts and land issues.
234 Acemoglu and Robinson, 2013.
235 Haggard, MacIntyre and Tiede, 2008; Salacuse, 2013.
236 Boyle, 2012; Mo Ibrahim Foundation, 2018.
237 WJP, 2020.
238 Baruti, 2017; Schill, 2017a; Mbengue, 2019.
239 African regional treaties dedicated to investment also include the 1982 Community Investment Code of the Economic Community of the Great Lakes Countries (in force), the 1965 Common Convention in Investments in the States of the Customs and Economic Union of Central Africa (in force) and the 2003 ECOWAS Energy Protocol (not in force).
240 Ngobeni and Fagbayibo, 2010.
241 Denters and Gazzini, 2017: 452.
242 Alschner and Skougarevskiy, 2016.
243 UNCTAD, 2020b.
244 Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others, 2011.
245 Aréou, 2020.
246 Chidede, 2019a; El-Kady and De Gama, 2019; Mbengue, 2019.
247 Ghanaweb, 2020.
248 ECA, 2019a.
249 Wells and Wint, 2000; Harding and Javorcik, 2012, 2013.
250 WAIPA, 2019; World Bank and WAIPA, 2020.
251 UNCTAD, 2020d; WAIPA, 2020.
252 Berger and Gsell, 2019; Hamdani et al., 2020; Hees and Mendonça Cavalcante, 2017; Hees, Moraes and Mendonça Cavalcante, 2018; UNCTAD, 2016.

253 Hees, Moraes and Mendonça Cavalcante, 2018; Novik and de Crombrugghe, 2018; UNCTAD, 2017.
254 Volpe Martincus et al., 2020.
255 UNCTAD, 2018b.
256 UNCTAD, 2013a; UNCTAD, 2014b.
257 UNCTAD, 2013b.
258 UNCTAD, 2017.
259 Arriagada Peters, 2020; Berger and Gsell, 2019; de Oliveira, 2020; see also UNCTAD (2008) for policy advocacy.
260 UNCTAD, 2017; Coleman et al., 2018; Polanco Lazo, 2018.
261 Bermann et al., 2020.
262 Sauvant et al., 2019; Hees and Mendonça Cavalcante, 2017.
263 WTO, 2017.
264 Bermann et al., 2020; Francke, 2020.
265 Sauvant, 2020.
266 Benin, Guinea, Liberia, Nigeria and Togo (Berger and St John, 2020).
267 Berger and Gsell, 2019; Kanth, 2017; Mann and Brauch, 2019.
268 Sauvant et al., 2019.
269 Sauvant et al., 2019.
270 ECA, 2019a: box 6.6; Monebhurrun, 2017; Morosini, Perrone and Sanchez-Badin, 2019. By August 2020, Brazil had concluded Investment Cooperation and Facilitation Treaties with five African counterparts, most recently Morocco in June 2019.
271 EC, n.d.; Egan and Guimarães, 2017; Galetta, 2014; Kokolia, 2018.
272 UNCTAD, 2019.
273 Baruti, 2017.
274 Analysis of the AMU treaty is based on an unofficial translation from the Arabic original.
275 Mbengue, 2020.
276 Polanco Lazo, 2018.
277 UNCTAD, 2007.
278 ECA, 2019a.
279 Hees, Moraes and Mendonça Cavalcante, 2018.
280 de Oliveira, 2020.
281 UNCTAD, 1995.
282 UNCTAD, 2018b, UNCTAD, 2018c; UNCTAD, 2019.
283 World Bank and WAIPA, 2020.
284 Singh, 2018.
285 Arriagada Peters, 2020; Sauvant, 2020.
286 ECA, 2019a.
287 Berger, Dadkhah and Olekseyuk, 2020.
288 Bonnitcha, Skoygaard Poulsen and Waibel, 2017.
289 Sornarajah, 2017.
290 Stephan, 2014.
291 ECA, 2019a; Pohl, 2018.
292 Van Harten and Loughlin, 2006; for a broader discussion, see ECA (2020b) and UNCTAD (2015).
293 Nichols, 2018; Dimitropoulos, 2020.
294 Alvarez et al., 2016; Bernardini, 2017; Schwebel, 2015.
295 Cotula, 2018.
296 Behn, Langford and Létourneau-Tremblay, 2020.
297 Arato, Brown and Ortino, 2020; Franck, 2005; Kabra, 2020; Zarra, 2018.
298 Schwebel, 2015.
299 Alschner, 2020; Franck, 2005; Ortino, 2012.
300 Branson, 2010; Bernasconi-Osterwalder, Johnson and Marshall, 2010; Donaubauer, Neumayer and Nunnenkamp, 2018; Fernández Masiá and Salvadori, 2020; Langford, Behn and Lie, 2017; Puig and Strezhnev, 2016; Van Harten, 2018.
301 Bjorklund et al., 2020; Kidane, 2017; Soopramanien and Soopramanien, 2016.
302 Perrone, 2019.
303 Chaisse, 2015.
304 Garcia, 2018; Guven and Johnson, 2019; ICCA-Queen Mary Task Force, 2018; Santosuosso and Scarlett, 2019.
305 According to UNCTAD (2018d), the median award in favour of investors was $20 million. The average was $504 million or $125 million depending on whether three cases against Russia over the oil and gas company Yukos were included.
306 Pelc, 2017: box 5.
307 Bonnitcha, Skoygaard Poulsen and Waibel, 2017; Behn, Langford and Létourneau-Tremblay, 2020; Spears, 2010; UNCTAD, 2015.
308 Nunnenkamp, 2017; Rao, 2019. See also Faure and Ma (2020) and Sweet, Chung and Saltzman (2017).
309 Behn, Berge and Langford, 2017–2018.
310 Franck and Wyllie, 2015.
311 Behn and Daza (2019) report that the average duration of ISDS proceedings is about 3.7 years, that delays are usually caused by parties and that proceedings may not be particularly long compared with other types of dispute settlement. See also Álvarez Zárate et al., 2020.
312 The average cost for claimants is $6.1 million, and the cost for respondents, $5.2 million. Average tribunal fees are about $950,000, with a median of $750,000 million (Behn and Daza, 2019, cited in Behn, Langford and Létourneau-Tremblay, 2020).
313 Bottini et al., 2020.
314 Alcolea, 2020; Doward, 2020; UNCTAD, 2020c.
315 Thakur, 2020; Tienhaara, 2006, 2018.
316 Baltag and Dautaj, 2020; Behn and Langford, 2017.
317 Ortino, 2018.
318 Bonnitcha, Skoygaard Poulsen and Waibel, 2017; Moehlecke, 2020.
319 Alet, 2018; Economist, 2014; Pauwelyn, 2015.
320 UNCITRAL, 2018.
321 UNCITRAL, 2018.
322 Bernardini, 2017.
323 Dimitropoulos, 2020; Kelsey, Schneiderman and Van Harten, 2020.
324 Langford et al., 2020.
325 Roberts and St John, 2019a; Schill and Vidigal, 2020.
326 Langford et al., 2020.
327 Chidede, 2019a; Roberts and St John, 2019b.
328 By December 2020, 46 "contracting states," had signed and ratified the ICSID Convention and three "signatory states," had not yet ratified the treaty—Ethiopia, Guinea-Bissau and Namibia. Angola, Equatorial Guinea, Eritrea, Libya and South Africa have never signed the convention.
329 Ramos Codeço and Martins Sachetim, 2020.
330 Under the ICSID convention, which is not subject to review, both parties must express consent for the final award to be made public.
331 To be adopted, the rules must be accepted by a two-thirds majority of Member States.
332 Titi, 2018, UNCTAD, 2020e.
333 ECA, 2019a: box 6.6.
334 Hanessian and Duggal, 2015; Leikin, Gadodia and Loudon, 2018; Rajput, 2016.
335 Duggal and van de Ven, 2019.
336 El-Kady and Rwananga, 2020.
337 UNCTAD, 2020b.

338 Chidede, 2019b; Mbengue, 2019. Akinkugbe (2019) also underlines the part African states have played as respondents in developing the existing ICSID case law and elucidating key concepts and rules.
339 Mbengue, 2017: 372. See also Baruti (2017) and Gazzini (2014).
340 Schill, 2017a.
341 Dolzer and Schreuer, 2012; OECD, 2004; UNCTAD, 2012.
342 Alter, Gathii and Helfer, 2016.
343 Happold, 2018; Happold and Radović, 2018.
344 Mouawad and Khoury, 2017.
345 Ebere, 2016.
346 El-Kady, 2014; Hasaan, 2019.
347 Ben Hamida, 2013.
348 Bennadji, 2019.
349 Živković, 2019: 528.
350 The first investment codes in Africa were enacted by Côte d'Ivoire in 1959 and Cameroon the following year.
351 Cotula, 2020.
352 See, for example, the status of African countries' acceptance of current international transaction obligations under the International Monetary Fund's Article VIII (which prevents restrictions of payments and transfers for current international transactions with other members) and the provsional regime of Article XIV (IMF, 2019).
353 See, for example, Getma v. Guinea (ICSID Case No. ARB/11/29) regarding the termination of a concession contract which contained a clause that selected the Common Court of Justice and Arbitration (CCJA) of the Organization for the Harmonization of Business Law in Africa (OHADA) as an exclusive domestic arbitration dispute resolution.
354 Mbengue, 2012.
355 Botchway, 2019.
356 Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Republic of Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal and Togo.
357 Ben Hamida, 2019; Douajni, 2020.
358 Ceesay, 2020; Enaw, 2018.
359 UNCTAD, 2015; Bernasconi-Osterwalder, 2019.
360 Cotula, 2018.
361 Bernasconi-Osterwalder et al., 2018.
362 Krajewski, 2020.
363 Dumberry and Aubin, 2013; Santacroce, 2019; Sattorova, 2019.
364 Choudhury, 2020.
365 Ishikawa, 2019; Fernández Masiá and Salvadori, 2020.
366 ECA, 2019a.
367 UNEP and IISD, 2016.
368 Fouchard Papaefstratiou and Shihoor, 2019.
369 AUC and ECA, 2013; ECA, 2018a; UNCTAD, 2020a.
370 Cotula, 2020.
371 Oluonye, 2020.
372 This provision appears to be an echo of the earlier ECOWAS Investment Code, under which acts or decisions resulting "significant damage, personal injuries or loss of life in the host State" were subject to civil action in the host state. Furthermore, the treaty requested that countries enabled the filing of lawsuits against investors in their home economies for transgressions in the host countries while applying the latter's liability rules.
373 ECA, 2019a.
374 Cotula, 2018. Externalizing the costs of investment upon local communities by relaxing labour or environmental standards may produce immediate benefits but impedes the long-term development of the host state (ECA, 2019a).
375 The indicative list of policy areas includes human rights, corruption, labour standards, conduct in conflict zones, subsidies and incentives and environmental and social impact assessments.
376 ECA, 2019a.
377 ECA, 2019a; Bermann et al., 2020.
378 Cotula, 2020.
379 UNCTAD, 2015.
380 Chidede, 2019a.
381 Government of Republic of Guinea, 2019.
382 ECA, 2019a.