Towards a Common Investment Area in the African Continental Free Trade Area

Levelling the Playing Field for Intra-African Investment

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Economic Commission for Africa

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Foreword

The global pandemic could not have hit us harder. We have seen health systems and economies come under severe strains with COVID-19. Much of the past two decades' progress to achieve the Sustainable Development Goals has been curbed or reversed. Increased unemployment, negative growth and dwindling trade and investment have increased poverty at all levels.

Bringing down the numbers of reported cases and deaths has required countries to introduce various, sometimes very drastic, measures, including lockdowns damaging the economic and social sectors. The struggle has also accentuated two reflections. First, this global public bad forces us to fight the battle and win together, not in isolation. Second, and more important, it has curbed progress towards sustainable development and demanded more than ever the resilience and flexibility to manage development in the post-pandemic era.

The fight against the pandemic remains hard-fought on all fronts. For Africa, it has also brought many challenging opportunities, including the call for us to innovate in handling global health issues and their impact on the wider economy. In many ways, COVID–19 has forced us to accelerate and implement measures beyond any we could have conceived of in the past. For example, we have been able to test Fourth Industrial Revolution digital solutions that might otherwise have taken us years to fast-track and deploy.

In this context, I see encouraging opportunities for Africa to leapfrog onto the digital bandwagon by advancing the regional integration agenda under the African Continental Free Trade Agreement. We have learned through our analytical work on COVID–19 that trade, more than ever before, is a lifeline for the continent and its people to face both the health crisis and the consequent economic crisis. Trade within Africa has been more resilient than trade with the rest of the world. So, creating markets, eliminating market distortions (including trade protectionism) and achieving greater market functionality are necessary to counter COVID's negative effects. A great digital initiative, spearheaded by ECA, that puts this affirmation to the test is the African Medicines Supply Platform and the opportunity it presents for pooled procurement of much-needed medicines and equipment to fight COVID–19 at low cost.

We must turn despair into opportunity. More than ever before, African Union Member States, the private sector and African citizens are being called upon to think outside the box. In envisaging how we can take on this challenge, I see the AfCFTA as a development game changer. I am therefore convinced that we must advance the AfCFTA Phase II protocols on investment, competition and intellectual property, jointly with one on e-commerce. The digital economy, a critical sector for building back better by becoming more resilient, will bolster opportunities in investment, competition and intellectual property, as this report highlights.

The pandemic has ushered in a new reality. We cannot win the fight against it by operating only in a crisis management mode. Setting the stage for the post-crisis “new normal” will require targeted policy measures to continue attracting much-needed investment—domestic, intra-African and global—in investment markets expected to be crowded and dwindling. Investments are projected to fall by at least 40 per cent from pre-pandemic levels by the end of 2021, setting back many social and economic indicators.

The responses advocated by the wider UN family and by us in ECA to counter the likely impact on development financing include debt pardoning, fiscal easing and more recently a freeze on disputes arising from governments unable to honour their commitments under investment agreements due to measures they are taking to fight the pandemic. This report advocates measures against COVID specific to investment policy supported by the African Continental Free Trade Agreement to secure and enhance gains from the common market for African businesses and citizens.

Against this backdrop, I believe more than ever that the 2020s must be a decade of action for Africa in attaining the Sustainable Development Goals. And the African Continental Free Trade Agreement provides an opportunity to challenge our biggest opponent, the COVID–19 pandemic. The game is on.

Vera Songwe

United Nations Under-Secretary-General and
Executive Secretary of the Economic Commission for Africa

Acronyms

2IPD	Integrated Index for Postal Development
4IR	Fourth industrial revolution
ACF	African Competition Forum
ACP	African, Caribbean and Pacific Group of States
ACTA	Anti-Counterfeiting Trade Agreement
AfCFTA	African Continental Free Trade Area
Afreximbank	African Export-Import Bank
Africa CDC	Africa Centres for Disease Control and Prevention
AI	Artificial intelligence
AIC	Arab Investment Court
AMA	African Medicine Agency
AMSP	Africa Medical Supplies Platform
AMU	Arab Maghreb Union
ARIA	Assessing Regional Integration in Africa
ARIPO	African Regional Intellectual Property Organization
ASEAN	Association of Southeast Asian Nations
ATM	Automated teller machine
AU	African Union
AUC	African Union Commission
B2B	Business-to-business
B2C	Business-to-consumer
B2G	Business-to-government
BIPPAs	Bilateral Investment Promotion and Protection Agreements
BRICS	Brazil, India, China and South Africa
C2C	Consumer-to-consumer
CCBA	Coca Cola Beverages Africa
CCC	COMESA Competition Commission
CCIA	COMESA Common Investment Area
CCJA	Common Court of Justice and Arbitration
CEMAC	Central African Economic and Monetary Community
CEN-SAD	Community of Sahel–Saharan States
CoD	Cash on delivery
COMESA	Common Market for Eastern and Southern Africa
COVID–19	Coronavirus disease 2019
DFTA	Digital Free Trade Area
DTS	Digital Transformation Strategy
EAC	East African Community
EAPS	East African Payment System
ECA	United Nations Economic Commission for Africa
ECCAS	Economic Community of Central African States

e-CoO	Electronic certificate of origin
ECOWAS	Economic Community of West African States
ECOWIC	ECOWAS Common Investment Code
EFT	Electronic fund transfer
EGDI	E-Government Development Index
EMMEs	Emerging market multinational enterprises
EU	European Union
FDI	Foreign direct investment
fDi	Greenfield foreign direct investment projects
FRAND	Fair, reasonable and non-discriminatory
FTA	Free trade area/agreement
GDP	Gross domestic product
GDPR	General Data Protection Regulation
GERD	Gross expenditure in research and development
GVCs	Global value chains
HATC	High-Level African Trade Committee
HIV/AIDS	Human immunodeficiency virus/acquired immunodeficiency syndrome
ICSID	International Centre for Settlement of Investment Disputes
ICT	Information and communications technology
IFC	International Finance Corporation
IGAD	Intergovernmental Authority on Development
IIAs	International Investment Agreements
ILO	International Labour Organization
IMF	International Monetary Fund
IoT	Internet of things
IP	Intellectual property
IPAs	Investment promotion agencies
IPRs	Intellectual property rights
ISDS	Investor–state dispute settlement
ISO	International Standards Organisation
IT	Information technology
ITU	International Telecommunication Union
LDCs	Least-developed countries
LLL	Link, leverage and learn
M&As	Mergers and acquisitions
MMM	Mavrodi Mundi Moneybox
MNEs	Multinational enterprises
MoICT	Ministry of Information Communications and Technology (Kenya)
MSMEs	Micro, small and medium enterprises

OAPI	Organisation Africaine de la Propriété Intellectuelle
OECD	Organisation for Economic Co-operation and Development
OHADA	Organisation for the Harmonisation of Corporate Law in Africa
OIC	Organisation of Islamic Cooperation
OLI	Ownership, location and internalization
PAIC	Pan-African Investment Code
PAIPO	Pan-African Intellectual Property Organization
PAPSP	Pan-African Payments and Settlements Platform
PCA	Permanent Court of Arbitration
PE	Permanent establishment
POS	Point of sales
PPDP	Guidelines on Privacy and Personal Data Protection
PPE	Personal protective equipment
PPPs	Public–private partnerships
R&D	Research and development
RDB	Rwanda Development Board
RECs	Regional economic communities
REPSS	Regional Payment and Settlement System
SAATM	Single African Air Transport Market
SACU	Southern African Customs Union
SADC	Southern African Development Community
SARS	Severe acute respiratory syndrome
SDGs	Sustainable Development Goals
SEPs	Standard essential patents
SIRESS	SADC Integrated Regional Electronic Settlement System
SMEs	Small and medium enterprises
STISA	Science, Technology and Innovation Strategy
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UPOV	International Union for the Protection of New Varieties of Plants
US	United States
VAT	Value-added tax
WAEMU	West African Economic and Monetary Union
WAIPA	World Association of Investment Promotion Agencies
WAMZ	West African Monetary Zone
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
ZIDA	Zimbabwe Investment and Development Agency

Overview

Responsible investments creating jobs, generating taxes to reinvest in the local economy, complying with domestic regulations and promoting corporate social responsibility are needed more than ever to catalyse Africa's development. But foreign direct investment (FDI) in Africa was already in decline before the COVID–19 pandemic— in 2019 it was down 10.3 per cent from 2018. At $45.4 billion, Africa's share of global FDI in 2019 was a low 2.9 per cent.[1]

FDI in Africa remained strongly skewed towards the primary sector. Though 2019 saw increased investments in the service and manufacturing sectors, the lion's share went to natural resources such as oil and gas, responding to growing demand and anticipated new discoveries. That resource-seeking bias limits Africa's structural transformation prospects, keeping the continent from channelling more FDI towards such promising sectors as the digital economy. The bias, coupled with many countries' slow progress in making reforms to open structural productivity bottlenecks, is likely to stifle the continent's growth.

For most of 2020, prospects worldwide were dampened by rising protectionism and the COVID–19 pandemic, stiffening the competition among countries seeking investment. How might this affect Africa in its quest for structural transformation? The continent will require out-of-the-box thinking for development financing, going beyond unpredictable official development assistance and uncertain amounts of FDI—the traditional sources—distributed unevenly across countries and sectors. And with the outbreak of COVID–19 and its associated costs, new financing is required more than ever by African countries to build back better. Africa must thus turn to alternative finance for more productive investment in sectors contributing to lasting growth.

The African Continental Free Trade Area (AfCFTA) will help generate the financial resources needed to underwrite Africa's economic development. It aims to achieve an integrated African market where goods, people, services and capital circulate freely, complementing regional integration efforts for the benefit of the continent's 1.3 billion people. The AfCFTA's market has a combined gross domestic product of $2.5 trillion. It was officially launched on 21 March 2018 in Kigali, when 44 African Union (AU) Member States signed the Agreement Establishing the African Continental Free Trade Area. It came into force on 30 May 2019 following the deposit of the ratification instrument by the 22nd AU Member State. Its operational phase was launched in July 2019. Trading under AfCFTA rules began on 1 January 2021.[2]

The continent will require out-of-the-box thinking for development financing, going beyond unpredictable official development assistance and uncertain amounts of FDI—the traditional sources—distributed unevenly across countries and sectors.

Accompanying the AfCFTA agreement, Phase I negotiations led to the adoption of protocols on trade in goods, trade in services and dispute settlement. These complement existing AU instruments: the protocol on the Free Movement of Persons, Right of Residence and Right of Establishment, and the Yamoussoukro Decision on the Single African Air Transport Market. Work is incomplete on the Phase I negotiations to resolve the remaining 10 per cent of rules of origin and submit tariff/services offers from additional countries. At the 13th Extraordinary Session on the AfCFTA on 5 December 2020, it was agreed that the outstanding work would finish by June 2021. A Phase II will encompass protocols on investment, competition and intellectual property. The Phase II negotiations should deepen regional integration efforts on investment by harmonizing investment rules among individual African countries.[3] And if the investment regulation developed is coherent with competition and intellectual property regulation, opportunities will materialize for an African market rid of domestic and behind-the-border barriers, promoting the free circulation of goods, services and people and the transfer of embedded capital, innovation, technology and competitive capacity. Phase II negotiations were originally expected to conclude by the end of 2020 but, due to the COVID–19 pandemic, the deadline for negotiations is now 31 December 2021. A Phase III covering an E-commerce Protocol is also envisaged. Recognizing the interdependence of Industry 4.0, investment and e-commerce, as well as the growing significance of e-commerce in African economies during the pandemic, it was decided that Phase III negotiations must conclude at the same time as those of Phase II at the end of 2021.

In sum, the AfCFTA provides the prerequisites for a continental market. If coupled with the dismantling of digital barriers to the flow of capital across the continent, it will boost intra-African investment, which concentrates heavily in services, particularly insurance, retail banking and telecommunications—unlike FDI from outside the continent, which targets the natural resources sector. The bulk of investment in services in Africa, especially in finance, reflects features driving firms to expand on the continent but not beyond. And the AfCFTA, through its infrastructure and industrialization pillars, has the potential to unleash the industrial capacity of African countries to trade more with each other. But for the continent to do that, more investment is needed.

The AfCFTA's potential can be unleashed if investment in Africa targets the right sectors. For example, investment in transboundary infrastructure can help the continent take advantage of regional value chains. Greater industrial trade could further attract investment, thereby promoting opportunities for vertical integration and value addition.[4] Boosting intra-African investment, especially industrial investment, coupled with infrastructure investment, could promote diversification that also embraces the digital economy.

Linking investment with behind-the-border issues

Investment is the entry point for considering competition, intellectual property and digitalization, which are traditionally treated as "behind the border" since domestic market regulations and policies largely determine market access. Foreign direct investment grapples with such issues—unlike portfolio investment, which generally takes an arms-length approach to investing as long as the returns outweigh the risks and costs of that investment. In contrast, FDI entails transferring other tangible and intangible assets, such as managerial capacity, value chain connectivity, industrial know-how and technology, among others, that are part of the investing firm. The intangible assets are hardest to measure and yet most valued for their potential dynamic impact on an economy.

Investment is the entry point for considering competition, intellectual property and digitalization, which are traditionally treated as "behind the border" since domestic market regulations and policies largely determine market access.

Trade openness has a positive relationship with FDI, including agglomeration effects in African subregions or countries.[5] An array of other locational factors also have positive relationships with FDI, including market size, efficient legal systems, political stability[6] and a good business environment.[7]

Regional and intra-African FDI in recent years have been increasingly geared towards the service economy. Financial services, such as commercial banking and insurance,[8] have taken as much as 50 per cent of intra-African greenfield investment in 2003–2014.[9] That trend also reinforces the notion that more trade openness could promote wider trade in financial services and thereby attract more investment to finance Africa's structural transformation and development.[10]

Competition

In the context of the AfCFTA, coherent competition rules and regulatory approaches are crucial. Competition can play a key role in helping African countries stimulate and attract investment to achieve inclusive growth and sustainable development. In many African countries, markets are restricted by business practices that undermine competitive dynamics and by government actions that create barriers to healthy competition.[11] Fewer than half of Africa's national economies have competition laws and effective authorities to enforce them and so are genuinely ready for a larger and

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more liberalized market. Of Africa's regional economic communities (RECs), five have enacted competition laws, which are at different stages of implementation.[12] AU Member States with no competition regulations both weaken the AfCFTA instrument and are more vulnerable to anti-competitive behaviour by firms.

The AfCFTA policy framework on competition should build on existing national and regional competition frameworks, covering the main substantive competition issues: cartels, merger control, abuse of dominance and anti-competitive agreements. It should also address consumer protection issues. Since African countries are at different levels of legal development and governance, the framework should incorporate appropriate exceptions in areas such as public procurement to allow countries the policy space to implement measures to deal with their unique economic challenges.

Intellectual property rights

> *The AfCFTA protocol on intellectual property (IP) must seek to balance the dynamic trade-offs between generating knowledge or innovation and distributing the resulting benefits or profits.*

The AfCFTA protocol on intellectual property (IP) must seek to balance the dynamic trade-offs between generating knowledge or innovation and distributing the resulting benefits or profits. Since knowledge and innovation are public goods, compensation for how they benefit individuals and society often does not accrue to their creators—unless there are strong intellectual property rights (IPRs). But inadequate protection against low-cost imitation erodes creators' incentive to innovate, reducing those creators' productivity and preventing the maximization of benefits.[13]

Research associates stronger intellectual property (IP) regimes with FDI and more lenient IP protection rules with domestic companies. Strong IP regimes encourage innovation, favour the transfer of modern technologies[14] and can be expected to attract FDI related to knowledge.[15] IP protection against copycats rewards the necessary investment, though it implies trade-offs of static and dynamic efficiency.[16] IPR protection also facilitates product innovation, production relocation and increases in real wages if technology is introduced via FDI.[17] Companies might be more inclined to technology diffusion through joint ventures if they believe their IPRs are sufficiently protected.

But excessive IPR laws can obstruct home-grown innovation and industrialization and by extension slow inclusive and sustainable development.[18] Stringent IP protection, by hindering smaller firms using imitation and reverse engineering as part of their own innovative processes, can limit knowledge dissemination through those channels. A patent with an excessive term can create a monopolistic or near-monopolistic situation in which a product is undersupplied and the opportunities for new actors are limited or foreclosed.[19] The restriction affects both horizontal (within the sector) and vertical (across sectors) competition.

The digital economy

Today's digital platforms are essential to the business operations they undergird. Services from ride hailing to online tutoring can scale appropriately within and across countries through technology platforms that enable search, booking, payment and reviews and aggregate demand for businesses and entrepreneurs and supply for consumers. In finance, investments are made through digital platforms. For example, in the agriculture sector, mutual funds and crowdfunding platforms aggregate investors from multiple jurisdictions, while electronic banking spurs business transactions, filling the previous void of financial services for remote, rural areas and marginalized groups.

Proliferating digital markets are multi-sided and characterized by network effects, large economies of scale and scope and increasing returns to scale—which together raise barriers for new entry—and so tend towards oligopoly or monopoly.[20] But in its broader economic setting, the digital economy has lower entry barriers than other, more traditional sectors. If market failures are reined in, the digital economy can catalyse the rest of the economy.

E-commerce can spur FDI inflows, but FDI is often necessary to build the infrastructure to support digital trade in the first place.

The relationship between the digital economy and investment is complex. E-commerce can spur FDI inflows, but FDI is often necessary to build the infrastructure to support digital trade in the first place.[21] FDI is thus a first-order issue.

African countries must overcome the digital divide that kept their firms from fully integrating into the global digital economy and seizing the opportunities of the digital world.[22] Internet penetration is lower in Africa than in other regions.[23] And a wider enabling environment is essential for a digital economy to emerge, including local data centres, supportive laws and regulations and local content driving interest in online services.

A case has been made for an African digital industrial strategy.[24] A continental digital market associated with specific industrial policies targeting digitalization would enhance the overall investment attractiveness of the continent. Economies of scale and low transaction costs from digitalization, on the back of clear, predictable and universal rules, would provide opportunities to enhance competitiveness. Regional integration and cooperation are also needed for African countries to bridge the digital divide and catch up with more developed peers.[25] Informed by these rationales, the Digital Transformation Strategy for Africa (2020–2030) was formally adopted by the African Union Executive Council in January 2020.

E-government is another avenue for investment in the age of the digital economy. An online government portal can set standards and create demand for online services, thus encouraging investment in the digital economy.[26] E-government portals providing information on business opportunities and regulations increase transparency, reduce transaction costs and thus contribute to the investment attractiveness of the whole economy.[27] Since building e-government facilities is resource-intensive, exchanging best practices and experiences could help countries save resources and improve and innovate on the basis of gathered experiences.[28]

Link, leverage and learn

In the regional value chains that the AfCFTA is expected to foster, African firms can expand their operations and gain experience. They need strategies to link, leverage and learn (LLL) from that experience. As they grow stronger and themselves emerge as MNEs, they could expand their activities further, beyond the African market.

First, African small and medium-sized enterprises (SMEs) can link themselves to more mature MNEs, such as the Dangote Group (which even before the AfCFTA formally began was operating across African markets). Since the MNEs that already have a considerable and firm foothold on the continent are expected to have first mover advantages, demand for their goods and services will increase, creating opportunities for SMEs to link themselves to bigger MNEs through supplier and outsourcing contracts for products, inputs and services.

The AfCFTA will produce a common investment area under the Investment Protocol and a common digital market under the E-commerce Protocol.

In a second stage, the advantages of the four AfCFTA protocols will allow African firms to leverage resources and inputs to win, for instance, local sourcing contracts. The AfCFTA will produce a common investment area under the Investment Protocol and a common digital market under the E-commerce Protocol. Firms will also be able to access wider credit markets and financial technology (fintech) opportunities under the common investment area to expand their production possibilities. That will let them respond to the growing demands from the MNEs they supply and to foster greater opportunities with a wider network of MNEs.

The AfCFTA protocols' details will be key. For example, the elements of the protocol on investment—such as the definition of an investment in the common investment area, or protection against convertibility and transferability risks for investments and their proceeds—will enable intra-African investment to flow more freely across the African markets. Equally, the protocol on competition must contain elements to support adequate and fair competition across all continental markets, including the common investment area's credit markets so intra-African investment will be accessible to firms.

Provisions in the Intellectual Property Protocol must balance attracting international investment through a protection regime with incentivizing home-grown innovation. And the E-commerce Protocol will be a paramount regulatory tool cutting across all levels and sectors of the economy to bolster the link, leverage and learn process.

Digitalization in Africa will ease doing business so that firms can compete and ultimately attract investment, though acquiring digital platforms, upgrading the technological infrastructure and investing in cybersecurity and fraud prevention pose major cost and resource challenges.

The protocols' provisions could foster cooperative frameworks for shared digital platforms for business, addressing common challenges that must be met with harmonized regulations. They could also incentivize African countries to share experiences and best practices for e-government facilities to improve ease of doing business, boosting efficiency and cutting red tape for firms.

Across the link, leverage and learn stages, the transformation of African SMEs into full-fledged MNEs will be affected by the flanking issues that require proper attention by policymakers.

In the third stage, learning, the AfCFTA's industrialization and infrastructure pillars will be further bolstered, and regional value chains in the AfCFTA will bring about greater connectivity for the common market's entrepreneurs. African firms that have gone through linkage and leverage will find themselves in a position to learn through imitation and other means from the MNEs they have been partnering with. They will emerge as MNEs when they learn how to diversify and scale up supply by adapting business models to local realities and AfCFTA market space demands in a continuous and iterative process. They will thus become more adaptable and able to compete.

Across the link, leverage and learn stages, the transformation of African SMEs into full-fledged MNEs will be affected by the flanking issues that require proper attention by policymakers. For example, even after the full implementation of the AfCFTA, differences across African markets will remain in the ease of doing business (registering a business, obtaining operating licenses, hiring staff, enforcing contracts and so on). Similarly, divergent fiscal regimes could create opportunities for the newly minted MNEs to engage in creative transfer pricing or other tax strategies (legitimate and illegitimate) to minimize their total tax liabilities. Continental coordination on tax and private sector policies will be needed to avoid a race to the bottom that could negate some gains from deepening regional integration.

The AfCFTA Investment Protocol

The AfCFTA Investment Protocol will bring investment policymaking in Africa to a new stage. With negotiations slated to begin in 2021, the new agreement, crowning the continental investment regulation landscape, will build on innovations adopted by African countries in recent years.[29] It will offer a modern, consolidated, harmonized and coordinated approach[30] simplifying the existing regulatory regime. The AfCFTA Investment Protocol will especially be shaped by the Pan-African Investment Code, which is oriented towards sustainable development, not just towards investment protection.[31]

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.

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 could be supported by targeted assistance to boost business development and long-term competitiveness.

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. In the European Union, that approach was ultimately adopted by 23 countries for intra-EU treaties.

But other models, providing multi-speed or multi-level integration, are also possible. Then 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 floor but allow subregions to pursue bespoke approaches.[32] 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.

Domestic investment law

The Investment Protocol represents just one dimension of the rules and regulations applicable to foreign investment. National law is the most important and immediately applicable source of law to investors, both foreign and domestic. Even so, 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 law with a specific country's national legal order hinges on the country's constitution. Even so, national law remains relevant in arbitration.

Large-scale infrastructure or mining projects are usually structured by investment contracts between states and private investors. 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.

National investment policies and laws

National investment frameworks promote foreign investment by providing incentives and property rights guarantees and control foreign investment through restrictions and obligations.[33] Foreign investment is expected to promote economic development. The Ethiopian Investment Proclamation in April 2020, for instance promotes "socially and environmentally responsible" investment to enhance competitiveness, generate more, quality job opportunities, foster internal investment linkages and "exploit and develop natural, cultural and other resources."

> *National investment frameworks promote foreign investment by providing incentives and property rights guarantees and control foreign investment through restrictions and obligations.*

Many investment codes of African countries have fully opened their economies to foreign investors. Sometimes they can be overridden by specific regulations. In Ethiopia as of 2020, after 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." 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. But this type of restriction has been on the wane since the 1990s.[34]

Regional and bilateral investment treaties

The AfCFTA Investment Protocol 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. 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.[35] The Pan-African Investment Code represents the most comprehensive expression of the continental view on making investment treaties to date but requires further refining.

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.[36]

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.[37] 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.[38] This shift to digital communications accelerated amid the COVID–19 health crisis.[39] 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.

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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.[40]

Investment promotion agencies 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. They sometimes serve as matchmakers between domestic and international firms to facilitate production or research cooperation.[41]

Investment protection

Investment treaties' main objective historically has been 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. Uncertainty can result from policy changes that would dramatically reduce or wipe out the value of an investment, including expropriation; discrimination against foreign investors by national authorities and the ability to repatriate funds. Investment treaties typically open the capital account to allow such transfers. Further, to mitigate investors' misgivings over domestic courts or over diplomatic protection by investors' home states, investment treaties usually allow for investor–state dispute settlement through arbitration.[42]

If efforts on investment protection at the United Nations Commission on International Trade Law (UNCITRAL) Working Group III on the reform of investor–state dispute settlement—and to some extent related reforms at International Centre for Settlement of Investment Disputes—bear fruit, they will shape the global legal investment environment into which the AfCFTA will fit. The working group, agreeing that reform is desirable, focuses on procedural issues related to legal decisions; the independence, diversity, and impartiality of the tribunal; the cost and duration of proceedings and the recovery of costs when the defending state prevails.[43] Africa should harness its unique experiences and know-how to actively participate in those negotiations.[44]

A delicate balance is needed. If a strong continental investment protection regime backstops investment disputes, it could raise costs for states and perhaps weaken their 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.

Investor obligations

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.[45] One way of establishing these obligations would be to anchor them to applicable domestic law.[46] 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.[47] Investment treaties can also contain their own, autonomous

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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.

Other state commitments

State obligations beyond investment protection can enhance regional integration by fostering the harmonization of policy and rules, formalizing multilateral investment promotion and facilitation. Besides 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.[48] And adding obligations derived from international agreements can promote alignment with the international legal system.

The AfCFTA Competition Protocol

The elimination of tariffs and nontariff barriers under the AfCFTA will open opportunities for competition to a wider continental market since economic activities will no longer be restricted to national borders but combined in one community market. Negotiations for the AfCFTA Competition Protocol were put on hold because of the COVID–19 pandemic. And promoting competition has become increasingly difficult given the market disruption caused by COVID–19. Even so, open trade and investment policies have been seen as the best way to overcome barriers to market entry, because competition from potential foreign investors or imports would restrain firms seeking to exercise market power.

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In effect, open trade and investment regimes would mean that access to national markets is not limited to local firms. But experience suggests that open market regimes are inadequate for maintaining competition in national markets.[49] Structural characteristics can buffer incumbent firms from competition—including some factors inherent in the local nature of some markets, such as the non-tradability of certain products and services, cultural values that promote secrecy and deter whistleblowing and standards, licensing requirements and other such regulations. Further, restrictive business practices, such as collusion, can inhibit investment.

Policies that maintain conditions favourable to competition make markets efficient. The enforcement of competition policy prevents private market abuses from reversing the benefits of economic reforms. And competition advocacy—the promotion of competitive market principles in policy and regulatory processes—complements competition enforcement, leading to increased competition. This fosters entry by more efficient firms, exit by less efficient firms and the efficient use of resources and triggers innovation, thus improving productivity and, ultimately, economic growth and improved consumer welfare.

Traditionally open market policies assumed perfect competition among many sellers dealing in homogeneous products or services, who sell their products or services at prices set by a market with low entry and exit barriers. But the composition of trade and the international trading environment are changing. Technological advantages, economies of scale and multinational corporations are playing growing roles, and in some instances, governments own businesses and champion enterprises. Trade and production in resource- and labour-intensive commodities have shrunk steadily as a share of economic activity, while science-based, scale-intensive and differentiated commodities and services have grown.[50] Imperfect competitive behaviour thus seems increasingly relevant, and perfect competition less so.

During the COVID–19 pandemic, market failures have harmed firms and consumers alike with excessive pricing for health-related products, abusive price increases and collusion. Anti-trust competition authorities have continued to monitor markets, and, in April 2020, the United Nations Conference on Trade and Development (UNCTAD) recommended government actions to protect competition during the crisis, including ensuring equal conditions between companies and temporarily allowing cooperation between companies to assure essential products for consumers.

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Markets in most African countries are characterized by low competition. According to the World Bank, more than 70 percent of African countries rank in the bottom half on the intensity of local competition measure and on the existence of fundamentals for market-based competition.[51] In many African countries, competition is restricted by businesses practices that undermine competitive dynamics and by government interventions and regulations that create obstacles to healthy competition. In some African countries, this is aggravated by the absence of competition laws or weak enforcement of existing laws.[52]

Anti-competitive practices include price or margin fixing, restricting output to provoke a price increase, dividing the market among firms, boycotting a provider, exclusive restraints requiring use of a single dealer or foreclosure arrangements to prevent use of a dealer, excessive pricing and predatory pricing, tying the purchase of a product to purchase of other undesired products and mergers of companies in the same market, increasing concentration. Cross-border trade can engage in many of the same practices since African economies are increasingly connected to each other and to the global economy. Instances of significant competition-related issues include problems created by regional mergers and by cartels spread across the Southern African Customs Union (SACU) region, especially by a cartel in the cement industry.

Supranational competition regimes have formed for several regions in Africa. Five regional economic communities have enacted competition laws, and they are at different stages of implementation. For example, in 2006, the East African Community (EAC) agreed to competition legislation for the bloc, and the organization has established an operational competition authority. The Central African Economic and Monetary Community (CEMAC) has introduced a mandatory merger control regime, not yet fully operational, and prohibits anti-competitive agreements.

Intellectual property and competition protocols must be deliberated in a complementary way. At least in the short run, legitimate uses of intellectual property rights can restrict competition, producing a trade-off between the benefits of increased competition and the gains from further innovation.[53] Maximalist protection can hinder innovation by "making inputs to future innovation too costly and too cumbersome to sustain over time."[54] IP enforcement, a matter of law enforcement, should enforce standards, promote non-legal solutions where possible and avoid using enforcement to restrict competition. Inflexible copyright could compel developing country students to reproduce educational software and other materials with prices so high they have no other option than forgoing the use of the material altogether.

Competition policy needs to complement digital policy, and policies should address the market imperfections that are worsened by e-commerce.

Competition policy needs to complement digital policy, and policies should address the market imperfections that are worsened by e-commerce.[55] Cross-border competition issues are likely to grow as businesses transition from brick and mortar to trade through e-commerce. Uncompetitive delivery infrastructure, fragmented markets and rising barriers to cross-border e-payments can stifle competition or even result in market foreclosure, and regulations have not kept pace with digital developments.

Competition for contracts in public procurement is not only a political issue, but also a socioeconomic process. In Malawi and South Africa, procurement legislation includes provisions empowering local firms by giving them priority in public sector contract awards. Public procurement can also exclude rivals from national markets, as in the construction industry, when it is used together with other policies—such as state aid and subsidies—that give a competitive edge on pricing to local and not foreign firms. But public procurement can be abused to foreclose markets, discourage or limit players in a market or result in price distortions.

Anti-trust bodies—commonly referred to as competition authorities or regulators—face bottlenecks that affect effective enforcement of competition at the national and regional level. The number of African jurisdictions with competition regimes has expanded from 13 in 2000 to more than 30 in 2017, reflecting the growing role of competition policy in the development agenda. But some of them are in their infancy. Nigeria's competition authority that has been in existence for less than five years. Capacity building can help address gaps in research, strategy, expertise and other areas. This institutional arrangement can be best facilitated through the AfCFTA Competition Protocol, which goes further to delineate the policies, institutional arrangements and enforcement modalities.

The AfCFTA Intellectual Property Rights Protocol

When AfCFTA negotiations were launched, intellectual property rights were included as one of the AfCFTA pillars, in accordance with the recommendations of the High-Level African Trade Committee (HATC). Intellectual property refers broadly to creations of the mind, notably inventions, literary and artistic works and images used in commerce.[56] Intellectual property rights (IPRs) can enhance or hinder competition and investment. A flexible patent system, for example, can incentivize entrepreneurs and firms to invest in research and development (R&D) to produce more inventions, while the disclosure of these inventions in patent applications enables others to access and use the information and thus contribute further to scientific and technological progress.[57]

The original timeline was to have an IPR protocol negotiated and submitted for adoption to the AU Assembly by February 2020 and appended to the AfCFTA Agreement. But due to COVID-related disruptions, the IPR negotiations were delayed and are now expected to be finalized only on 31 December 2021.

UNECA has recommended that the AfCFTA IPR Protocol establish a regional intellectual property system to prevent fragmentation of the market, in addition to setting up a platform for WTO-compliant regional provisions on IPRs.[58] It also suggested setting norms to protect African interests under international instruments in areas such as traditional knowledge, genetic resources and traditional cultural expressions. It recommended that the protocol not be a comprehensive statement of continental intellectual property norms because countries already have national laws and have entered international commitments. It also recommended the protocol build on the existing framework, while emphasizing matters of significance to AfCFTA states.

Some African countries have used flexibilities to access affordable essential medicines in response to public health emergencies such as the HIV/AIDs and COVID–19 pandemics. A nuanced use of the IP system can aid development.

Across Africa, concerns are mounting about which rules or provisions, including protection and enforcement, AfCFTA states should pursue to balance the interests of IPR holders and other stakeholders. These rules and provisions need to be in keeping with national development plans, the Sustainable Development Goals (SDGs) and the socioeconomic and developmental needs outlined in the African Union's Agenda 2063. Notable goals relate to R&D, technology transfer, access to food and essential medicines at affordable prices and the development of competitive markets, local industries and value-added exports. Technologies under consideration include Fourth Industrial Revolution (4IR) technologies—specifically how they can be used to enhance development.[59]

The minimum standards outlined in the World Trade Organization (WTO)–administered Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which is binding on WTO member countries, are distinguished from the higher set of standards referred to as TRIPS plus, found in interregional, preferential and bilateral trade agreements.

TRIPS minimum standards require enforcing and providing remedies to deter infringements. But they include flexibilities, such as transitional periods for implementation, compulsory licensing of patents for products such as drugs needed to meet a national emergency, the exhaustion of a right to further control distribution of a product once it has lawfully entered the market, an exception that allows testing and trials of a generic version of a drug even before its patent protection has expired so it can be made available speedily when the patent protection expires, and an exception that allows investigating inventions and improving them without that activity being considered a patent infringement. Some African countries have used flexibilities to access affordable essential medicines in response to public health emergencies such as the HIV/AIDs and COVID–19 pandemics. A nuanced use of the IP system can aid development.[60]

TRIPS plus standards restrict or remove flexibilities, such as compulsory licensing, including for drugs. They are also more expansive about protections for patents, copyright terms, subjects of trademarks and plant varieties. The result can be much-increased prices for consumers—for example for pharmaceuticals in countries where generic versions are not yet permitted. The United States and European Union have increasingly been proposing TRIPS plus standards to their trading partners, including partners from Africa that generally follow TRIPS minimum standards.

Greenfield foreign direct investment projects (referred to as fDi) are much more sensitive to IPRs than conventional foreign direct investment (FDI), which mainly covers investments in low-tech sectors where IPRs have little or no relevance.

fDi covers manufacturing and technology-related areas or activities, including research and development and design and testing. The main sectors of interest for fDi include transportation, communication, food and tobacco, financial services, business services, renewable energy, industrial equipment, automotive components, and software and IT services. The numbers of greenfield fDi projects announced in Africa are low, indicating that the adoption of TRIPS has not yet boosted technology transfer to the levels expected when African governments were first negotiating and signing agreements.

South Africa, following TRIPS minimum standards, had the highest number of projects (1,019), almost twice as many as Morocco (510), which has stringent TRIPS plus provisions in its free trade agreements with the United States. Kenya, following the minimum standards of TRIPS, has 457 announced greenfield projects, like the number in Morocco.

The payments received for the use of IPRs are low in African countries that have followed TRIPS standards. One reason is the limited numbers of IPRs generated. Another potential reason, which still needs further research, may be the poor market for technology and information products in specific sectors or subsectors since markets for such technology are small in Africa.

Non-residents have much higher numbers of patents protected in Africa than residents do. In 2018, residents had only 3,120 patents registered, while non-residents had 13,380. This may be because patent owners need to protect the technologies embodied in products exported to the African region. Non-resident firms may also be registering defensive patents in a location to block innovation.

Inventions produced by most African countries tend to focus on the mainstream areas of technology, including technology in engines, electrical engines, turbines and pumps, machines and apparatus, basic and organic chemistry, and civil and chemical engineering.[61] From 2000 to 2017, the United States had 376,855 patent applications in digital communication, France had 53,679 and China had 344,959, while South Africa had 412, Kenya had 7, Côte d'Ivoire had 1 and Nigeria, the largest economy in the African region, had none.

African countries should improve their IP and other policy environments to foster innovation and small and medium-sized enterprises (SMEs). They should increase spending on research and development to at least 1 per cent of GDP. They should also improve law enforcement and align enforcement with TRIPS so that countries can absorb and learn from fDi and international R&D, thus boosting creativity, innovation and competition. And they should streamline the costs of IP protection to encourage youth and female entrepreneurs, who generally lack the resources to develop inventions and bring their innovations to the marketplace.

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African countries should also increase public and private investment in the production of inventions and innovations to socially or publicly desirable levels. This will reduce the scarcity of inventions and innovations and thus blunt the efforts of counterfeiters to produce substandard, lower-cost substitutes. The increased public and private investment should be coupled with improved enforcement in cases that are threats to public safety or security, such as the counterfeiting of branded medicines. Such cases will require strong interagency coordination and collaboration, including regulatory authority, police services and customs officers. It will be necessary to mobilize additional resources from developed countries to supplement national efforts and strengthen the capacity of judiciary and administrative systems to improve IPR enforcement standards.

The digital economy and investment

Through the AfCFTA negotiations on the E-commerce Protocol, African countries can develop common positions on e-commerce and harmonized digital economy regulations. The AfCFTA can support data protection, data privacy and data transfer policies and can back e-commerce enforcement to bolster online consumer trust and so business-to-consumer e-commerce. And it can provide a framework for harmonizing taxes on digitally traded goods to bolster revenue promote digital industrialization and ensure a level playing field among local and foreign suppliers.[62]

Facilitating a regional dialogue in Africa to open opportunities to cross-border e-commerce trade is key. Countries where e-commerce is well developed tend to attract investment. Structural factors that support the growth of digital commerce—such as pervasive access to the internet, strong legislative frameworks that promote trust, and efficient payment and logistics systems—are also those that investors typically look for. In Africa, there is some overlap between the countries with the most established e-commerce ecosystems and the top FDI destinations—Ghana, Kenya, Nigeria, Morocco and South Africa.

The benefits of digitalized economies will be maximized where regulations are coherent and supervisory structures balance investment, fair competition and adequate levels of protection to foster market innovation and enable compliance with the existing rules and regulations. Such a set-up will level the playing field for investors and their ability to access markets, irrespective of their origin, and allow for sustainable and transformative investment in Africa.

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Various African countries—for instance, Egypt, Kenya, Nigeria and Senegal—have developed comprehensive strategies or policies for the digital economy. These aim to boost e-commerce, e-government, creating “a digitally empowered citizenry” (Kenya), requiring infrastructure, entrepreneurship, and digital skills and values. Several of the regional economic communities have also introduced strategies, instruments and initiatives to increase cross-border e-commerce transactions among their members.

E-commerce start-ups are not spread evenly across the continent: the vast majority of entrepreneurship teams are based in West Africa (48 per cent), Southern Africa (27 per cent) and East Africa (18.2 per cent).[63] Businesses operate closer to consumers, and more than half of online shoppers in Africa are in just three countries— Kenya, Nigeria and South Africa. Nigeria is the largest e-commerce market in both revenue and number of shoppers.[64]

A simple copy-and-paste transfer to Africa of existing business models in developed countries does not work. Despite the advance of mobile money, less than half the population over age 15 has an account at a financial institution or mobile money operator.[65] Cash on delivery (CoD) remains the only option for many online shoppers, though bank and electronic fund transfers (EFT) through payment gateways, credit and debit cards and mobile/ digital wallets are also increasingly being used and accepted. In Nigeria, 25 per cent of e-commerce payments are through bank transfers, 24 per cent in CoD, 16 per cent by credit and debit cards, 10 per cent on mobile wallets and the rest through other payment methods.[66]

A simple copy-and-paste transfer to Africa of existing business models in developed countries does not work.

To create trust in e-commerce transactions, African governments have made efforts to strengthen their legislative frameworks. UNCTAD identifies four key pieces of e-commerce legislation: electronic transactions, consumer protection, privacy and data protection and cybercrime.

Afreximbank has been developing a Pan-African Payments and Settlements Platform as a solution to the current situation, where intra-African trade is transacted in foreign currencies, posing an additional cost for traders and consumers. The platform supports cross-border payments where both the sender and receiver transact in local currencies and on mobile devices, facilitating the clearing and settlement of trade transactions. A Digital Transformation Strategy was developed by the AUC in partnership with the ECA and other institutions and adopted by the AU Executive Council in January 2020.[67]

The AU Convention on Cyber Security and Personal Data Protection can play an important role in improving consumer trust in e-commerce transactions, which is still low. The convention prescribes security rules and principles that are “essential for establishing a credible digital space for electronic transactions, personal data protection and combating cybercrime.”[68] It also seeks to harmonize legislation in these areas and guides the establishment of national data protection authorities. To protect consumers, the convention lays down broad principles to govern processing personal data.

Cooperative regulatory development will be required for consumer protection, data, taxation and inter-operability of technology systems. Cooperation will also ensure a level playing field where businesses and workers can compete fairly. Other areas include taxation, standards, cybersecurity, personal data protection, consumer and worker protection and protection of digital innovations and technology. Some of these issues will be addressed in the AfCFTA Phase II negotiations on the investment, competition and intellectual property rights protocols.

Complementary and flanking policies

Complementary and flanking policy measures advance policy outcomes in other policy areas. Sectors such as trade, fiscal and private sector development can enhance, stifle or worsen the outcomes of interventions in investment, competition, intellectual property and digitalization. Policies for the complementary and flanking sectors can complement policies in the study's central sectors, maximize positive outcomes and minimize negative ones. Governments can start by cataloguing policy measures and assessing their impact on various sectors of the economy. Further policy measures for various sectors can then be developed to complement and flank policies on investment, competition, intellectual property and digitalization.

For example, tax rebates for purchases by manufacturing firms might be formulated as an incentive—perhaps exemption from tariffs on importing industrial machinery above a certain value. The measure might appear to be neutral since it does not distinguish between foreign and domestic investment. But in the medium to long run, it could result in greater investment by foreign firms entering the market and seeking to capture the tax rebate through a locally established company purchasing machinery. That could harm smaller domestic firms unable to take advantage of the incentive because of the cost of the machinery.

So, although investment through foreign firms might increase, domestic investment in the manufacturing sector could stagnate, harming domestic private sector development. A small adjustment of the policy measure—such as lowering or eliminating the threshold for the rebate—might, in contrast, allow domestic small and medium-sized enterprises in the private sector to purchase machinery and so add to their productivity and competitiveness, at their specific level of production.

Limiting the ownership and the nationality of staff of foreign firms in the domestic market might cause harm by reducing the transmission of know-how and technology to the domestic market. The policy might have sought to promote joint ventures of local and foreign capital and to build stronger backward and forward linkages in the economy. But firms wanting to protect intangible assets, such as those in information technology or pharmaceuticals, might be discouraged from investing in the country, especially if intellectual property protection and enforcement are weak.

The trade policy nexus

Trade policy is intertwined with investment, competition, intellectual property and the digital economy. A trade policy targeted at enhancing a mutually reinforcing relationship between trade and investment in one sector could have exactly the opposite effect in another sector. So, trade policy must be synchronized and targeted at sectors rather than the whole economy.[69]

Trade policy and competition are interlinked. Competition policy decisions reliably address market failures that can result from trade policy, such as cartels, anti-competitive mergers, unilateral conduct and abuse of dominant position.

By their nature, competition policy decisions require separating economic and non-economic goals in trade policy, which at times is used to pursue the public interest. Since the AfCFTA Competition Protocol will, of necessity, try to harmonize states' competition rules or policies, trade policies need to be implemented so they can coexist with the harmonized competition policies.

Trade policies integrating markets can hinder the competitiveness and growth of specific domestic industries at different stages of growth that are overexposed to international competition. Competition policy must balance the needs of different market players at different levels of maturity to competitively coexist in a single market.

Trade policy should consider competition policy in a market where several countries' economies are integrated so that competition rules will be the same at home and beyond the countries' borders. This will benefit community members since trade policy is not used to shield domestic markets at the expense of the greater economic community.

Trade policy and intellectual property policy also have an intrinsic relationship. Trade policy must respect intellectual property rights (IPRs) and enforcement across borders if trade in knowledge-intensive goods and services is to take place. Without such protection, trade in sectors such as information technology, pharmaceuticals and the creative industries, as well as intra-industry trade, is likely to be severely stifled and underperform.

A free trade area can support consistency in enacting, applying and enforcing IPRs through its trade policy. The AfCFTA could bolster trade in goods and services with greater knowledge content and become a good destination for foreign direct investment in greenfield projects and research and development (R&D) spending from abroad.

Trade policy and the digital realm are also closely linked, particularly in e-commerce. The prospective AfCFTA protocol on e-commerce presents a unique opportunity to design trade policy tailored to Africa's digitalization needs and objectives. That protocol must set trade policy for electronic transactions across borders. It must also capture the financial transactions and the digital components embedded in the trade, accompanying the cross-border movement of a good (or service) from seller to buyer. And it must establish a relationship with investment in the digital economy and address principles of competition and intellectual property that will govern the digital space. These linkages provided a rationale to frontload the negotiation of an E-commerce Protocol so that it connects with the other Phase II issues—investment, competition and intellectual property—as was decided at the 13th Extraordinary Session of the African Union Heads of State and Government on the African Continental Free Trade Area.[70]

The prospective AfCFTA protocol on e-commerce presents a unique opportunity to design trade policy tailored to Africa's digitalization needs and objectives.

The fiscal policy nexus

Fiscal policy dictates what government budgetary allocations can be secured for and what taxes and other impositions can be derived from each economic activity. Its effectiveness and efficiency can be enhanced considerably through digitalization.

Digital technology can help African countries increase fiscal revenue by an estimated 3–4 per cent—the same amount as they could gain by bringing into taxation sectors that are considered hard to tax, such as agriculture, the digital economy and the informal sector. Using digital technologies to mobilize and manage revenue (and to manage, downstream, public investment expenditure) can strengthen government capacity. Big data analytics, financial technology (fintech) and blockchain technology can increase revenue and improve tax administration by lowering compliance and tax collection costs. Tax avoidance can be reduced if taxpayers use technologies as simple as mobile banking to file their taxes.

Digital technology can help African countries increase fiscal revenue by an estimated 3–4 per cent...

Similarly, digital technology can promote greater fiscal discipline in public expenditure by better monitoring, enhancing spending transparency in real time and ensuring that such spending aligns with budgets requirements.

Fiscal policy geared to investment can achieve multiple development objectives. It can, for example, propel investment towards critical economic sectors, such as the knowledge economy, and thereby enhance the interlinkages with IP policy. Fiscal policy can support blending in non-fiscal investment sources, if adequately designed. It can also reduce procyclical responses and regulate speculation by investors in boom and bust cycles that exacerbate a country's vulnerability, instead contributing to the resilience and predictability of long-term investment.

Private sector development policy nexus

Advancing the private sector to support industrialization, which drives structural transformation, is a critical and fundamental policy objective in Africa. But industrialization requires large capital expenditure on productive assets. Domestic capital is insufficient, making inflows of foreign capital, among other sources, virtually indispensable.

Most intra-industry trade takes the form of cross-border intra-company exchanges, so foreign investment is often necessary to participate. But regional integration through the movement of African capital could create regional value chains that could move countries faster into production involving more processing and blending with global flows of goods and services. Regional production could offer a better cost structure for processing raw materials than global trade, allowing African countries to trade at the higher parts of value chains.

Moving up the value chain requires embedding local intangible content—the activity where the most value addition and most opportunities for harnessing greater revenue lie. African countries must support their tech entrepreneurs in developing scalable products. And important spillover effects flowing from foreign companies can help domestic suppliers and competitors, including SMEs, increase their competitiveness.

African countries must support their tech entrepreneurs in developing scalable products.

To promote investment in sectors that might support industrialization, and ultimately structural transformation, African countries should develop and implement industrialization plans identifying and tapping their static comparative advantages (often based on cost-competitiveness). This strategy would increase the employment and purchasing power of domestic consumers, allowing further investment and greater specialization of domestic companies. It would also develop SMEs—the backbone of the private sector in Africa, as in many parts of the world. The AfCFTA will usher in an opportunity for continental free circulation of goods and services with embedded R&D content.

African industrialization must avoid being merely temporary, with assets losing their value due to climate change (becoming "stranded"). Greening the brown must be a foundation, particularly for the private sector, as well as for several interrelated Sustainable Development Goals (SDGs): achieving industrialization (SDG 9), accessing affordable and clean energy, (SDG 7) and sustainable production and consumption (SDG 12). Smart regulation and the use of incentives to support the private sector in this task would ensure responsible stewardship, underpinning long-term competitiveness and so aligning socioeconomic development driven by industrialization with the environmental dimension of sustainable development.

COVID–19 and investment in Africa

Since it emerged in December 2019, COVID–19 has taken lives and damaged health across the world. The health consequences are tragic for the continent, but COVID–19's impact goes further. The pandemic is an "economic disaster, a security disaster and a humanitarian disaster—and they're all interrelated," according to John Nkengasong, the head of the Africa Centres for Disease Control and Prevention.[71]

The pandemic led to a fall in foreign direct investment (FDI), a key source of financing for development in Africa, in 2020 and will likely continue to put downward pressure on investment going into 2021.

The economic cost has been severe and, without drastic actions by policymakers, may continue to be so. The Economic Commission for Africa projected that GDP growth would drop from 3.2 per cent in 2019 to between 1.8 and −2.6 per cent in 2020.[72] The International Monetary Fund (IMF) revised its 2020 GDP growth forecast for Africa (excluding North Africa) to −3 per cent, the region's worst performance since the IMF started keeping a record.[73] The pandemic led to a fall in foreign direct investment (FDI), a key source of financing for development in Africa, in 2020 and will likely continue to put downward pressure on investment going into 2021.

The pandemic is the primary cause of Africa's expected decline in FDI. By 13 May 2020, every country in Africa had confirmed cases.[74] The continent is currently experiencing a surge in infections and deaths. To protect the lives and health of their citizens, countries have imposed varying levels of lockdowns and travel restrictions. Businesses have closed and re-opened, and workers are asked to work from home. Economic activities have contracted. On the demand side, consumers and firms with actual or expected reduced earnings cut down discretionary spending. And on the supply side, the pandemic has disrupted production and global supply chains, affecting firms' access to raw materials and intermediate inputs.

The pandemic has resulted in severe, simultaneous demand and supply shocks. Consumers and businesses spend less, due to actual or anticipated income loss. And workers and firms produce less, since health risks force them to adopt alternative working arrangements and to close manufacturing plants.[75] An April 2020 survey found that, on average, African firms were operating at less than half capacity, with micro, small, and medium-sized enterprises being the most affected.[76] The plunge in demand was the biggest challenge they faced. Supply-side issues —business closures, logistical problems, disruptions in access to raw materials and lower worker productivity due to work-from-home arrangements— were also a hindrance.

Demand and supply shocks reduce MNE earnings, thus limiting their ability to make new investments and even forcing some of them to divest. The shocks also lower returns on FDI, making it less attractive. In the longer term, uncertain business outlooks and heightened risks lead investors to adjust their portfolios towards safer assets and adopt a wait-and-see approach.

The AfCFTA after the pandemic

Africa can take advantage of its experience with COVID–19 to better prepare for a world increasingly at risk of pandemics, natural disasters, economic crises and environmental catastrophes. Investment policies can play a critical role in protecting supply chains and strengthening the continent's readiness to respond to future crises. The disruptions in global value chains and the protectionist tendencies witnessed during COVID–19 highlight the urgent need for Africa to develop regional value chains and reduce its external economic dependence.

Africa can take advantage of its experience with COVID–19 to better prepare for a world increasingly at risk of pandemics, natural disasters, economic crises and environmental catastrophes.

Continent-wide collective actions become even more important in a post-pandemic world of increased competition and uncertainty. The AfCFTA must be at the forefront of Africa's economic recovery: as the worst of COVID–19 passes, AU Member States must refocus on Phase I implementation and Phase II negotiations. The Investment Protocol, in particular, will boost FDI inflows by harmonizing rules and creating a level playing field for investors. Further, COVID–19 has catalysed changes in consumer behaviour and the future of work, quickly moving employment and economic activities online. This transition presents Africa with a unique opportunity to capture the benefits of e-commerce and digitalization. In this light, the 13th Extraordinary Session of the African Union Heads of State and Government on 5 December 2020 decided to merge the negotiations of the AfCFTA E-commerce Protocol with those of the Phase II protocols on investment, competition and intellectual property. Africa, by leveraging its 1.2 billion–strong continental market, will be well positioned as an attractive FDI host.

References

African Payment Solutions. 2019 "African Ecommerce Payments: Survey of Nigerian Online Payment Methods for Ecommerce." 10 October. https://africanpaymentsolutions.com/2019/10/10/african-ecommerce-payments-survey-of-nigerian-online-payment-methods-for-ecommerce/.

Al-Azzam, A., and E. A. Abu-Shanab. 2014. "E-Government: The Gate for Attracting Foreign Investments." Paper presented at the 6th International Conference on Computer Science and Information Technology (CSIT). https://www.researchgate.net/publication/269308681_E-government_The_gate_for_attracting_foreign_investments.

Anyanwu, J. C., and N. D. Yaméogo. 2015. "Regional Comparison of Foreign Direct Investment to Africa: Empirical Analysis." *African Development Review* 27: 345–363.

Arrow, K. 1962. "Economic Welfare and the Allocation of Resources for Invention." In *The Rate and Direction of Inventive Activity: Economic and Social Factors*, 609–626. Universities-National Bureau Committee for Economic Research, Committee on Economic Growth of the Social Science Research Council. http://www.nber.org/chapters/c2144.

Artashyan, A. 2019. "African E-commerce Market Size Expected to Reach $22 Billion by 2022." *GIZ China*, 12 December. https://www.gizchina.com/2019/12/12/african-e-commerce-market-size-expected-to-reach-22-billion-by-2022/.

Asiedu, E. 2006. "Foreign Direct Investment in Africa: The Role of Natural Resources, Market Size, Government Policy, Institutions and Political Instability." *World Economy* 29: 63–77.

AU (African Union). 2014. "African Union Convention on Cybersecurity and Personal Data Protection." https://au.int/sites/default/files/treaties/29560-treaty-0048_-_african_union_convention_on_cyber_security_and_personal_data_protection_e.pdf.

AU (African Union). 2020a. "Executive Council, Thirty Sixth Ordinary Session, Executive Council Decision on the Reports of the Specialised Technical Committees (STCs) and Other Ministerial Meetings (EX.CL/Dec.1073–1096(XXXVI))." 6–7 February, Addis Ababa, African Union.

AU (African Union). 2020b. "Assembly of the Union, Thirty Third Ordinary Session, Report of H.E. Mahamadou Issoufou, President of the Republic of Niger and Leader of the African Continental Free Trade Area (Assembly/AU/4(XXXIII)Rev.1)." 9–10 February, Addis Ababa, African Union.

AU (African Union). 2020c. "Creating One African Market: Report submitted to the 13th Extraordinary Session of the Assembly on the African Continental Free Trade Area (AfCFTA) on 5 December 2020 by His Excellency Mr. Issoufou Mahamadou, President of the Republic of Niger, Leader and Champion of the African Continental Free Trade Area (AfCFTA) Process." Addis Ababa: AU. https://au.int/sites/default/files/newsevents/workingdocuments/39710-wd-ext_assembly_au_2_xiii_e.pdf.

Baker, D., A. Jayadev and J. Stiglitz. 2017. *Innovation, Intellectual Property, and Development: A Better Set of Approaches for the 21st Century*. AccessIBSA.

Banga, K., M. Gharib, M. Mendez-Parra and J. Macleod. 2021. *E-commerce in Preferential Trade Agreements: Implications for African Firms and the AfCFTA*. London: Overseas Development Institute. https://www.odi.org/sites/odi.org.uk/files/resource-documents/e-commerce_in_preferential_trade_agreements_report.pdf.

Bartels, F. L., S. Kratzsch and M. Eicher. 2009. "Foreign Direct Investment in Sub-Saharan Africa: Determinants and Location Decisions." Research and Statistics Branch Working Paper 08/2008, United Nations Industrial Development Organization, Vienna.

Benjamin, O. N. 2012. "Foreign Direct Investment in Sub-Saharan Africa." *African Journal of Economic and Sustainable Development* 1 (1): 49–66.

Berger, A., and S. Gsell. 2019. "How Can an International Framework for Investment Facilitation Contribute to Sustainable Development?" Briefing Paper 15/2019, German Development Institute, Bonn, Germany.

Bernasconi-Osterwalder, N., C. Dommen, M. Abebe, H. Mann and J. Zhang. 2018. "Harnessing Investment for Sustainable Development: Inclusion of Investor Obligations and Corporate Accountability Provisions in Trade and Investment Agreements." Background document for the expert meeting co-hosted by the International Institute for Sustainable Development and Friedrich Ebert Stiftung, Versoix, Switzerland, 11–12 January.

Braga, P., and C. Fink. 1998. "The Relationship Between Intellectual Property Rights and Foreign Direct Investment." *Duke Journal of Comparative & International Law* 9: 163–187.

Cabral, A., L. Moodley and S. Yeboah-Amankwah. 2014. "Digital Divide: The Impact of Closing Africa's Internet Gap." https://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/digital-divide-the-impact-of-closing-africas-internet-gap.

Chidede, T. 2019. "Investment Facilitation in Africa: Problems and Recommendations." Presented at the TRALAC (Trade Law Centre) Annual Conference. https://www.tralac.org/documents/events/tralac/2765-tralac-annual-conference-poster-presentation-investment-facilitation-in-africa-problems-and-recommendations-talkmore-chidede-march-2019/file.html.

Cotula, L. 2018. "Raising the Bar on Responsible Investment: What Role for Investment Treaties?" IIED Briefing March 2018, International Institute for Environment and Development, London.

Dessemond, E. G. 2019. "Restoring Competition in "Winner-took-all" Digital Platform Markets." Research Paper 40, United Nations Conference on Trade and Development, Geneva.

ECA (United Nations Economic Commission for Africa). 2016. *Investment Policies and Bilateral Investment Treaties in Africa*. Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa). 2018. *Assessing Regional Integration in Africa VIII: Bringing the Continental Free Trade Area About*. Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa). 2019a. *Assessing Regional Integration in Africa IX (ARIA IX): Next Steps for the African Continental Free Trade Area*. Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa). 2019b. "Financing Digital and Clean Technology Firms alongside Sustainable Infrastructure in Africa." Policy Brief, ECA, Addis Ababa.

ECA (United Nations Economic Commission for Africa). 2019c. "Fiscal Policy, Trade and the Private Sector in the Digital Era (E/ECA/COE/38/13)." Presented at the Thirty-eighth Meeting of the Economic Commission for Africa Committee of Experts, Marrakech, Morocco, 20–22 March.

ECA (United Nations Economic Commission for Africa). 2020a. *Drivers for Boosting Intra-African Investment Flows towards Africa's Transformation*. Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa). 2020b. "Linkages between Double Taxation Treaties and Bilateral Investment Treaties." Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa) and South Centre. 2017. "The WTO's Discussions on Electronic Commerce." Analytical Note SC/AN/TDP/2017/2, South Centre, Geneva.

El-Kady, H. 2020. "The New Landmark African Investment Protocol: A Quantum Leap for African Investment Policy Making?" *Kluwer Arbitration Blog*, 24 September. http://arbitrationblog.kluwerarbitration.com/2020/09/24/the-new-landmark-african-investment-protocol-a-quantum-leap-for-african-investment-policy-making/

Fink, C., and K. E. Maskus. 2005. "Why We Study Intellectual Property Rights and What We Have Learned." In C. Fink and K. E. Maskus (Eds.), *Intellectual Property and Development*. Washington, DC and New York: World Bank and Oxford University Press.

Gathii, J. T. 2016. “Strength in Intellectual Property Protection and Foreign Direct Investment Flows in Least Developed Countries” *Georgia Journal of International and Comparative Law* 44: 499.

Gopinath, G. 2020. “Limiting the Economic Fallout of the Coronavirus with Large Targeted Policies.” International Monetary Fund blog, 9 March. https://blogs.imf.org/2020/03/09/limiting-the-economic-fallout-of-the-coronavirus-with-large-targeted-policies/.

Greenhalgh, C., and M. Rogers. 2010. *Innovation, Intellectual Property, and Economic Growth*. Princeton, NJ: Princeton University Press.

Hailu, Z. A. 2010. “Demand-side Factors Affecting the Inflow of Foreign Direct Investment to African Countries: Does Capital Market Matter?” *International Journal of Business and Management* 5 (5): 104–16.

Hamdani, K., Y. Kagan, K. P. Sauvant and M. Stephenson. 2020. *An Inventory of Concrete Measures to Facilitate the Flow of Sustainable FDI: What? Why? How?* International Trade Centre and German Development Institute.

Harding, T., and B. S. Javorcik. 2012. “Foreign Direct Investment and Export Upgrading.” *Review of Economics and Statistics* 94 (4): 964–980

Harding, T., and B. S. Javorcik. 2013. “Investment Promotion and FDI Inflows: Quality Matters.” *CESifo Economic Studies* 59: 337–59.

Hees, F., and P. Mendonça Cavalcante. 2017. “Focusing on Investment Facilitation: Is It That Difficult?” Columbia FDI Perspectives 202, Columbia Center on Sustainable Investment, Columbia University, New York.

Hees, F., H. C. Moraes and P. Mendonça Cavalcante. 2018. “Investment Facilitation: Leaving the Past behind.” Columbia FDI Perspectives 240, Columbia Center on Sustainable Investment, Columbia University, New York.

Holmey, O. 2020. “Coronavirus: ‘We’ve Gone from Looming Threat to Looming Disaster.’” *The African Report*, 23 March. https://www.theafricareport.com/24924/coronavirus-weve-gone-from-looming-threat-to-looming-disaster/.

IMF (International Monetary Fund). 2020. *Regional Economic Outlook, Sub-Saharan Africa: COVID–19: An Unprecedented Threat to Development*. Washington, DC: IMF. https://www.elibrary.imf.org/doc/IMF086/28915-9781513536835/28915-9781513536835/Other_formats/Source_PDF/28915-9781513538495.pdf.

Kidane, W. L. 2018. “Contemporary Trends in International Investment Law and Africa’s Dilemmas in the Pan-African Investment.” *The George Washington International Law Review* 50 (3): 523–79.

Krajewski, M. 2020. “A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application.” *Business and Human Rights Journal* 5 (1): 105–29.

Krüger, R., and I. Strauss. 2015. “Africa Rising Out of Itself: The Growth of Intra-African FDI.” Columbia FDI Perspectives 139, Columbia Center on Sustainable Investment, Columbia University, New York.

Lai, E. C. 1997. “International Intellectual Property Rights Protection and the Rate of Product Innovation.” *Journal of Development Economics* 55: 133–153.

Marwala, T. 2019. “Preparing Africa for the Fourth Industrial Revolution.” *WIPO Magazine*, November. https://www.wipo.int/wipo_magazine/en/2019/si/article_0006.html.

Marwala, T. 2020. *Closing the Gap: The Fourth Industrial Revolution in Africa*. Johannesburg, South Africa: Pan Macmillan SA.

Maskus, K., and G. Yang. 2000. “Intellectual Property Rights, Foreign Direct Investment and Competition Issues in Developing Countries.” *International Journal of Technology Management* 19 (1): 22–34.

Mbengue, M. M. 2019. “Africa’s Voice in the Formation, Shaping and Redesign of International Investment Law.” *ICSID Review: Foreign Investment Law Journal* 34 (2): 1–27.

Mbengue, M. M., and S. Schacherer. 2017. “The ‘Africanization’ of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime.” *Journal of World Investment and Trade* 18 (3): 414–48.

Merges, P. R. 1994. “Of Property Rules, Coase, and Intellectual Property.” *Columbia Law Review* 94: 2655–2673.

Mijiyawa, A. G. 2015. “What Drives Foreign Direct Investment in Africa? An Empirical Investigation with Panel Data.” *African Development Review* 27 (4): 392–402.

Morisset, J. 2000. “Foreign Direct Investment in Africa: Policies Also Matter.” Policy Research, Working Paper 2481, World Bank, Washington, DC.

Moser, P. 2013. “Patents and Innovation: Evidence from Economic History.” *Journal of Economic Perspectives* 27 (1): 23–44.

Ncube, C. B. 2013. “Harnessing Intellectual Property for Development: Some Thoughts on an Appropriate Theoretical Framework.” *Potchefstroom Electronic Law Journal* 16 (4): 370–396.

Nnadozie, E., and A. E. Njuguna. 2011. “Investment Climate and Foreign Direct Investment in Africa.” Presented at the 6th African Economic Conference in Addis Ababa, Ethiopia, 26–28 October.

OECD (Organisation for Economic Co-operation and Development). 1987. *Structural Adjustment and Economic Performance*. Paris: OECD Publishing.

OECD (Organisation for Economic Co-operation and Development). 2003. “A Policy Framework for Investment: Competition Policy.” Background information for the OECD Conference held in Rio de Janeiro, Brazil.

Páez, L. 2017. “Bilateral Investment Treaties and Regional Investment Regulation in Africa: Towards a Continental Investment Area?” *The Journal of World Investment and Trade* 18 (3): 379–413.

Peukert, A. 2017. “Intellectual Property and Development: Narratives and their Empirical Validity.” *The Journal of World Intellectual Property* 20 (1–2): 2–23.

Pires, G., J. Stanton and I.-D. Salavrakos. 2010. “The Interaction of Foreign Direct Investment with Electronic Commerce in Less Developed Countries.” *Forum for Social Economics* 39 (2): 127–143.

Reichman, J. H. 2009. “Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow?” *Houston Law Review* 46 (4): 1115–1185.

Salacuse, J. W. 2013. *The Three Laws of International Investment*. Oxford, UK: Oxford University Press.

Shaban, A. 2020. “Africa COVID–19 Stats.” *Africa News*. https://www.africanews.com/2020/06/07/coronavirus-in-africa-breakdown-of-infected-virus-free-countries/. Accessed 8 June 2020.

Stephan, P. B. 2014. “International Investment Law and Municipal Law: Substitutes or Complements?” *Capital Markets Law Journal* 9 (4): 354–72.

UNCITRAL (United Nations Commission on International Trade Law). 2018. “Possible Reform of Investor–State Dispute Settlement (ISDS): Note by the Secretariat (A/CN.9/WG.III/WP.149).” Working Group III (Investor–State Dispute Settlement Reform) Thirty-sixth session, Vienna, 29 October–2 November.

UNCTAD (United Nations Conference on Trade and Development). 1995. *Foreign Direct Investment in Africa*. Geneva and New York: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 1997. *World Investment Report 1997: Transnational Corporations, Market Structure and Competition Policy*. Geneva: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2016. *Global Action Menu for Investment Facilitation*. Geneva: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2017. *World Investment Report 2017: Investment and the Digital Economy*. Geneva: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2018a. *South–South Digital Cooperation for Industrialization: A Regional Integration Agenda.* Geneva: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2018b. "Nairobi Manifesto on the Digital Economy and Inclusive Development in Africa." Geneva: UNCTAD. https://unctad.org/meetings/en/SessionalDocuments/Africa-eWeek2018_NairobiManifesto_en.pdf.

UNCTAD (United Nations Conference on Trade and Development). 2019. "Competition Issues in the Digital Economy: Note by the UNCTAD Secretariat." Trade and Development Board, Intergovernmental Group of Experts on Competition Law and Policy, Eighteenth session, Geneva, 10–12 July. https://unctad.org/system/files/official-document/ciclpd54_en.pdf.

UNCTAD (United Nations Conference on Trade and Development). 2020. World Investment Report 2020: International Production beyond the Pandemic. New York and Geneva: UNCTAD. https://unctad.org/system/files/official-document/wir2020_en.pdf.

UNCTAD (United Nations Conference on Trade and Development). 2020b. Investment Policy Hub. https://investmentpolicy.unctad.org/. Accessed 8 March 2020.

UNCTAD (United Nations Conference on Trade and Development). 2020c. Post-COVID–19: Investment Promotion Agencies and the "New Normal." *The Investment Promotion Agency Observer* Special Issue 9. Geneva: UNCTAD.

WAIPA (World Association of Investment Promotion Agencies). 2019. *Overview of Investment Promotion: Report of the findings from the WAIPA Annual Survey of 2018*. Geneva: WAIPA.

WAIPA (World Association of Investment Promotion Agencies). 2020. *The Impact of COVID–19 from the Perspective of IPAs*. Geneva: WAIPA.

Wells, L. T., and A. G. Wint. 2000. *Marketing a Country: Promotion as a Tool for Attracting Foreign Investment*. Washington, DC: World Bank.

WIPO (World Intellectual Property Organization). n.d. "What is Intellectual Property?" https://www.wipo.int/about-ip/en/. Accessed 12 March 2021.

World Bank. 2016. *Breaking Down Barriers: Unlocking Africa's Potential through Vigorous Competition Policy*. Washington, DC: World Bank.

World Bank and WAIPA (World Association of Investment Promotion Agencies). 2020. *State of Investment Promotion Agencies: Evidence from WAIPA–WBG's Joint Global Survey*. Washington, DC: World Bank and WAIPA.

End notes

1 UNCTAD, 2020a.
2 AU, 2020b. Currently, 54 African States have signed the agreement, with Eritrea pending signature, and a total of 36 AU member States have ratified the agreement, as of 16 February 2020.
3 Examples of such efforts include various legal instruments of regional economic communities, as well as the Pan African Investment Code. See ECA (2016, 2020b), as well as Section 2 of this report, for a discussion.
4 ECA, 2020a.
5 Anyanwu and Yaméogo, 2015; Bartels, Kratzsch and Eicher, 2009; Hailu, 2010.
6 Anyanwu and Yaméogo, 2015; Asiedu, 2006; Bartels et al. 2009; Mijiyawa, 2015.
7 Benjamin, 2012; Morisset, 2000; Nnadozie and Njuguna, 2011.
8 Krüger and Strauss, 2015.
9 ECA, 2020a.
10 ECA, 2020a.
11 World Bank, 2016.
12 World Bank, 2016.
13 Other situations where the accrual of benefits and profits may not be in the hands of the knowledge creators or innovators relates to profits that accrue to the rightful owners of registered geographical indications and traditional knowledge-based products.
14 Maskus and Yang, 2000.
15 Braga and Fink, 1998.
16 Fink and Maskus, 2005.
17 Lai, 1997.
18 Moser, 2013; Peukert, 2017.
19 Greenhalgh and Rogers, 2010.
20 Dessemond, 2019.
21 Pires, Stanton and Salavrakos, 2010.
22 Cabral, Moodley and Yeboah-Amankwah, 2014.
23 ECA and South Centre, 2017.
24 ECA, 2018, 2019c.
25 UNCTAD, 2018a.
26 UNCTAD, 2017.
27 Al-Azzam and Abu-Shanab, 2014.
28 ECA, 2019a; UNCTAD, 2018a. Several such portals do exist. In the field of investment promotion, work has been advanced in developing the electronic investment guides (iGuides). For examples of such portals in the African continent, see chapter 6.
29 Mbengue, 2019.
30 Páez, 2017; El-Kady, 2020.
31 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)
32 As per Article 19(2) of the AfCFTA agreement "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."
33 Salacuse, 2013.
34 UNCTAD, 1995.
35 UNCTAD, 2020b.
36 ECA, 2019a.
37 Wells and Wint, 2000; Harding and Javorcik, 2012, 2013.
38 WAIPA, 2019; World Bank and WAIPA, 2020.
39 UNCTAD, 2020c; WAIPA, 2020.
40 Berger and Gsell, 2019; Hamdani et al., 2020; Hees and Mendonça Cavalcante, 2017; Hees, Moraes and Mendonça Cavalcante, 2018; UNCTAD, 2016.
41 ECA, 2019a.
42 Stephan, 2014.
43 UNCITRAL, 2018.
44 Chidede, 2019.
45 Cotula, 2018.
46 Bernasconi-Osterwalder et al., 2018.
47 Krajewski, 2020.
48 Cotula, 2018. Externalizing the costs of investment to local communities by relaxing labour or environmental standards may produce immediate benefits but impede long-term benefits to the host state (ECA, 2019a).
49 UNCTAD, 1997; OECD, 2003.
50 OECD, 1987.
51 World Bank, 2016.
52 ECA, 2019a.
53 OECD, 2003.
54 Reichmann, 2009.
55 UNCTAD, 2019.
56 WIPO, n.d.
57 Arrow, 1962; Merges, 1994.
58 ECA, 2019a.
59 Marwala, 2019, 2020.
60 Baker, Jayadev and Stiglitz, 2017; Ncube, 2013; Gathii, 2016.
61 ECA, 2019b.
62 Banga et al., 2021.
63 Artashyan, 2019.
64 UNCTAD, 2018b.
65 World Bank Global Findex Database.
66 African Payment Solutions, 2019.
67 AU, 2020a, para. 10–14.
68 AU, 2014.
69 ECA, 2020a.
70 AU, 2020c.
71 Holmey, 2020.
72 ECA, 2020a.
73 IMF, 2020.
74 Shaban, 2020.
75 Gopinath, 2020.
76 ECA, 2020b.

PART 1:

BACKGROUND AND THEORETICAL FRAMEWORK

Chapter 1 Regional integration advances and foreign direct investment in the era of the African Continental Free Trade Agreement

The changing African investment landscape has become more attractive to foreign capital. Before the COVID–19 crisis, global foreign direct investment (FDI) slumped in 2018 for a third consecutive year to $1.3 trillion—down 13 per cent.[77] Greenfield projects plummeted by 37 per cent, and mergers and acquisitions fell by 15 per cent. But in contrast, African FDI increased 11 per cent in 2018 (to $46 billion). The positive trend in Africa represented diversified investments and economic recovery in South Africa, one of the biggest continental economies.

Global FDI was down 49 per cent in the first half of 2020 to $399 billion, compared with $777 billion in the same period in 2019, thanks to the global lockdown, the freeze of investment projects and pessimism across the world.[78] In 2020, global FDI flows were projected to slump 40 per cent to a level last seen in 2005, less than $1 trillion, down from $1.54 trillion in 2019. The developed countries were the most severely hit, with a decline of 75 per cent to $98 billion, down from $397 billion. In this context, African FDI inflows followed the world trend, with a decrease of 28 per cent to $16 billion, down from $23 billion the previous year—largely a consequence of reduced demand for commodities due to COVID–19. Greenfield projects declined 66 per cent, and cross-border mergers and acquisitions 44 per cent in 2020. Africa has been hit. Besides FDI in the resource-based economies, which suffered the worst, FDI in Egypt, for instance, slumped 57 per cent in the first half of 2020, beyond the average decline in North Africa of 44 per cent. But FDI in Morocco increased 6 per cent, thanks to diversified investments.

Prospects are uncertain, depending on the severity and duration of the health crisis. Vaccines could lead to a fairly quick recovery.

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Investments are critical for development, especially in Africa, which requires resources for development finance and achieving the Sustainable Development Goals. FDI generates activity and employment in destination countries, induces technology transfer and forces domestic producers to compete and so to increase efficiency. FDI also leads to economies of scale and promotes access to big markets with more profit opportunities than smaller ones.

In this context, efforts across the continent have recently sought to improve the business environment and attract FDI. Investment promotion agencies have been revamped and empowered. International efforts (World Bank and United Nations—particularly the United Nations Economic Commission for Africa, ECA, and United Nations Commission on Trade and Development, UNCTAD) have been embarked to accompany corporate efforts to promote investment (box 1.1). In the past two years, seven countries have benefited from ECA assistance to attract investments.

Box 1.1 iGuides and assistance to Member States

The iGuides provide investors with online up-to-date information on business costs, opportunities and conditions in developing countries. They cover investment opportunities; economic fundamentals; costs of doing business; laws, regulations, and procedures; and insights from companies already active in the target market. The objective of the platform is to overcome information asymmetry that might hurt developing countries.

Initially designed by the United Nations Commission on Trade and Development (UNCTAD) and the International Chamber of Commerce, these platforms are developed free of charge in partnership with developing country governments, based on their request, to foster FDI. By October 2020, 14 African countries (including Congo, Ethiopia, Madagascar, Malawi, Mauritania, Nigeria and Zambia) had added iGuides to their investment promotion toolbox to encourage productive investments supporting structural transformation. Each country's investment promotion agency (IPA) is supported by UNCTAD and ECA in developing the iGuide, and a local team of professionals takes over its maintenance once it is launched.

Local capacity building and institutional cooperation constitute the foundations of the project. The local IPA professionals develop the necessary skills to manage the platform. They are encouraged to forge or reinforce linkages with other public bodies dealing with investment issues, reinforce dialogue with existing investors and identify potential reform areas.

The tool has shown its usefulness and attractiveness, and new countries are seeking help in developing it for themselves. For instance, Gabon and Zimbabwe requested assistance from UNCTAD and United Nations Economic Commission for Africa (ECA), and Cameroon was about to start the process when COVID–19 prevented it.

Beneficiaries are giving positive feedback, and iGuides for more African countries are in the pipeline. Regional, or even continental, iGuides to highlight investment opportunities across the AfCFTA have also been suggested. And ECA is moving towards assessing the platform for improvement and better efficiency.

> *Numerous policies have also encouraged a rapid rise in inward FDI from emerging economies such as China, India and Turkey, besides the traditional development partners.*

Numerous policies have also encouraged a rapid rise in inward FDI from emerging economies such as China, India and Turkey, besides the traditional development partners. Despite a wide variability in which countries and subregions in Africa receive investments from year to year, some countries maintain consistent track records of attracting FDI.[79]

Even so, COVID–19 could dramatically affect partners' policies and decisions on investment across the continent. Unfavourable economic conditions slowed favourable investment policies and damaged the business environment. Even if most investment promotion agencies adapted quickly to the pandemic and continued their online services, very few have the capacity to provide COVID-related advisory services. As the pandemic spreads and eventually subsides, African investment promotion agencies must continue to adapt, providing services tailored to investors' needs in a subdued environment (see chapter 8).

African regional integration, based on agreements to reduce or eliminate tariffs and non-tariff barriers, is critical. Fifty years of efforts culminated in the African Continental Free Trade Area, launched officially in July 2019 at the 21st Extraordinary Summit of the African Union Heads of State and Government. The AfCFTA is expected to be the largest free trade area in the world. With a gross domestic product (GDP) of $2.5 trillion, it covers a market of 1.2 billion people, projected to reach 2.5 billion by 2050, when it will count 26 per cent of the world's working age population. Phase II of the AfCFTA negotiations will cover investment, competition and intellectual property rights.

The AfCFTA process is moving forward. A secretariat has been set up in Ghana, and the first Secretary-General has been sworn in. On 1 January 2021, trading started. A launch ceremony was marked by the participation of African Union Heads of State and Government, development partners and the private sector. As of today, the share of trade within African countries is 16–18 per cent; the launch of AfCFTA will allow Africa to trade more with Africa.[80] The gradual elimination of tariffs will boost business opportunities across the continent and provide more employment opportunities. These developments will create new momentum for African investments.

Against that backdrop, this chapter will next look at regional integration advancement and the landscape and trends of FDI inflows in Africa. Then it will delve into a deeper understanding of the main drivers and challenges of FDI in Africa. The last section develops imperatives for levelling the FDI playing field to increase welfare, efficiency and economic growth.

Regional integration advancements

The 50-year pursuit of regional integration in Africa has had five major phases with different approaches.[81] The first was a small-scale, subregional approach without any legally binding treaty.

The second phase, beginning with the 1979 Monrovia Summit and the 1980 Lagos Plan of Action, had a binding continental treaty and a political agenda for integration articulated around the proud perspective of African economic self-reliance and self-sustainment. The second phase culminated in the adoption on 3 June 1991 of the Abuja Treaty establishing the African Economic Community. The treaty entered into force in 1994.

The third delineated an ambitious 34-year programme for continental integration with a clear timeline and roadmap in six parts as follows:[82]

- Strengthening existing Regional Economic Communities (RECs) and establishing new ones where they did not exist by 1999. Eight Regional Economic Communities were recognized as building blocks.[83]
- Consolidating within each REC by gradually removing tariffs and non-tariff barriers and harmonizing between the RECs by 2007.
- Establishing free trade areas and customs unions in each REC by 2017.
- Coordinating and harmonizing tariff and non-tariff systems among the RECs to create a continental customs union by 2019.
- Creating an African common market by 2023.
- Establishing the African Economic Community, including a monetary union and a pan-African parliament, by 2028. Work on the African monetary union was begun almost a decade ago but has made no substantial progresses so far.

Although the tentative schedule was commendable, it was not met.

The fourth phase attempted to implement a 2012 decision, the Action Plan for Boosting Intra-African Trade, by creating two big blocks of existing RECs as a springboard to a continental free trade area. The Tripartite bloc formed by the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA) and the Southern African Development Community (SADC) made serious attempts to take shape, but the other bloc did not take off.

The six steps towards the African Economic Community under the Abuja Treaty were not intended to lead to the AfCFTA. But the AfCFTA, as a key project of the African Union's Agenda 2063—a steppingstone towards achieving the Sustainable Development Goals[84] and an excellent initiative for continental development—fits the treaty's spirit perfectly. Further, the AfCFTA coincides with and complements the Action Plan for Boosting Intra-African Trade. Still, continental integration faces numerous challenges: countries in opposition, insecurity and conflicts, scarce energy, poor infrastructure, scarce financial resources and others.

The African Continental Free Trade Area

The African Continental Free Trade Area, spearheaded by the AU, marks a momentous step towards deeper African regional integration.

The African Continental Free Trade Area, spearheaded by the African Union (AU), marks a momentous step towards deeper African regional integration. The AfCFTA is to be governed by a single set of rules applying to all State Parties in the areas of trade, investment, competition policy and intellectual property rights. The AfCFTA is expected to boost intra-African trade, support industrialization, establish new regional value chains and help countries take advantage of existing ones and generate new jobs. Its ultimate objectives are "the Africa We Want," as set out in the AU Strategy 2063, and the attainment of the 2030 Sustainable Development Goals on the continent.[85]

As of August 2019, 54 countries had signed the AfCFTA agreement, adopted in March 2018 in Kigali. The last two countries to sign the agreement were Nigeria, the largest country on the continent, and Benin, leaving Eritrea as the only African Union Commission (AUC) Member State that has not signed. The threshold of 22 ratifications needed for the agreement to enter into force was met in April 2019, when Sierra Leone and Western Sahara deposited their ratification instruments with the AUC chairperson.

The AU Heads of State and Government welcomed the AfCFTA entry into force on 30 May 2019. At the official launch of its operational phase in July 2019, five key operational instruments related to trade measures, rules of origin, non-tariff barriers, further negotiations by national experts and a digital payment platform were unveiled.[86] Still, several pending issues prevent the full conclusion of the trade negotiations, including goods produced in special economic zones, a final agreement on the rules of origin and how to calculate the value of non-originating materials. Until those issues are fully resolved, the agreement lacks legal power. African political leaders committed at the July 2019 Niamey Summit to find compromises all outstanding issues so African business could start taking advantage of the free trading bloc on 1 July 2020. The start of trading under AfCFTA rules was delayed due to COVID-19 but was subsequently launched virtually on 1 January 2021.

Phase II expert discussions to draft protocols on investment, competition policy and intellectual property rights (also addressing the interlinkages between those issues) were to commence in October 2019 but were delayed by COVID–19. When drafted, the protocols will be submitted to country negotiators. Although their content is yet to be agreed, it is already clear that the protocols hold a promise of transforming, harmonizing and simplifying the rules on the continent, creating an environment easier for African companies to navigate and a level playing field where they can compete.

The investment landscape and trends in investment since 1990

FDI inflows into African countries increased fourfold over 2000–2018, from less than $10 billion to nearly $46 billion.[87] Many countries deployed investment promotion policies, which may have led to positive outcomes, though their contribution is difficult to quantify precisely.

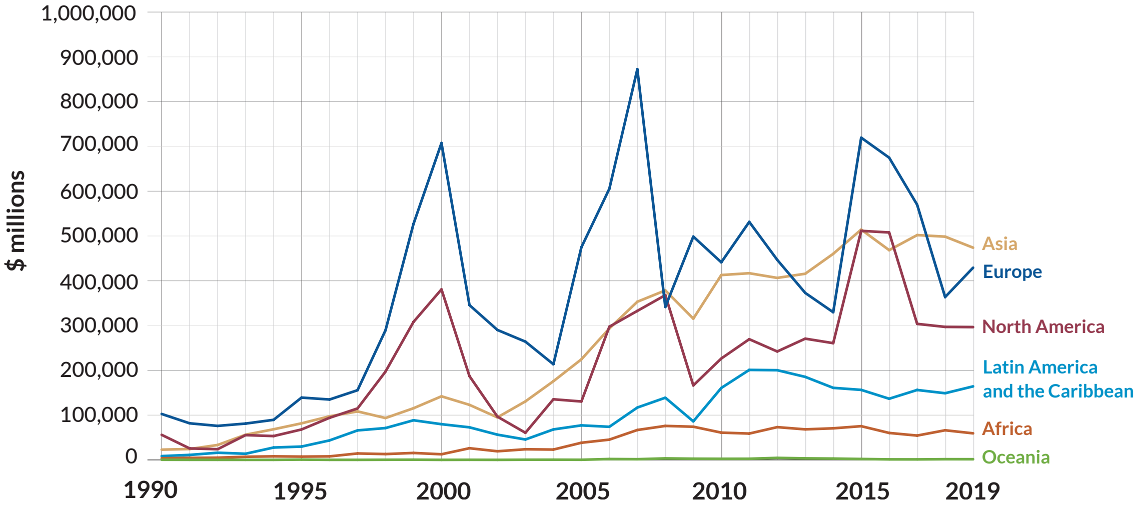
FDI inflows to the main beneficiaries have been unstable. The general trend, however, showed a fall in 2017 (contrary to increases in growth and trade), followed by an expansion of 11 per cent in 2018. The 2018 figure of $46 billion was below the $50 billion average of the preceding 10 years. The main reasons for the rise from 2017 to 2018 were resource-seeking investments, efforts to diversify investments in a few economies and a surge of FDI flows to South Africa from $2 billion to $5.3 billion. The change of political power in South Africa triggered confidence in the investors that was followed quickly by investments.

In 2019, FDI flows to Africa slumped 10 per cent to $45 billion, thanks to low demand for commodities and low economic performance. Commodity-driven and less diversified economies were the most affected (Ethiopia, Morocco and Sudan, among others). But the impact was uneven: Egypt, one of the big FDI recipients, registered an increase of 11 per cent.

Global FDI decreased in 2018 to $1.3 trillion for a third consecutive year (figure 1.1), driven by the gradual and protracted global growth recovery from the 2008 crisis and by policy changes in major global economies. For instance, following US tax reforms in 2017, US-based multinational enterprises engaged in a major repatriation of foreign earnings. That effect was too large to be offset by cross-border merger and acquisitions, climbing to $694 billion in 2017 and $816 billion in 2018, or by a 41 per cent increase in promising greenfield investment from $698 billion in 2017 to $981 billion in 2018.

Over 1990–2019, Europe was the main beneficiary of FDI, so world fluctuation has been pronounced. Africa, the world's smallest beneficiary except Oceania, recorded moderate fluctuation.

Figure 1.1 Average foreign direct investment inflows, by continent, 1990–2019



Source: ECA, based on UNCTAD database, 2020.

Drivers, barriers and top destinations for foreign direct investment in Africa

Investments flows within Africa are limited, whether inflows or outflows. For instance, the total FDI inflows in Kenya, one of the most open African countries, were $2.3 billion over 2007–2017, a mean of $232 million a year. Similarly, outflows from Morocco were at a similar level, $3.4 billion over 2008–2018.

But data are underreported, and in extreme cases do not exist, even for the champions. For instance, Egypt has outflow data for 2000–2018 but inflow data only for 2013–2018. In Côte d'Ivoire, data are available for 2012–2017. In Kenya, data for inflows are available for 2007–2017, and outflow data for 2009–2015. Nigeria invests in 37 countries, but those data are available only for 2013–2017, and inflow data are available only for a few countries. Many African countries report inflows but not outflows. Worse, data are unavailable for some countries known to have substantial flows stemming from their natural endowments (Cameron, Democratic Republic of Congo and Gabon) or comparative advantages (Mauritius).

Political instability affects statistical systems. For instance, no investment flows are recorded for Zimbabwe, or Central African Republic, Liberia, Somalia or South Sudan.

Discussion of FDI should go beyond inflow sizes and sectors. Also important is how they are managed to optimize their benefits for growth, technology transfer and sustainable support for sectoral or national development objectives, especially as the continent focuses on the Sustainable Development Goals and the AU's Agenda 2063. Poorly managed FDI will not provide the expected results, especially in Africa, where FDI targets the natural resources sector, in which rent-seeking and other distorted incentives prevail. But many African countries have increasingly attracted investments into other sectors, helping them to diversify their economies. They include Côte d'Ivoire for information technology, Ethiopia and Madagascar for textiles, Kenya for agri-food production, Rwanda for tourism and Zambia for cement. Or they attract investments to move up the value chain, such as South Africa for cosmetics laboratories. A lack of reliable sectoral data highlights the need to build the capacity of statistical bureaus on the continent.

The recent experience of Chinese investment in Ethiopia show constraints on investment. China is becoming one of the largest trade and investment partners of Africa. First, trade logistics should be emphasized. In Ethiopia, Chinese investment is deterred by the web of trade regulation and customs clearance inefficiencies. In many other countries, underdeveloped trade logistics discourage potential investors. But long-standing institutional weaknesses prevalent in many African countries foster the design of regulations that delay customs clearance of imported materials.

Second, exchange rate risks affect countries that restrict foreign currency transactions, such as Ethiopia. Fairly frequent haphazard monetary policy decisions in African countries introduce sudden foreign exchange shocks in the form of devaluations that damage the asset valuation of firms and raise the costs of local labour and of imports since markets do not provide the inputs required for local production.

Third, clear tax laws are fundamental. Many countries change tax laws far too often and confront investors with unclear and confusing interpretations of the law.

Fourth, investors end up paying larger training costs instead of saving on labour costs. They must work with existing human capital and skills, which on average are much lower in Africa than at home. A well-educated labour force with affordable labour costs, as in Mauritius, is important.

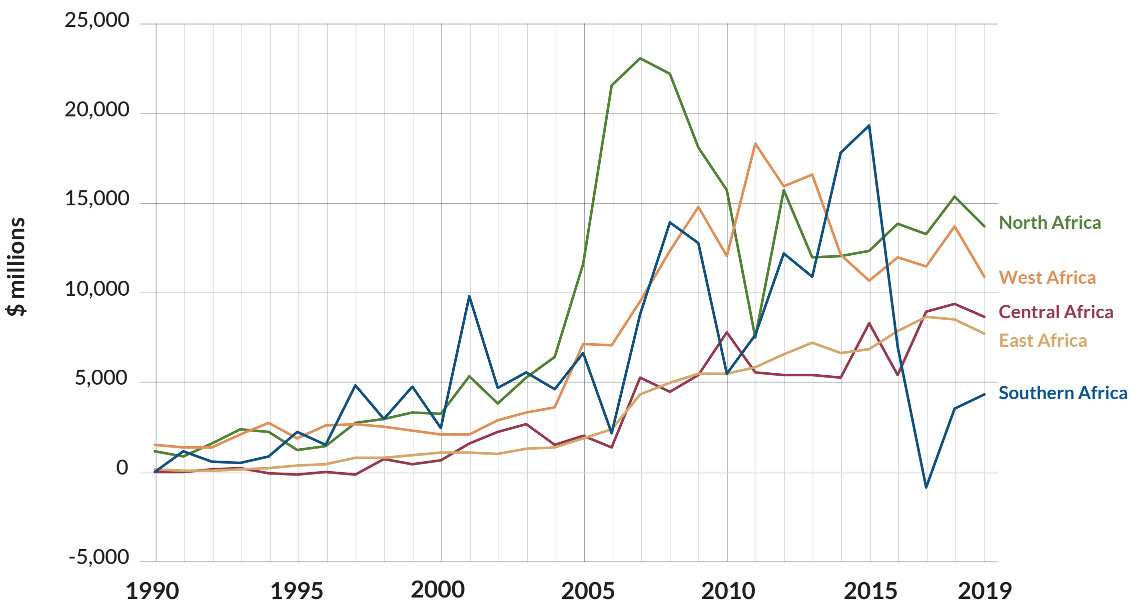
Fifth, there is no access to loans from local banks (such as for export finance). Small and medium enterprises (SMEs) face excessive delays in applications and complex regulations.[88]

The suddenly increased inflows in South Africa are mainly attributed to investor confidence stemming from the 2018 change of power. Ethiopia and Nigeria, in contrast, have been impacted by political turbulence and uncertainty. On an optimistic note, investment in Morocco rose slightly in 2017–2018, thanks to active promotional campaigning and mergers and acquisitions. Morocco's recent return to the African Union signalled political commitment and institutional improvement, bringing hopes of an improved business climate in the country. The African continent is big, has heterogenous institutions and economic conditions and offers diverse degrees of ease of doing business.

Disaggregated subregional data on attracting FDI show strong performance by North Africa, followed by West Africa and Southern Africa (figure 1.2). Eastern and Central Africa did not perform as well. Inflows to Southern Africa plummeted in 2015, but started to recover in 2017. FDI inflows to North Africa increased 7 per cent to $14 billion in 2017 and even jumped to $15.4 billion in 2018, thanks to an overall increase in investments in most countries. But persistent uncertainty and the slow pace of reforms in many regional economies led to an 11 per cent decrease to $14 billion in 2019 in North Africa. This poor performance stems mainly from a big 45 per cent slowdown in Morocco to $2 billion in 2019, down from $3.6 billion the previous year. Egypt was the largest FDI recipient not only in the North but also in Africa in 2018, despite an 8 per cent decrease in inflow to $8.1 billion. The United Kingdom plays an important role in trading and investment links with Egypt. Egypt is embarking on several policy reforms in an ambitious repositioning initiative to be a global destination for investment. FDI flows to Morocco increased 36 per cent to $3.6 billion thanks to a stable economic performance and diversified economy. FDI increased in Sudan by 7 per cent to $1.1 billion and in Tunisia by 18 per cent to $1 billion, lower than the 22 per cent increase to $1.5 billion registered by Algeria. However, the sound performance in North Africa was hampered by the sharp decline since the 2008 economic and financial crises and the Arab Spring revolution. Sudan's recent political volatility dents investor confidence in the country. FDI in Central Africa remained stagnant. FDI flows to East Africa were unchanged in 2018 at $9 billion, and inflows to Ethiopia, the biggest recipient in the subregion, decreased by 18 per cent to $3.3 billion. Ethiopia's new government has pursued encouraging privatization policies since April 2018, but recent regional tensions could reduce inflows. Kenya has been the exception in East Africa, with FDI increasing 27 per cent to $1.6 billion.

Disaggregated subregional data on attracting FDI show strong performance by North Africa, followed by West Africa and Southern Africa

Figure 1.2 Africa foreign direct investment inflows, by subregion, 1990–2019



Source: ECA, based on UNCTAD database, 2020.

No African country is a top beneficiary among the main FDI destinations across the world. In Africa, Egypt, Nigeria and South Africa have been the top three destinations from 1990 to 2018. Nigeria led in the 1990s, then Egypt took over at the top position, followed by Nigeria and South Africa. Mozambique and Ghana joined the leading countries in the 2010s and even overtook Morocco's long-standing position. In the 2010s, newcomers such as Ethiopia, with its vibrant investments in infrastructure, Congo and Democratic Republic of Congo, with dominant investments in primary commodities, and Sudan filled out the top 10. In Congo, for instance, more than 90 per cent of FDI was directed to the petroleum sector.

Table 1.1 Foreign direct investment, inflows and annual percentage change, top 5 African host economies, 2017–2019

RANK	2017			2018			2019		
	COUNTRY	INFLOWS ($ BILLIONS)	CHANGE (%)	COUNTRY	INFLOWS ($ BILLIONS)	CHANGE (%)	COUNTRY	INFLOWS ($ BILLIONS)	CHANGE (%)
1	Egypt	7.4	-8.8	Egypt	6.8	-8.2	Egypt	9.01	10.67
2	Ethiopia	3.6	-10.1	South Africa	5.3	165.8	South Africa	4.6	-15.14
3	Nigeria	3.5	-21.3	Congo	4.3	-2.1	Congo	3.4	-22
4	Ghana	3.3	-6.6	Morocco	3.6	35.5	Nigeria	3.3	-48.46
5	Morocco	2.7	22.9	Ethiopia	3.3	-17.6	Ethiopia	2.5	-23.99

Source: ECA calculations based on UNCTAD database, 2020.

Intra-African foreign direct investment

Evidence has shown repeatedly that an economically conducive environment is likely to drive intra-African investment.[89] Trade facilitation and reduced trade-related costs play a critical role in attracting investments. Even more important, industrial capacity, including soft and hard infrastructure, is a major determinant of intra-African investment. Empirical studies confirm these findings for Southern Africa in the Common Market for Eastern and Southern Africa (COMESA) and Southern African Development Community (SADC) countries, and also in the north African region.

Unlike world FDI, which targets the natural resources sector, intra-African investment concentrates heavily in services, particularly insurance, retail banking and telecommunications. The bulk of investment in services in Africa, especially in finance, reflects features driving firms to expand on the continent but not beyond. In a study of 53 African countries over 1970–2009, the main FDI drivers were country size, infrastructure development, macroeconomic stability, the degree of economic openness, political stability, the return on investment and the persistence of FDI inflows.[90] Similarly, in 49 countries over 2002–2014, the size of the market, economic performance, an economically conducive environment and industrial capacity and development, among others, were the main drivers of intra-African investment.[91] But FDI distribution varies across subregions and countries. For instance, only five countries (Angola, Egypt, Ethiopia, Ghana and Nigeria) attracted 57 per cent of continental investment inflows in 2016.[92] As the AfCFTA shapes dynamics, the hubs of activity, trade creation and destruction will certainly change, as the continent gradually transforms into a common market.

Several factors constrain investments, particularly intra-African ones. They include political uncertainty on the continent, conflicts, inflation and macroeconomic disturbances. Poor growth performance, weak infrastructure, poor governance, unfriendly regulatory environments and ill-conceived investment strategies are also responsible for poor FDI flows in Africa.[93]

Ranking countries by the number of other African countries they interact with, only seven interact with more than 20 countries: namely Kenya, Morocco, Mozambique, Nigeria, Rwanda, Tanzania and Zambia. In the second-best category are countries that interact with more than 10 others: Benin, Côte d'Ivoire, Mali and South Africa.

No single African country was among the top 20 worldwide investors abroad in 2017, 2018 or 2019. Africa is traditionally a recipient of FDI inflows, not an investor abroad, with rare exceptions. In 2018, FDI outflows from African countries decreased by 26 per cent to less than $10 billion, including a 40 per cent drop of outflows from South Africa to $4.6 billion and a complete drying up of outflows from Angola from $1.4 billion in 2017.

Elsewhere in 2019, surprisingly, FDI outflows from MNEs in developed economies, transition economies and Latin America rose, while those coming from developing economies and Asia declined.[94]

Data from UNCTAD, the World Bank, the International Monetary Fund (IMF) and official national sources show that net outflows of FDI count for a very minor share of GDP in African countries.

Data from UNCTAD, the World Bank, the International Monetary Fund (IMF) and official national sources show that net outflows of FDI count for a very minor share of GDP in African countries. For 2009–2019, Djibouti, Equatorial Guinea, Liberia, Seychelles and Togo had the highest average share.

An analysis of the investment landscape should examine all aspects—inflows, outflows and intra-African investment—particularly during substantial progress towards a continental free trade area. Unfortunately, as discussed above, the few available data do not cover these critical aspects. This lack calls for effort across the continent in strengthening statistical capacity.

Imperatives to level the foreign direct investment playing field for efficiency, welfare gains and economic growth

In recent years, governments in Africa and beyond have taken measures to attract FDI. In Africa, particularly in developing countries, investment promotion agencies have shown substantial results in boosting FDI. Countries such as Ethiopia are pursuing privatization aggressively by selling stakes and assets in state-owned or state-operated enterprises, including telecoms and transport. Countries worldwide are taking policy measures to increase investments and improve the investment environment. In 2017, 65 countries adopted at least 126 investment policy measures for such sectors as transport, energy, infrastructure and manufacturing, among others. Nearly all the measures (84 per cent) were favourable to investors. In 2018, 55 economies introduced more than 112 measures affecting foreign investment levels, while more than 22 mergers and acquisition deals were withdrawn or blocked for reasons stemming from regulatory or political motivations. Similarly, mechanisms for screening their quality have increased since 2011.

In Africa, given its benefits and implication for growth, attracting FDI remains a priority. Numerous countries devised investment reforms and other policies such as investment facilitation, liberalization, promotion through tax breaks, and removal of investment barriers. Investment promotion agencies have been created, revamped or empowered. Entry restrictions to FDI have been lowered or simply removed, and fiscal incentives provided and regulations eased for start-ups and new firms.

> *African countries have taken measures to improve investment and the investment environment, including adopting such incentives as tax holidays and investment facilitation measures.*

African countries have taken measures to improve investment and the investment environment, including adopting such incentives as tax holidays and investment facilitation measures. Proliferating international investment agreements have created an unlevel playing field for different types of investors and contracted the policy space of host economies, so that some investors are crowded out or unable to compete. On a level playing field, market distortions and imperfections are addressed through policies and regulations ensuring all players can access the market effectively and can function and compete under comparable conditions. This condition does not mean that all investors are treated as equal, precisely because they are not all the same. Rather, levelling the playing field ensures an element of equity by recognizing that investors have differences that need to be taken into account so they can compete under principles of fairness, equitability and diversity. Levelling the playing field also achieves the ultimate goal of allowing consumers the freedom of choice provided by enhanced market functionality.

The World Bank, backing its long-standing policy advice for private sector development and expansion, has provided loans and other support to African countries to help them attract more FDI.

At first glance, intra-African investments seem insignificant. Although well-known evidence shows that neighbouring countries interact and that natural resource endowments fuel transactions across borders, numerous countries lack records of inflows and outflows. Data are underreported due to conflicts, instability, the informal economy and poor statistical systems, among other reasons. Even so, AfCFTA will leverage existing channels and level the playing field for more investments within African economies.

But policymakers under pressure to raise finances for development should not welcome investors with reckless open-door policies. Public finance can be damaged by tax incentives, such as reduced import duties and value-added tax or income tax holidays for businesses in export processing zones and industrial parks. Trade-offs should be carefully examined in the interests of sustainable and long-term economic development. Countries in a tax competition to attract investors could find themselves in a race to the bottom compromising government revenue. And countries relaxing rules and regulations to accommodate investors could compromise environmental standards.

But policymakers under pressure to raise finances for development should not welcome investors with reckless open-door policies.

Advances in institutions for regional integration, notably the AfCFTA, will affect different policies that will shape the playing field for investment. There are 47 bilateral investment treaties and 59 other investment treaties between African countries.[95] The treaties are unevenly distributed across the continent's subregions, with strong concentration in the north, and only a limited number of countries have worked actively to conclude them.[96] A continent-wide investment code was adopted by trade ministers in October 2017, and Phase II AFCFTA negotiations on investment, competition policy and intellectual property rights are ongoing. The Investment Protocol will be fully part of the Phase II negotiations, offering a platform to assess the continent's investment regulations and align them into a single instrument, binding on all countries, in place of the numerous treaties and arrangements. Such a development would boost credibility and could attract more investment.

References

AU (African Union). 2020. "AfCFTA (African Continental Free Trade Area) Start of Trading 2021, Launch Ceremony." https://bit.ly/2WMQELQ. Accessed 15 January 2021.

Baricako, J., and A. Kedir. 2020. "Disruptive Technology, Foreign Direct Investment and Private Sector Development Polices in Africa." In P. K. Arthur, K. Hanson and K. P. Puplampu (Eds.), *Disruptive Technologies, Innovation and Development in Africa*. Palgrave Macmillan.

Dupasquier, C., and P. N. Osakwe. 2006. "Foreign Direct Investment in Africa: Performance, Challenges, and Responsibilities." *Journal of Asian Economics* 17: 241–260.

ECA (United Nations Economic Commission for Africa). 2017. *Assessing Regional Integration in Africa VIII (ARIA VIII): Bringing the Continental Free Trade Area About*. Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa). 2018a. *Drivers for Boosting Intra-African Investment Flows towards Africa's Transformation.* Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa). 2018b. "African Continental Free Trade Area: Questions and Answers." https://knowledge.uneca.org/ATPC/sites/default/files/PDFpublications/qa_cfta_en_230418.pdf.

Geiger, M., and C. Goh. 2012. *Chinese FDI in Ethiopia: A World Bank Survey*. Washington, DC: World Bank.

Mijiyawa, A. G. 2015. "What Drives Foreign Direct Investment in Africa? An Empirical Investigation with Panel Data." *African Development Review* 27 (4): 392–402.

UNCTAD (United Nations Conference on Trade and Development). 2019. *World Investment Report 2019*. Geneva: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2020a. *World Investment Report 2020*. Geneva: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2020b. *Investment Trends Monitor*. Geneva: UNCTAD.

End notes

77 UNCTAD, 2019.
78 UNCTAD, 2020a.
79 Many African countries, such as Kenya, Senegal, Ghana and Ethiopia, are attracting investment from diverse origins. But the variability showed, that for instance, in 2014 and 2015, Angola became the top recipient of foreign direct investment in Africa, with its oil and gas sectors continuing to attract investors from abroad. But in 2017 and 2018, Egypt become the FDI top destination, while Angola fell from the top 10 (UNCTAD, 2019). The COVID–19 pandemic will bring a new landscape.
80 AU, 2020.
81 The 50-year history of African integration has had different approaches and challenges in different phases. This section gives a brief global overview of the phases.
82 ECA, 2017.
83 The eight REC building blocks are EAC, COMESA, ECOWAS, SADC, ECCAS, CEN-SAD, IGAD and AMU. Other regional or intergovernmental organizations such as CEPGL (Communauté Economique des Pays des Grands Lacs), COI (La Commission de l'Océan Indien), CEMAC (Commission Économique et Monétaire de l'Afrique Centrale), Manu River, ICGLR (International Conference for the Great Lakes Region), are operational but are not recognized by the AUC. Some of them are well-advanced on specific integration agendas. For instance, CEMAC, spearheading the CFA franc, is a monetary union.
84 The AfCFTA can help achieve at least 11 SDGs of the 17, namely SDGs 1, 2, 5, 7, 8, 9, 10, 12, 13, 16 and 17.
85 ECA, 2018b.
86 The five supporting instruments include the portal for reporting, monitoring and eliminating non-tariff barriers, the AU Trade Observatory Dashboard to measure progress on implementing agreed trade measures, an online negotiation portal for national for national experts, the Pan-African Digital Payment and Settlement Platform and the adoption of the agreed rules of origin.
The implementation of AfCFTA has two phases. Phase I, consisting of liberalization of trade in goods and services, is ongoing. The states have adopted protocols on trade in goods (it includes annexes on schedules of tariff concessions, rules of origin, customs cooperation and mutual administrative assistance, trade facilitation, non-tariff barriers, technical barriers to trade, sanitary and phytosanitary measures, transit and trade remedies); trade in services, with a component on MFN exemption and air transport; and a protocol on the settlement of disputes between AfCFTA states with a component on rules of origin. The Phase II consists of negotiations on investment, competition policy and intellectual property rights
87 UNCTAD, 2019.
88 Geiger and Goh, 2012.
89 Baricako and Kedir, 2020.
90 Mijiyawa, 2015.
91 ECA, 2018a.
92 ECA, 2018b.
93 Dupasquier and Osakwe, 2006. An empirical literature overview is provided in ECA (2018a). Similarly, a conceptual framework of FDI drivers and impact is delineated.
94 UNCTAD, 2020b.
95 ECA, 2020.
96 Five countries, Algeria, Egypt, Mauritius, Morocco and Tunisia, have the high number of bilateral investment treaties, while Egypt, Mauritius, Morocco, South Africa and Tunisia record most of the double taxation treaties in Africa.

Chapter 2 Theory and evidence linking investment with behind-the-border issues

The theoretical literature on cross-border investment has expanded over decades to a vast size. Theory on international capital transactions generally follows one of two traditional lines—portfolio investment theory and theory of the firm—which have been the basis of myriad contributions.

International portfolio investment theory presupposes a transfer of financial capital, generally of a temporary nature, to achieve profitable returns on the basis of financial arbitrage through a difference either of currencies or of interest rates. Portfolio investment can generate important gains but is often associated with a higher level of risk and volatility, especially since investors do not have control over their capital.

By contrast, the theory of the firm is associated with international capital in the form of foreign direct investment (FDI), which responds to firms' decisions to invest in foreign locations. This second type of international capital flow tends to be more durable and predictable, since it is often linked with firms' interest in expanding their productive capacities beyond their domestic markets while retaining some degree of ownership and control over their investment.[97]

FDI is unlike portfolio investment, which generally takes an arms-length approach to investing as long as the returns outweigh the risks and costs of that investment. In contrast, FDI entails transferring other tangible and intangible assets, such as managerial capacity, value chain connectivity, industrial know-how and technology, among others, that are part of the investing firm. The intangible assets are hardest to measure and yet most valued for their potential dynamic impact on an economy.

This chapter first reviews major theories of why firms decide to invest in a foreign location. It next examines theoretical and empirical underpinnings of investment and trade in the context of regional integration theory. Third, the chapter conceptualizes the relationship between FDI and three behind-the-border issues: competition, intellectual property and the digital economy.[98] Last, it highlights empirical evidence substantiating and complementing the theoretical literature to propose a theoretical framework explaining the interlinkages between investment and the behind-the-border issues, setting the stage for the later chapters.

This chapter first reviews major theories of why firms decide to invest in a foreign location. It next examines theoretical and empirical underpinnings of investment and trade in the context of regional integration theory.

Theoretical literature on the underpinnings of investment

Among the seminal theories explaining FDI as a type of investment by firms beyond national borders are those focusing on multinational enterprises (MNEs). The theories depict MNEs as firms able to extend their operations across borders to maximize profits; access resources, inputs and markets and, in more recent literature, even access value chains.[99]

This stream of theories dates back as far as Ronald Coase,[100] who initially explained that firms' growth is a function of their expected profitability, which in turn is defined by transaction costs. In Coase's theory, firms diversify either by managing exchange transactions for new products or by ceasing transactions for old products that become too costly. That theory has since evolved to consider not only products but also production factors, such as technology and capital, with transaction costs being costs that cannot be fully internalized by the firm but can greatly be influenced and minimized by the method a firm chooses to organize itself.[101]

Other well-rooted theories have focused on the asset-based movements of MNEs. For example, Stephen Hymer's market structure theory lays an important theoretical foundation for FDI, characterizing a firm's FDI decisions as resting on two distinct factors: the prevalence of market imperfections and the firm's intrinsic competitive advantages, such as know-how and access to cheaper production factors, supply chains and distribution networks.[102] In the presence of market imperfections, MNEs can use their firm-specific advantages and market power to influence market outcomes, either engaging in horizontal competition when selling their products in the same markets or in vertical competition when trading with each other across several countries. A firm's decision to invest abroad will also be determined by additional factors, such as market size, the risk of expropriation and exchange rate risks.

A contemporary of Hymer, Charles P. Kindelberger, developed industrial organization theory to explain how MNEs invest (relocating assets across borders) to overcome informational and operational deficiencies with respect to their domestic competitors.[103] FDI results from imperfect competition across markets, where market power results from a monopolistic advantage rather than, as Hymer claimed, a firm-specific advantage. So, cross-border investment can issue from a firm leveraging a market failure to its advantage, rather than merely competing with a firm-specific asset under conditions of perfect competition.

Product cycle theory, a major theoretical contribution by Raymond Vernon (1961), uses innovation-driven considerations to explain FDI. Vernon argued that innovation is a conduit to technology-based FDI, which in turn enables knowledge transfer. The investment corresponds to a firm's maturity in producing a certain good. In an initial stage, the firm launches a new product in a given host or location based on the cost of factors of production and external economies. Depending on the firm's proximity to the host market, it gains access to information. In a second stage, a firm benefits from economies of scale and will choose import markets from which it can source inputs depending on production and transport costs, where prospective

This contribution, rather than being firm-specific, takes a more economy-wide approach to offer a broader view of FDI in the context of a developing economy. It shows how latecomer countries catch up as they industrialize.

cost savings are defined as the differences in technology and factor costs between the home and foreign market. Finally, in a third stage, the prevalence of a highly standardized product enables the firm to relocate production to less developed countries, and locating the cross-border investment depends on the cost and proximity to the input source.

Kaname Akamatsu contributed his flying geese theory, which portrays the growth of manufacturing industries in developing countries as the rationale for FDI.[104] This contribution, rather than being firm-specific, takes a more economy-wide approach to offer a broader view of FDI in the context of a developing economy. It shows how latecomer countries catch up as they industrialize. Like the product cycle theory, the flying geese theory breaks production into three stages. Initially, industries in a developing economy diversify and upgrade from simple to more sophisticated products or from consumer goods to capital goods (along an inter-industry dimension). In a second stage, the economy that initially imported a good learns to use local production for that good and finally to export it (along an intra-industry dimension). In a third and last stage, industries relocate to the developing country, bringing FDI from the advanced economy.

Stage theory, by Jan Johanson and Jan-Erik Vahlne (1977, 1990) and Johanson and Finn Wiedersheim-Paul (1975), claims that the international engagement of firms is progressive, motivated by a sequential increase in worldwide involvement in which firms gradually gain experiential knowledge and commit resources. As MNEs become more integrated into the world economy through either vertical or horizontal integration, their increased international involvement will enhance their experiential knowledge and learning by exposing them to cross-border production. The development of experiential knowledge and skills, a condition of a firm's internationalization, cannot be bought. Such experience ultimately allows an MNE to identify exploitable market opportunities while reducing the uncertainty associated with investment risk.

Newer theoretical contributions rely on new or revised assumptions. The evolution has been a response to the limitations of older assumptions in explaining the realities of FDI. John H. Dunning (1973, 1977 and 1993), developed an approach more dynamic and all-encompassing than the prevalent FDI theories, known as the eclectic paradigm or OLI framework. It explains investment decisions by firms as a function of ownership (O), location (L) and internalization (I) advantages. Ownership advantages are derived from the ability of firms to control and have some degree of ownership over their investment, while location advantages or benefits are associated with location-specific assets in host countries, such as natural resources and factor endowments. Internalization advantages enable firms to overcome market imperfections by internalizing costs and cutting red tape and uncertainty:[105] a firm will undertake vertical FDI if it can reduce some of those costs by relocating production to a foreign market.[106]

Further specifying OLI-specific advantages firms might have, Dunning (1993) sorted FDI into four main categories. Market-seeking FDI (sometimes called vertical FDI) taps into consumer or producer markets and qualifies the relationship between investment and trade. Efficiency-seeking FDI favours the reduction of costs. Resource-seeking FDI envisages tapping into locally available infrastructure, labour and raw materials or inputs. Strategic asset-seeking FDI seeks access to specific advantages ahead of the pack, such as a new technology, innovative process or another opportunity that could arise for a first-comer in a given market.

In more up-to-date FDI theories built on the OLI framework, a fifth category has complemented that typology: learning or knowledge-seeking FDI. These theories consider cross-border investment due to delocalization of production and cross-border networks that operate in global value chains. In such a context, the intangible assets that FDI brings or develops within firms receive more emphasis, as explained by the link, leverage and learn (LLL) framework developed by John Mathews (2002, 2006) and subsequently elaborated.[107] In this analysis, a firm's behaviour in international markets depends on its degree of exposure to such markets. The theory helps explain the rise of firms known as emerging market multinational enterprises (EMMEs), which became active during the 1990s in international markets. Such firms, due to their exposure to interconnected global networks, are able to access the capital and other resources of more mature and established firms to set up linkages to them. Learning happens as the EMMEs repeatedly gather information and acquire knowledge, becoming more adaptable and capable of competing in that situation.

The more modern contributions explain the surge of business models today focused on such criteria as value creation, task specialization, linkage development, on-demand production, local sourcing of goods and services by intermediary firms, and delocalized sourcing of inputs. These theoretical contributions on FDI are more attuned to the fast and changing pace of global value chains.

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Theoretical and empirical underpinnings of investment and trade in the context of regional integration theory

The rich literature on FDI has used international trade theory and regional integration theory to expand its analysis and understanding. Bringing investment, trade and integration together can follow the understanding of cross-border trade and cross-border investment as comparable conduits of MNEs' international operations.

Trade theory and regional integration theory perspectives

Are trade and investment substitutes or complements? If substitutes, a firm with international operations will choose to *either* trade *or* invest across borders, not both, depending on a given set of market conditions, investing would likely crowd out trading opportunities in the host country. But if they are complements, a firm investing in a foreign location can complement or crowd in trading opportunities in the host country market.

Some of the classical FDI theories reviewed above clearly assume substitution between investment and trade.[108] And FDI theories with more sequential approaches seem to suggest that in initial stages, substitution shapes investment decisions.[109] But as a firm gains a foothold in a foreign location and become more sophisticated and knowledgeable about production, trade can follow and even complement the initial FDI made in the host country so the firm can export to other markets or even back to the original home economy.[110]

More recent theoretical work suggests that firms' decisions can face both substitution and complementarity effects, depending on the nature and determinants of the investment.[111] The literature thus remains unsettled, so such relationships require a case-by-case empirical approach (the focus of the next section). Much theoretical evolution has been propelled by empirical contributions that tested and counter-tested theories.

Combined theoretical and empirical contributions on international trade are as disparate in their approach as the FDI literature in characterizing the relationship of FDI and trade. Some assume a substitution relationship in horizontal FDI, where MNEs have an incentive to invest to gain access to a market while bypassing tariffs (tariff jumping).[112]

Others—trade models that look at vertical FDI—observe complementarity between trade and investment flows, provided they make allowances for differences between the source and host countries, such as those in wages and factor endowments.[113] These investments may even have trickle-down effects, such as reducing the cost of credit by promoting domestic investment.[114] But another strand of literature argues the contrary, saying that larger companies such as MNEs can crowd out credit to smaller companies, such as SMEs, since the larger companies are seen as less risky and thus more creditworthy.[115]

The trade literature, like the investment literature, has elaborated on the FDI–trade relationship with multiple and combined empirical contributions. How FDI and trade each behaves in the presence of the other depends on local factors, such as trade openness and incentives for FDI activity in foreign markets.[116] From this perspective, trade openness—critical to advancing regional integration through regional trade agreements—has been considered as complementary to attracting FDI.[117]

The empirical literature on Africa also provides a wide spectrum of explanations about the trade–FDI relationship. Regional trade agreements are at the heart of this research as Africa begins trade in the AfCFTA, which envisages eliminating tariffs for 90 per cent of trade. If this structure is coupled with common investment rules through an Investment Protocol, complementarities between trade and investment flows could be maximized.

Regional integration theories uncover the links between FDI and trade in the context of countries' motivations to participate in such schemes as customs unions and free trade areas. They also describe the welfare impact of such participation. There are two kinds of analysis of development strategies in the economic integration literature.[118] Static analysis seeks to explain the impact of integration on a country's welfare through trade effects. Dynamic analysis expands the economic rationale for integration beyond trade to include new dimensions, including behind-the-border issues and more.

Regional integration theories uncover the links between FDI and trade in the context of countries' motivations to participate in such schemes as customs unions and free trade areas.

In static analysis, Jacob Viner's seminal work (1950) discusses the advantages and disadvantages of economic integration by distinguishing two different effects: trade creation and trade diversion. Regional integration schemes such as customs unions affect trade flows between members and non-members. Trade creation happens when, in the absence of tariff barriers among members, lower-cost producers inside the customs unions can export more to other members with a higher cost base. Trade diversion results from the replacement of imports to member states from more efficient producers outside the union by imports from higher-cost member states. Trade creation increases a country's welfare, since such a shift goes in the direction of the free-trade allocation of a country's resources, but trade diversion reduces welfare by a moving away from that.[119] According to static analysis of comparative advantage, decisions to take part in economic integration schemes become a matter of cost-benefit analysis: it makes sense for a country to participate when integration leads to more trade creation than trade diversion.[120]

But static analysis is limited in assessing the welfare impact of integration. The concept of dynamic effects explains the wider economic rationale behind economic integration schemes.[121] Bela A. Balassa identified major dynamic effects of integration in addition to static trade effects: “large-scale economies, technological change, as well as the impact of integration on market structure and competition, productivity growth, risk and uncertainty, and investment activity.”[122]

Another strain of economic integration theory concerns the applicability of static and dynamic analyses to developing country contexts. Various researchers argue that, in developing countries, dynamic effects analysis is a better instrument to evaluate economic integration. Amr Sadek Hosny (2013), for example, cited studies that question the relevance of mainstream theories of regional economic integration for considering only production and consumption effects while disregarding employment, productivity and income effects that are essential in developing countries.[123]

Another strain of economic integration theory concerns the applicability of static and dynamic analyses to developing country contexts. Various researchers argue that, in developing countries, dynamic effects analysis is a better instrument to evaluate economic integration.

Contributing further to the question of application, Robert Z. Lawrence (1997) argued that recent integration agreements have more diverse rationales than past efforts, for which countries can unlock economies of scale,[124] economies of scope,[125] investment creation and investment diversion,[126] increased competition[127] and so on.

Economic integration theories thus reveal the often complex economic rationales underpinning regional integration arrangements. In the case of the AfCFTA, the harmonization of investment rules through the Investment Protocol in Phase II shows ambitions, beyond simply boosting intra-regional investment, to deepen regional integration among AU Member States. Future studies of the impact of the AfCFTA need to take these intentions into account.

Empirical evidence supporting theoretical investment underpinnings in Africa

A growing number of empirical contributions attempt to transpose theories on investment and regional integration to the African context and to test them there. The literature has a diverse geographical scope examining evidence from countries, subregions, and even the whole continent. But its results are mixed in substantiating or corroborating the elements of various theories.

Trade openness shows it has a positive relationship with FDI, including agglomeration effects in African subregions or countries.[128] An array of other locational factors also have positive relationships with FDI, including market size, efficient legal systems, political stability[129] and a good business environment.[130] Other research investigates elements of macro stability and nominal or monetary convergence[131] and good infrastructure,[132] among others, in relation to attracting FDI. Some literature reinforces the notion that adequate policies and regulations help attract more sustainable and development-oriented investment.[133]

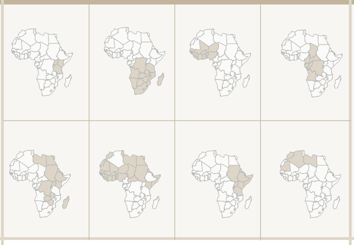
Counterfactual research tends to corroborate that thinking. Poor regulation, poor infrastructure[134] and the prevalence of trade restrictions[135] deter FDI in Africa. More recent research points to trade facilitation, an aspect of infrastructure specific to trade, as critical to improving gains in the volume of intra-African trade of as much as 22 per cent due to trade openness expected from the AfCFTA.[136] The gains from trade facilitation, given the complementarities between trade and investment indicated by the literature, are likely to stimulate market-seeking FDI in the AfCFTA. They also imply a more fundamental structural transformation:[137] that infrastructure-related FDI, which contributes directly to trade facilitation, could link African economies to global value chains and promote greater trade connectivity and insertion into the world economy.[138]

Regional and intra-African FDI in recent years have been increasingly geared towards the service economy. Financial services, such as commercial banking and insurance,[139] have taken the lion's share of intra-African greenfield investment—as much as 50 per cent in 2003–2014.[140] That trend also reinforces the notion that more open trade in services could promote further trade in financial services and thereby attract more investment to finance Africa's structural transformation and development.[141]

Financial services, such as commercial banking and insurance, have taken the lion's share of intra-African greenfield investment—as much as 50 per cent in 2003–2014.

In sum, these African-specific results do not substantially differ from those reported in the literature for other regions or even for the entire world (table 2.1). Even so, some literature establishes a negative relationship between trade openness and FDI in African subregions, pointing to substitution effects between the two.[142] That finding is consistent with divergent views on FDI and calls for a case-by-case approach with sufficient disaggregation that research results do not mask regional or sectoral specifics.

Table 2.1 Summary of theoretical and empirical literature portraying the relationship of FDI and trade openness in Africa

SETUP	A PAIR OF COUNTRIES	SEVERAL COUNTRIES	CONTINENTAL SPACE
Geographical scope	In a theoretical context, any given pair of two countries that dismantle trade barriers between themselves in the context of a free trade area or customs union. Examples from the past: Senegambia, and earlier versions of the East African Community.		
Literature	Classic setup: any two given countries Balassa (1961), Corden and Neary (1982), Helpman (1984), Rekiso (2017), Baldwin, Forslid and Haaland (1995), Panusheff (2003), Marinov (1999, 2014)	Anyanwu and Yaméogo (2015), Anyanwu (2012) and Bartels, Kratzsch and Eicher (2009), in several subregions Negative relationship between trade openness and FDI (Kudaisi, 2014) in West Africa, Morisset (2000) and Asiedu (2006), Mijiyawa (2015), ECA (2020a)	Morisset (2000) ECA (2015, 2018a, 2020a)
Degree of liberalization	Elimination of tariffs in a free trade agreement Set up of a common external tariff in a customs union	Elimination of tariffs in a free trade agreement Set up of a common external tariff in a customs union Sectoral liberalization of services, free movement of people	Liberalization of trade in goods Sectoral liberalization of trade in services Liberalization of investment Regulation on IPRs and competition Free movement of people Liberalized air transport (SAATM) Continental Digital Strategy
FDI typology	Tariff-jumping FDI, which sought to access a market and possibly also resources in substitution of trade, will cease Market-seeking FDI may increase in the regional trade area market Resource-seeking FDI	Complementary to trade Market-seeking FDI Resource-seeking FDI Efficiency-seeking FDI Learning or knowledge–seeking FDI	Complementary to trade Market-seeking FDI Resource-seeking FDI Efficiency-seeking FDI Learning or knowledge–seeking FDI
Static effects	Reduction in trade in the presence of market-seeking FDI Increase of trade if resource-seeking FDI Reduction of welfare gains from trade if tariff-jumping FDI Increase in capital flows reflected in the balance of payments (capital account)	Increase in capital flows reflected in the balance of payments capital and current account	Administrative procedures (or arbitration)

Dynamic effects	Economies of scale Economies of scope Production structure may experience shifts, as labour moves from trade to other sectors Technological change Productivity growth Increased competition and investment flows	Economies of scale Agglomeration effects Monetary, nominal or real convergence	Complete factor mobility Price equalization effects Economies of scope, scale and agglomeration Regional value chains Access to global value chains
Expected outcomes	A free trade area or customs union	A common market A common digital market	A common investment area A common air transport market A common digital space

Source: ECA interpretation based on literature cited in this subsection.

Linkages between investment, competition, intellectual property and the digital economy

Firm decisions on cross-border investment depend on factors in the behind-the-border areas of competition, intellectual property and digitalization. Among competitive features are market imperfections that might enable a degree of market control or even monopoly. Intellectual property considerations focus on intellectual property embedded in transferrable innovation and technology. Digitalization considerations concern the ways cross-border investment can be complemented and scaled up.

The relationships between investment and competition, intellectual property and the digital economy are fluid. Conceptualizing existing linkages between investment and these various policy areas becomes critical to understanding causality between them. The following discussion offers such a conceptualization and then proposes a theoretical framework for the relationships between investment and such behind-the-border policy areas.

Competition and investment

Competition can play a key role in helping African countries stimulate and attract investment to achieve inclusive growth and sustainable development. Competition is a double-edged sword: it can stifle investment, but if properly regulated, it can encourage investment. Some empirical and qualitative studies have shown that the contestation of investment opportunities—disputing them by raising points of disagreement—promotes investment.[143] Other studies have shown that, in some cases, competition can dampen firms' capacity to invest. The impact of competition on investment depends both on precise competition-enhancing measures and the type of investment at stake.[144]

Since African countries and RECs lack a coherent and coordinated competition policy framework and have disparate competition regimes, anti-competitive conduct could undermine efforts to stimulate and attract investment.

In many African countries, markets are restricted by business practices that undermine competitive dynamics and by government actions that create barriers to healthy competition.[145] Of 55 African countries, 23 have both competition laws in force and competition authorities to enforce them, 10 have laws but no authorities,[146] 4 have competition laws in an advanced stage of preparation and 17 have no competition laws at all. So, fewer than half Africa's national economies are genuinely ready for a larger and more liberalized market. Of Africa's regional economic communities (RECs), five have enacted competition laws, which are at different stages of implementation.[147] AU Member States with no competition regulations both weaken the AfCFTA instrument and are more vulnerable to anti-competitive behaviour by firms. Given competition's role in promoting investment, coherent competition rules and regulatory approaches in the context of the AfCFTA are crucial.

Proliferating digital markets present a further risk. They are multi-sided and characterized by network effects, large economies of scale and scope and increasing returns to scale—which together raise barriers for new entry—and so tend towards oligopoly or monopoly.[148] But in its broader economic setting, the digital economy has lower entry barriers than other, more traditional sectors. If market failures are reigned in, the digital economy can catalyse the rest of the economy.

Since African countries and RECs lack a coherent and coordinated competition policy framework and have disparate competition regimes, anti-competitive conduct could undermine efforts to stimulate and attract investment. The integration of markets under the AfCFTA will likely create breeding ground for cross-border cartels, anti-competitive mergers, other anti-competitive trade agreements and the creation of dominant firms that can abuse their market power. If those factors are not regulated through a concerted framework, they will undermine the investment gains that African countries are seeking.

Effective national, regional and continental enforcement of competition laws will greatly bolster the policies they embody. The AfCFTA policy framework on competition should build on existing national and regional competition frameworks. It should cover the main substantive competition issues: cartels, merger control, abuse of dominance and anti-competitive agreements. It should also address consumer protection issues. Since African countries are at different levels of legal development and governance, the framework should incorporate appropriate exceptions in areas such as public procurement to allow countries the policy space to implement measures to deal with their unique economic challenges. Strengthening the enforcement of national competition laws should be emphasized through building capacity and harmonizing national and REC competition frameworks to create synergies. Last but not least, a Competition Protocol for the AfCFTA must be adequately negotiated, adopted and implemented, and enforced at the national level in each State Party.

Intellectual property rights and investment

Intellectual property rights (IPRs) seek to balance the dynamic trade-offs between generating knowledge or innovation and distributing the resulting benefits or profits. Since knowledge and innovation are public goods (that is, their consumption is non-rival—my benefiting from an innovation does not prevent yours—and non-excludable—everyone typically benefits from innovation), compensation for their benefits for individuals and society often does not accrue to their creators, unless there are strong IPRs. For instance, a lack of protection against low-cost imitation erodes creators' incentive to innovate, reducing the creators' productivity and preventing the maximization of benefits.[149]

These considerations also shape the relationship between investment and IPRs. Research indicates that stronger intellectual property (IP) regimes have higher FDI, while more lenient IP protection rules tend to favour domestic companies. Although robust IP regimes form part of an attractive business environment,[150] the purpose and type of FDI involved, the overall economic environment, including technological development, the type of industry in question and individual types of IP also matter to investors.[151] IP protection is only one of many factors weighing on investment decisions. Other factors, as shown above, include factor productivity, regulatory stability and the size of the market.

Strong IP regimes encourage innovation, favour the transfer of modern technologies[152] and can be expected to attract FDI related to knowledge.[153] IP protection against copycats rewards the necessary investment, though it implies trade-offs of static and dynamic efficiency.[154] IPR protection also facilitates product innovation, production relocation and increases in real wages if technology is introduced via FDI.[155] Companies might be more inclined to technology diffusion through joint ventures if they believe their IPRs are sufficiently protected. Mid-level companies in research and development–intensive industries are the most likely to form joint ventures involving technology diffusion while allowing for flexibilities to maximize consumer welfare.[156]

But excessive IPR laws can obstruct home-grown innovation and industrialization and by extension slow inclusive and sustainable development.[157] Stringent IP protection, by hindering smaller firms using imitation and reverse engineering as part of their own innovative processes, can limit knowledge dissemination through those channels. A patent with an excessive term can create a monopolistic or near-monopolistic situation in which a product is undersupplied and the opportunities for new actors are limited or foreclosed.[158] The restriction affects both horizontal (within the sector) and vertical (across sectors) competition, since both direct consumers of the patented product and indirect consumers —such as companies that use the patented product in their production and their consumers— would face higher costs.

Since stronger IP regimes attract higher levels of FDI and technology licensing but can restrict some kinds of innovation, non-discriminatory and transparent frameworks are needed. Foreign enterprises can engage in enclave production with limited spill-overs, or they might unduly exploit their IPRs to the point of market abuse to hinder dynamic competition driven by follow-on innovation.[159] Investment opportunities in the sector, and the economy at large, could thus deteriorate. So, a delicate balance between IP protection and innovation or knowledge dissemination is needed to give investment a foothold, generate backward linkages to the economy and present opportunities for domestic investment and reinvestment.

The effect of weak IP protection—characterized by imperfect contract enforcement mechanisms—is ambiguous. Investors could be deterred, since their domestic competitors could appropriate know-how that is vulnerable to imitation. Or they could eschew joint ventures or technology-licensing production models in favour of greenfield investments, allowing them to keep control over their know-how.[160] Low-income countries may be well-placed to compete through imitation in industries that are labour-intensive rather than technology-intensive, attracting investment and creating much-needed employment.[161]

Historically, many Asian countries attracted significant volumes of FDI despite weak IP regimes.[162] And many developed nations that today strongly advocate stricter IPRs benefited in the past from more relaxed rules that helped them develop their industries, first tapping low-cost production and learning-by-doing strategies and advancing to higher levels of product and process innovation.[163]

The empirical literature is mixed on what IPR protection is adequate, suggesting once more that a case-by-case approach specific to Africa may be more suitable in understanding causality and the relationship between IPRs and investment.

Digitalization and investment

Business operations in today's world cannot be conceived of without the digital platforms they are transacted on. Services from ride hailing to online tutoring can scale appropriately within and across countries through technology platforms that enable search, booking, payment and reviews and aggregate demand for businesses and entrepreneurs and supply for consumers.

In finance, investments are made through digital platforms. For example, in the agriculture sector, mutual funds and crowdfunding platforms aggregate investors from multiple jurisdictions, while electronic banking spurs business transactions, filling the previous void of financial services for remote, rural areas and marginalized groups.

The relationship between the digital economy and investment is complex. E-commerce can spur FDI inflows, but FDI is often necessary to build the infrastructure to support digital trade in the first place.[164] FDI is thus a first-order issue.

The evolution of companies' behaviour due to digitalization and the need to promote a thriving digital economy are likely to shape investment policies in African countries.[165] Digital and technology-driven MNEs are less likely to invest in foreign markets than their more traditional peers. When digital and technology-driven MNEs expand, physical investment and job creation are lower than for MNEs in other industries. Companies with higher internet intensity—more likely to be started in developed economies—have been more sensitive than other companies to favourable tax treatment and expect adequate hard and soft infrastructure.[166] There seems to be some substitution between cross-border investment and technology as a way to deliver goods and services across borders.

But a strand of literature suggests that concentration in a market marked by information-intense production, intangible assets, network effects and first-mover advantages can undermine developing countries' ability to develop competitive companies.[167]

Digitalization can influence market outcomes in many unexpected ways. For example, the internet can lower entry barriers, resulting in more competition and higher productivity.[168] Business models evolve as new technologies are introduced in production (robots and 3D printing), distribution (transformation of previously tangible products into intangible ones), and consumption (for example, streaming). These changes could have profound, yet contrary, impacts on value chains. On the one hand, large companies can now source from a host of suppliers around the world, and micro, small and medium enterprises (MSMEs) can use digital trade platforms to reach customers beyond the borders of their countries.[169] On the other hand, large corporations can demand standardization that is difficult for developing country suppliers to meet, which could also entail lock-in effects making it hard for these suppliers to develop other products for other customers.

African countries must overcome the digital divide that kept their firms from fully integrating into the global digital economy and seizing the opportunities of the digital world.[170] Internet penetration is lower in Africa than in other regions.[171] In industrial output, the value addition of programming services in manufacturing exports rose faster in developed economies than in developing counterparts between 2000 and 2014.[172] Both connectivity and a wider enabling environment are essential for a digital economy to emerge, including local data centres, supportive laws and regulations and local content driving interest in online services.

African countries must overcome the digital divide that kept their firms from fully integrating into the global digital economy and seizing the opportunities of the digital world.

A case has been made for an African digital industrial strategy.[173] A continental digital market associated with specific industrial policies targeting digitalization would enhance the overall investment attractiveness of the continent. Economies of scale and low transaction costs from digitalization, on the back of clear, predictable and universal rules, would provide opportunities to enhance competitiveness. Regional integration and cooperation are also needed for African countries to bridge the digital divide and catch up with more developed peers.[174] Informed by these rationales, the Digital Transformation Strategy for Africa (2020–2030) was formally adopted by the African Union Executive Council in January 2020 (see chapter 7).

Digital trade reveals how big the challenge of the digital economy is. It requires infrastructure for both digital and physical connectivity (roads and ports), skills development and a supportive legal, institutional and regulatory environment.[175] Investment will be needed to bridge the digital divide. But in addition, a unified continental approach and rules will be needed to support e-commerce, since much of it crosses borders and implies the value of network economies. Any regulations, whether national, regional or continental, would entail the simplification and alignment of rules traditionally managed by diverse line ministries and regulators.

Since connectivity is necessary but not sufficient for a knowledge-based digital economy to emerge, targeted policies must sustain a thriving digital environment.[176] Many such policies could apply region-wide—including the development of tech incubators and data centres that might attract foreign investors and support local start-ups and new forms of private financing.[177] Investment decisions in the technology and innovation sector will be affected by the economies of scope and agglomeration tech incubators could provide.

E-government is another avenue for investment in the age of the digital economy. An online government portal can set standards and create demand for online services, thus encouraging investment in the digital economy.[178] E-government portals providing information on business opportunities and regulations increase transparency, reduce transaction costs and thus contribute to the investment attractiveness of the whole economy.[179] Since building e-government facilities is resource-intensive, exchanging best practices and experiences could help countries save resources and improve and innovate on the basis of gathered experiences.[180]

The relationship between investment and the digital economy is multifaceted and bidirectional. A wide rethink of investment policies is needed to target and coordinate a series of targeted approaches across national, regional and continental levels for policy areas such as trade, investment, competition, infrastructure, consumer protection and industrial policy.

A conceptual framework for the interplay between investment and the three behind-the-border policy areas

Although competition, intellectual property rights and digitalization have similarities in attracting investment, the regulatory environment is often far from providing optimal enforcement and protection on the issues that affect them.

Cross-border investment presupposes competition at one level across the MNEs that venture abroad and at second level between MNEs and domestic firms already operating in the market where the MNE chooses to invest. Some theories, as has been noted, highlight the added advantage firms sometimes have to set up operations in a foreign market through cross-border investment so they can exercise some form of market power or even anti-competitive behaviour where market failures allow it.

Investing MNEs, especially those transferring know-how, technology and intermediate inputs incorporating intangible assets, embed elements of intellectual property such as industrial design, patents, copyrights and industrial secrets in their investment. That IP forms part of the goods or services they sell through their foreign operations, often representing the unique or competitive advantage of such firms over their domestic competitors in today's knowledge economy.

And many companies investing in foreign operations use digital platforms for their transactions or their outreach to prospective consumers and to the producers of vital inputs of their core business. Such firms' investments are strongly determined by the digital space they can tap into. It is the digital economy that allows them to diversify, expand their business strategy and employ new elements of trade (e-commerce) and investment (e-finance and e-banking) well beyond their initial investment.

The way firms engage across borders is porous and changeable. Their investment and trade operations are strongly determined by the measures and regulations governing local market conditions.

The way firms engage across borders is porous and changeable. Their investment and trade operations are strongly determined by the measures and regulations governing local market conditions. Most conditions shaping competition and local protection for intellectual property have classically remained behind the borders, meaning they are under the purview of national regulatory authorities and domestic regulations—which can in turn be curtailed by international agreements the country has joined.

So, market access for firms from abroad can only be fully evaluated when the effect is known of the "interference" of domestic regulations on their ability to operate just like domestic firms. In other words, effective market access is defined by the ability to be treated similarly to domestic competitors under domestic regulations so the firm from abroad has comparable opportunities to compete (and be protected) in the domestic market. And digitally driven investment vehicles and models require evolved regulatory supervision within national borders and cooperation across borders.

For example, in Nigeria, the Mavrodi Mundi Moneybox digital platform (also known as MMM) collapsed in 2016, leaving individual investors with significant losses.[181] But financial regulators were unable to intervene, finding that type of platform beyond their remit of action.

Underregulation can also distort market functionalities and aggravate market failures, as often happens in the absence of competition regulations.

Underregulation can also distort market functionalities and aggravate market failures, as often happens in the absence of competition regulations. Digital markets, which are characterized by network effects, control over user data and increasing returns to scale, often suffer market power abuse that raises barriers to entry, especially when the markets are not regulated well enough to ensure fair and free competition and adequate consumer protection.[182] This feature has sparked debates over tech giants such as Facebook and Google, with some calling for the tightening of anti-trust regulation.[183]

The regulation of other investment-related issues, such as taxation, has also been transformed. Technology giants such as Facebook and Google collect payments for services, such as advertisements and subscriptions, without remitting value-added tax (VAT) or corporate tax in the jurisdictions where revenue is collected. This is a concern in many African countries, especially where efforts, not restricted to the digital economy, are under way to improve domestic resource mobilization through widening and deepening the tax base.

The proliferation of borderless digital platforms can integrate African economies through networked industries, value chains and institutions. Nonetheless, digitalization creates virtually linked economies and raises traditional concerns around investment in addition to taxation, such as intellectual property ownership; protections for investors, workers and consumers; and the establishment and enforcement of standards, among others (see chapter 7). At the same time, digitalization also offers opportunities for greater industrial development, including in the context of the Fourth Industrial Revolution.[184]

In sum, the benefits of investment, in tandem with competition and IP opportunities in digitalized economies, will be maximized where coherent regulations and supervisory structures ensure protection for corporate and individual investors and investors' end clients. This is particularly important when investors do not stand on the same footing. As mentioned above, levelling the playing field implies that governments take account of the differences across the panoply of investors and investment models, and seeks to offer condition under which certain types of investor are not crowded out because of regulatory or market imperfections.

To view the complex relationships between investment and the behind-the-border issues, a conceptual framework is proposed that points to location factors, among others, as major determinants of FDI. A starting point is the eclectic paradigm, also known as the ownership, location, and internalization (OLI) model, which considers pull and push factors besides location. It will help to explain how creating a common African market in the AfCFTA will attract investment from MNEs able to take advantage of ownership and internalization advantages and combine them with the locational advantages the AfCFTA presents.

The conceptual framework below attempts to capture the ownership, location, and internalization advantages that MNEs tap into when investing in the AfCFTA common market (figure 2.1). An MNE choosing the continental market as a host for its business operations based on location will incorporate into its decision a view of competition based on the protection AfCFTA common competition rules will provide against unfair competition (such as abuse of market power and predatory behaviour by incumbent firms or copycats) and on the effective market access such rules will confer in the AfCFTA common market.

And an MNE is likely to invest in a host country in the AfCFTA if two IP conditions are observed. First, regulatory and policy enablers for IP must be in place. Regulations cover patents, copyrights, trade secrets and industrial design. Policy enablers include effective IP enforcement in the host country and in countries where the firm's IP assets are registered, as enabled by the AfCFTA Intellectual Property Protocol (chapter 4). Second, other locational factors that may make one host more attractive than another in the AfCFTA market might be proximity to knowledge or technology institutions and innovation hubs and incubators.

And an MNE is likely to invest in a host country in the AfCFTA if two IP conditions are observed.

Last, an MNE assuming that investment and trade are complementary and vying to invest will consider FDI the right conduit for its business operations in a given host economy if operations will be able to expand into the e-trade of its goods and services in a common digital space under the AfCFTA. The envisaged protocol on e-commerce under the AfCFTA is a critical location factor besides enabling regulations facilitating digital trade, as is the information and communications technology infrastructure and the digital readiness of the envisaged host country.

African MNEs may be latecomers in regional and global value chains, so the ownership-location-internalization model may not be sufficient to explain how they might begin to participate. Since those companies would first expand their operations and gain experience in the regional value chains that the AfCFTA is expected to foster, they need strategies to link, leverage, and learn (LLL) from that experience. As they grow stronger and emerge as MNEs, they could expand their activities further, beyond the African market. So the elaboration of the conceptual framework through the LLL framework should complement the OLI framework.

Figure 2.1 depicts how African firms will operate in the context of the newly established AfCFTA under the LLL framework. Now that trade has formally commenced, barriers to trade in goods and services will be reduced and dismantled. Four additional protocols will be instituted governing investment, competition, intellectual property and e-commerce, for which negotiations are expected to start soon. The protocols will contain elements to bolster the LLL process of African firms to maximize the desired outcomes of a common AfCFTA market where goods, services, capital and people can circulate freely.

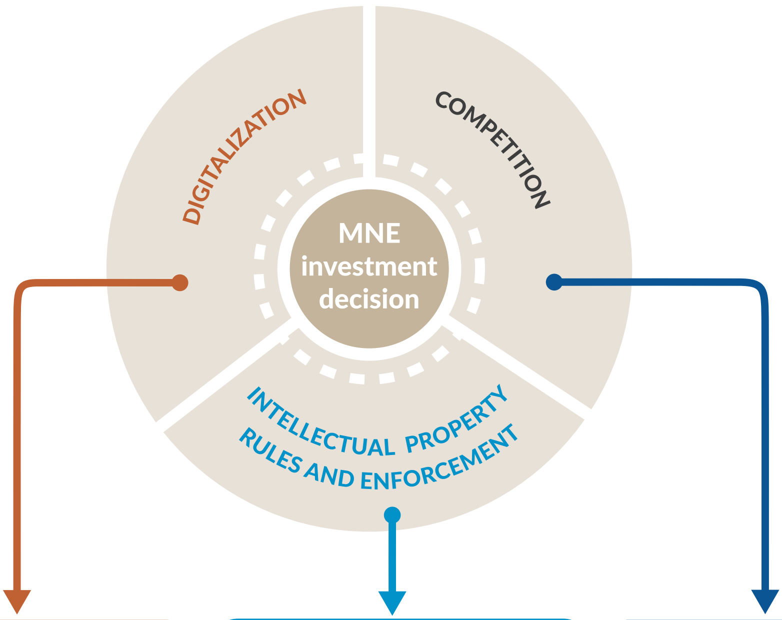
First, African small and medium-sized enterprises (SMEs) will have the incentive and ability under such conditions to link themselves to more mature MNEs, such as the Dangote Group (which even before the AfCFTA formally began was operating across African markets). Since the MNEs that already have a considerable and firm foothold on the continent are expected to have first mover advantages, demand for their goods and services will increase, creating opportunities for SMEs to link themselves to bigger MNEs through supplier and outsourcing contracts for products, inputs and services.

In a second stage, African firms will leverage resources and inputs through the advantages of the four AfCFTA protocols as they are implemented in 2021 and beyond. The AfCFTA will produce an African common investment area under the Investment Protocol and a common digital market under the E-commerce Protocol. African firms will be able to use digital platforms to leverage resources and inputs for, for instance, local sourcing contracts. They will also be able to access wider credit markets and financial technology (fintech) opportunities under the common investment area to expand their production possibilities. That will let them respond to the growing demands from the MNEs they supply and to foster greater opportunities with a wider network of MNEs.

The protocols' provisions will be key to this process. For example, the elements of the protocol on investment—such as the definition of an investment in the common investment area, or protection against convertibility and transferability risks for investments and their proceeds—will enable intra-African investment to flow more freely across the African markets. Equally, a protocol on competition must contain elements to support adequate and fair competition across all continental markets, including the common investment area's credit markets so intra-African investment will be accessible to firms.

Provisions in the Intellectual Property Protocol must balance attracting international investment through a protection regime with incentivizing home-grown innovation (excessive IP laws deter local innovation). And the E-commerce Protocol will be a paramount and regulatory tool cutting across all levels and sectors of the economy to bolster the link, leverage and learn (LLL) process. Digitalization in Africa will ease doing business so that firms can compete and ultimately attract investment. However, acquiring digital platforms, upgrading the technological infrastructure and investing in cybersecurity and fraud prevention pose major cost and resource challenges.

Figure 2.1 A conceptual framework linking investment to IPRs, competition and digitalization



DIGITALIZATION-LINKED OLI ASSETS

OWNERSHIP ASSETS: In-house development of digital tools and digital strategies (e.g. marketing and sales strategy through e-commerce platforms and distribution chains)

LOCATION ASSETS: Prevalence of digital infrastructure and a digital market space, regulatory and policy enablers for digitalization, enabled by an E-commerce Protocol in the AfCFTA and associated national digital trade strategies

INTERNALIZATION ASSETS: Ability to uptake digital technologies and innovation through the digital space, ability to engage suppliers of digital technologies and applications in lock-in contracts and exclusive supply modalities

IPRS AND ENFORCEMENT-LINKED OLI ASSETS

OWNERSHIP ASSETS: Patents, industrial designs, copyrights or trade secrets, owned by the firm covering the firm's research and development assets, products and services, including for business and management processes

LOCATION ASSETS: Regulatory and policy enablers for IP, such as effective IP regulation enforcement in the host country and in countries where IPR assets of the firm are registered, as enabled by the AfCFTA IP Protocol

INTELLECTUAL-ASSETS: Uptake and usage of research and development assets, as well as benefit accrual from IP protection (royalties & fees stemming from patent and copyrights use). Ability to protect ownership assets from unwanted consumption by third parties (both consumers and producers) through lock-in contracts and physical or technical measures

COMPETITION-LINKED OLI ASSETS

OWNERSHIP ASSETS: Competitive or firm-specific asset or advantage (e.g. a company's management model or strategy)

LOCATION ASSETS: Regulatory and policy enablers for competition (i.e. covering elements of antitrust, protection against market power and predatory behaviour, consumer protection and ensuring a degree of effective market access in the AfCFTA Competition Protocol

INTERNALIZATION ASSETS: Ability to protect and safeguard company assets, such as knowledge about internal price structures, clients and input providers, from unfair competition

Source: ECA, based on Dunning (1993) and Páez (2011).

The protocols' provisions could foster cooperative frameworks for shared digital platforms for business, addressing common challenges that must be met with harmonized regulations. They could also incentivize African countries to share experiences and best practices for e-government facilities to improve ease of doing business, boosting efficiency and cutting red tape for firms. That would bolster efforts towards the AU's Digital Transformation Strategy initiative (see chapter 7).

In the third stage of LLL, learning, the AfCFTA's industrialization and infrastructure pillars will be further bolstered, and regional value chains in the AfCFTA will bring about greater connectivity for the common market's entrepreneurs. African firms that have gone through linkage and leverage will find themselves in a position to learn through imitation and other means from the MNEs they have been partnering with. They will eventually emerge as MNEs themselves when they learn how diversify and scale up supply by adapting business models to local realities and AfCFTA market space demands in a continuous and iterative process. They will thus become more adaptable and able to compete.

Across all three link, leverage and learn stages, the transformation of African SMEs into full-fledged MNEs will be affected by the flanking issues that require proper attention by policymakers. For example, even after the full implementation of AfCFTA, differences across African markets will remain in the ease of doing business (registering a business, obtaining operating licenses, hiring staff, enforcing contracts and so on). Similarly, divergent fiscal regimes could create opportunities for the newly minted MNEs to engage in creative transfer pricing or other tax strategies (legitimate and illegitimate) to minimize their total tax liabilities. Continental coordination on tax and private sector policies will be needed to avoid a race to the bottom that could negate some gains from deepening regional integration.

Targeted support and assistance for firms' participation in the economy will be required above and beyond linkage, leverage and learning. A level playing field is necessary so all players can take part in economic activity. As noted above, a level playing field requires policies and regulations permitting firms to deliberately seek backward and forward linkages in economic activity to strengthen and extend the entrepreneurial fabric. A third level of intervention is needed, where complementary national, subregional and regional policies and flanking policies in other policy domains ensure such connectivity for African entrepreneurs, big and small (figure 2.2).[185]

This chapter has proposed a conceptual framework theoretically compatible with the AfCFTA, explaining how investment is linked to competition, intellectual property and digitalization. The report now turns to specific applications in investment, competition, e-commerce and intellectual property rights. The following chapters review existing national and regional policies and regulations, document best practices and propose recommendations for a common investment area levelling the playing field for productive and sustainable investment across Africa.

Figure 2.2 Applying the lens of the link, leverage and learn framework to the AfCFTA

AfCFTA PROTOCOLS

INVESTMENT PROTOCOL	COMPETITION PROTOCOL	IP PROTOCOL	E-COMMERCE PROTOCOL
National and most-favored-nation treatment Eliminates barriers to investment and creates common investment area Protects investments and provides redress in disputes	Covers anti-trust, abuse of market power, predatory behavior and so on Offers a cooperation framework Redress against anticompetitive practices	Rules covering patents, traditional knowledge, geographical indications, copyrights and industrial design in a continental space Possibility of legal redress and remedies when IPRs are infringed	Creates a digital market for e-commerce Sets standards on cybersecurity and interoperability Common rules for e-trade

	COMPETITION	IPRs	DIGITAL
LINKAGE	Ability of competing latecoming firms to establish sourcing relationships with existing MNEs on the continent	Ability of MNEs to leverage existing locational assets the AfCFTA may offer, such as access to credit in a common investment area, access to a continental labour force and other factors and inputs	Ability of competing latecomer firms to learn from, emulate and imrpove on the existing business models and strategies of MNEs in a continental space and emerge as EMNEs in the AfCFTA
LEVERAGE	Ability of latecomer firms to develop technologies or innovative products and services in demand by established MNEs	Ability of latecomer firms to leverage and tap into R&D resources on the continent, as well as a result of continental IP regulation that protects and markets technologies and innovation	Ability of latecomer firms to imitate, adapt and improve on existing technologies or innovative products, processes and services developed by established MNEs
LEARNING	Ability of latecomer firms to use the digital AfCFTA market to sell intermediary goods and services to existing MNEs	Ability of competing latecoming firms to establish sourcing relationships with existing MNEs on the continent	Ability of latecomer firms to use the digital AfCFTA market in order to position themselves as emerging MNEs in the digital space through digital marketing and positioning strategy

COMPLEMENTARY MEASURES AND FLANKING POLICIES

National and regional digital policies and strategies National and regional digitial trade and economy institutions National and regional AfCFTA strategies	National and regional competition policies National and regional competition authorities National and regional AfCFTA strategies	National and regional IP policies National and regional IP bodies National and regional AfCFTA strategies	National and regional digital policies and strategies National and regional digitial trade and economy institutions National and regional AfCFTA strategies
TRADE POLICY	FISCAL POLICY	PRIVATE SECTOR POLICY	OTHER POLICY AREAS

Source: Based on Mathews (2002).

References

Al-Azzam, A., and E. A. Abu-Shanab. 2014. "E-Government: The Gate for Attracting Foreign Investments." Paper presented at the 6th International Conference on Computer Science and Information Technology (CSIT). https://www.researchgate.net/publication/269308681_E-government_The_gate_for_attracting_foreign_investments.

Adepoju, P. 2016. "The Meteoric Rise of One of the World's Largest Ponzi Schemes in Nigeria." *CNN Marketplace Africa*, 14 December. https://edition.cnn.com/2016/12/14/africa/mmm-ponzi-scheme-nigeria/index.html.

Akamatsu, K. 1962. "Historical Pattern of Economic Growth in Developing Countries." *The Developing Economies* 1: 3–25.

Akdogu, E., and P. MacKay. 2008. "Investment and Competition." *The Journal of Financial and Quantitative Analysis* 43 (2): 299–330.

Anyanwu, J. C. 2012. "Why Does Foreign Direct Investment Go Where It Woes? New Evidence from African Countries." *Annals of Economics and Finance* 13 (2): 433–70.

Anyanwu, J. C., and N. D. Yaméogo. 2015. "Regional Comparison of Foreign Direct Investment to Africa: Empirical Analysis." *African Development Review* 27: 345–363.

Asiedu, E. 2006. "Foreign Direct Investment in Africa: The Role of Natural Resources, Market Size, Government Policy, Institutions and Political Instability." *World Economy* 29: 63–77.

AU (African Union). 2013. "Report of the Meeting of Trade Senior Officials, 8th Ordinary Session of the Conference of Ministers of Trade, Addis Ababa." 21–25 October 2013, Addis Ababa, African Union.

AU (African Union). 2016. "Report of the Second Meeting of the African Union Ministers of Trade, Addis Ababa." 29–30 November 2016, Addis Ababa.

AU (African Union). 2020. "Assembly of the Union, Thirty Third Ordinary Session, Report of H.E. Mahamadou Issoufou, President of the Republic of Niger and Leader of the African Continental Free Trade Area." 9–10 February, Addis Ababa, African Union.

Balassa, B. 1961. *The Theory of Economic Integration*. New Haven, CT: Yale University Press.

Balassa, B., and A. Stoutjesdijk. 1975. "Economic Integration Among Developing Countries." *Journal of Common Market Studies* 14 (1): 37–55.

Baldwin, R., R. Forslid and J. Haaland. 1995. "Investment Creation and Investment Diversion: Simulation Analysis of the Single Market Programme." NBER Working Paper 5364, National Bureau of Economic Research, Cambridge, MA.

Bartels, F. L., S. Kratzsch and M. Eicher. 2009. "Foreign Direct Investment in Sub-Saharan Africa: Determinants and Location Decisions." Research and Statistics Branch Working Paper 08/2008, United Nations Industrial Development Organization, Vienna.

Barth, J. R., G. Caprio and R. Levine. 2006. *Rethinking Bank Regulation: Till Angels Govern*. Cambridge, UK: Cambridge University Press.

Benjamin, O. N. 2012. "Foreign Direct Investment in Sub-Saharan Africa." *African Journal of Economic and Sustainable Development* 1 (1): 49–66.

Belderbos, R., and L. Sleuwaegen. 1998. "Tariff Jumping DFI and Export Substitution: Japanese Electronics Firms in Europe." *International Journal of Industrial Organization* 16 (5): 601–638.

Blonigen, B. A., and J. Piger. 2014. "Determinants of Foreign Direct Investment." *Canadian Journal of Economics* 47: 775–812.

Bopkin, G. A. 2017. "Foreign Direct Investment and Environmental Sustainability in Africa: The Role of Institutions and Governance." *Research in International Business and Finance* 39 (PA): 239–247.

Borensztein, E., J.-W. Lee and J. De Gregorio. 1998. "How Does Foreign Direct Investment Affect Economic Growth?" *Journal of International Economics* 45: 115–135.

Braga, P., and C. Fink. 1998. "The Relationship Between Intellectual Property Rights and Foreign Direct Investment." *Duke Journal of Comparative & International Law* 9: 163–187.

Brainard, S. L. 1997. "An Empirical Assessment of the Proximity Concentration Trade-off between Multinationals Sales and Trade." *American Economic Review* 8: 520–544.

Cabral, A., L. Moodley and S. Yeboah-Amankwah. 2014. "Digital Divide: The Impact of Closing Africa's Internet Gap." https://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/digital-divide-the-impact-of-closing-africas-internet-gap.

Caprio, G. J.A. Hanson and R. E. Litan (Eds.). 2005. *Financial Crises: Lessons from the Past, Preparation for the Future*. Washington, DC: Brookings Institution Press.

Casella, B., and L. Formenti. 2018. "FDI in the Digital Economy: A Shift to Asset-light International Footprint." *Transnational Corporations* 25 (1): 101–130.

Caves, R. E. 1996. *Multinational Enterprise and Economic Analysis*. Second edition. Cambridge, UK: Cambridge University Press.

Chang, H. J. 2002. *Kicking away the Ladder: Development Strategy in Historical Perspective*. London: Anthem.

Coase, R. H. 1937. "The Nature of the Firm." In O. E. Williamson and S. Winter (Eds.), *The Nature of the Firm: Origins, Evolution and Development*, 61–74. New York: Oxford University Press.

Cooper, C. A., and B. F. Massell. 1965. "Toward a General Theory of Customs Unions for Developing Countries." *Journal of Political Economy* 73: 461.

Corden, W. M., and P. Neary. 1982. "Booming Sector and De-industrialization in a Small Open Economy." *Economic Journal* 92 (368): 825–848.

Correa, C. 1995. "Intellectual Property Rights and Foreign Direct Investment. *International Journal of Technology Management* 10 (2): 173–199.

Dessemond, E. G. 2019. "Restoring Competition in "Winner-took-all" Digital Platform Markets." Research Paper 40, United Nations Conference on Trade and Development, Geneva.

Dunning, J. H. 1973. "The Determinants of International Production." *Oxford Economic Papers* 25: 289–335.

Dunning, J. H. 1977. "Trade, Location of Economic Activity and the MNE: A Search for an Eclectic Approach." In B. Ohlin and P. O. Hesselborn (Eds.), *The International Allocation of Economic Activity*, 395–418. London: Macmillan.

Dunning, J. H. 1993. *Multinational Enterprises and the Global Economy*. Addison-Wesley.

Dupasquier, C., and P. N. Osakwe. 2006. "Foreign Direct Investment in Africa: Performance, Challenges, and Responsibilities." *Journal of Asian Economics* 17: 241–260.

ECA (United Nations Economic Commission for Africa). 2013. *Assessing Regional Integration in Africa V: Towards and African Continental Free Trade Area.* Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa). 2018a. *Assessing Regional Integration in Africa VIII: Bringing the Continental Free Trade Area About*. Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa). 2018b. "Brief 7: Phase II Issues." Paper prepared for the AfCFTA Ratification Forum, ECA, Addis Ababa.

ECA (United Nations Economic Commission for Africa). 2019a. "Assessing the Status of Regional Integration in Africa (E/ECA/COE/38/3ECA, 2018)." Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa). 2019b. *Assessing Regional Integration in Africa IX: Next Steps for African Continental Free Trade Area*. Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa). 2019c. "Fiscal Policy, Trade and the Private Sector in the Digital Era (E/ECA/COE/38/13)." Presented at the Thirty-eighth Meeting of the Economic Commission for Africa Committee of Experts, Marrakech, Morocco, 20–22 March.

ECA (United Nations Economic Commission for Africa). 2020a. *Drivers for Boosting Intra-African Investment Flows towards Africa's Transformation*. Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa). 2020b. "Linkages between Double Taxation Treaties and Bilateral Investment Treaties." Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa). 2020c. "Sustainable Industrialization and Diversification of Africa in the Digital Era (E/ECA/COE/39/4)." Presented at the Thirty-ninth meeting of the Economic Commission for Africa Committee of Experts of the Conference of African Ministers of Finance, Planning and Economic Development, Addis Ababa, 18–20 March.

ECA (United Nations Economic Commission for Africa) and South Centre. 2017. "The WTO's Discussions on Electronic Commerce." Analytical Note SC/AN/TDP/2017/2, South Centre, Geneva.

Eniola, T. 2016. "Ponzi Palaver: Nigerians Count Losses, Blame Economic Recession for MMM Woes." *Punch*, 18 December. https://punchng.com/ponzi-palaver-nigerians-count-losses-blame-economic-recession-mmm-woes/.

Fink, C., and K. E. Maskus. 2005. "Why We Study Intellectual Property Rights and What We Have Learned." In C. Fink and K. E. Maskus (Eds.), *Intellectual Property and Development*. Washington, DC and New York: World Bank and Oxford University Press.

Forte, R. 2004. "The Relationship between Foreign Direct Investment and International Trade Substitution or Complementarity? A Survey." Working Paper, University of Porto Faculty of Economics, Porto, Portugal.

Graham, M., S. Ojanperä, M. A. Anwar and N. Friederici. 2017. "Digital Connectivity and African Knowledge Economies." *Questions de Communication* 32: 345–360.

Greenhalgh, C., and M. Rogers. 2010. *Innovation, Intellectual Property, and Economic Growth*. Princeton, NJ: Princeton University Press.

Hailu, Z. A. 2010. "Demand-side Factors Affecting the Inflow of Foreign Direct Investment to African Countries: Does Capital Market Matter?" *International Journal of Business and Management* 5 (5): 104–16.

Haskel, J., and S. Westlake. 2017. *Capitalism without Capital: The Rise of the Intangible Economy*. Princeton, NJ: Princeton University Press.

Helpman, E. 1984. "A Simple Theory of International Trade with Multinational Corporations." *Journal of Political Economy* 92 (3): 451–471.

Helpman, E. 1993. "Innovation, Imitation, and Intellectual Property Rights." *Econometrica* 61 (6): 1247–80.

Hosny, A. S. 2013. "Theories of Economic Integration: A Survey of the Economic and Political Literature." *International Journal of Economy, Management and Social Sciences* 2 (5): 133–155.

Hymer, S. H. 1960. "The International Operation of National Firms: A Study of Direct Foreign Investment." Doctoral dissertation, Massachusetts Institute of Technology, Cambridge, MA.

Hymer, S. H. 1968. "The Large Multinational Corporation." In M. Casson (Ed.), *Multinational Corporations*. Aldershot, Hants, UK: Edward Elgar.

Hymer, S. H. 1970. "The Efficiency (Contradictions) of Multinational Corporations." *American Economic Review Papers and Proceedings* 60: 441–48.

Hymer, S. H. 1976. *The International Operations of National Firms: A Study of Direct Foreign Investment*. Cambridge, MA: Massachusetts Institute of Technology.

Johanson, J., and J. E. Vahlne. 1977. "The Internationalization Process of the Firm: A Model of Knowledge Development and Increasing Foreign Market Commitments." *Journal of International Business Studies* 8 (1): 23–32.

Johanson, J., and J. E. Vahlne. 1990. "The Mechanism of Internationalization." *International Marketing Review* 7 (4): 11–24.

Johanson, J., and F. Wiedersheim-Paul. 1975. "The Internationalisation of the Firm: Four Swedish Cases." *Journal of Management Studies* 12: 305–322.

Kaplinsky, R., and M. Morris. 2009. "The Asian Drivers and SSA: Is There a Future for Export-oriented African Industrialization?" *World Economy* 32: 1638–1655.

Kedia, B., N. Gaffney and J. Clampit. 2012. "EMNEs and Knowledge-seeking FDI." *Management International Review* 52: 155–173. https://doi.org/10.1007/s11575-012-0132-5.

Kinda, T. 2010. "Investment Climate and FDI in Developing Countries: Firm-level Evidence." *World Development* 38 (4): 498–513.

Kindelberger, C. P. 1969. *American Business Abroad: Six Lectures on Direct Investment*. New Haven, CT: Yale University Press.

Kindelberger, C. P. 1975. "The Rise of Free Trade in Western Europe." *The Journal of Economic History* 35 (1): 20–55.

Krüger, R., and I. Strauss. 2015. "Africa Rising Out of Itself: The Growth of Intra-African FDI." Columbia FDI Perspectives 139, Columbia Center on Sustainable Investment, Columbia University, New York.

Kudaisi, B. V. 2014. "An Empirical Determination of Foreign Direct Investment in West African Countries: A Panel Analysis." *International Journal of Development and Economic Sustainability* 2 (2): 19–36.

Lai, E. C. 1997. "International Intellectual Property Rights Protection and the Rate of Product Innovation." *Journal of Development Economics* 55: 133–153.

Leahy, D., and A. Naghavi. 2010. "Intellectual Property Rights and Entry into a Foreign Market: FDI versus Joint Ventures." *Review of International Economics* 18 (4).

Lee, K., and Y. K. Kim. 2010. "IPR and Technological Catch-Up in Korea." In H. Odagiri, A. Goto, A. Sunami and R. R. Nelson (Eds.), *Intellectual Property Rights, Development, and Catch-Up: An International Comparative Study.* Oxford, UK: Oxford University Press.

Luo, Y., J. Sun and S. L. Wang. 2011. "Emerging Economy Copycats: Capability, Environment, and Strategy." *Academy of Management Perspectives* 25 (2): 37–56.

Ma, Y., K. Morikawa, and R. Shone. 2000. "A Macroeconomic Model of Direct Investment in Foreign Affiliates of Japanese Firms." *Japan and the World Economy* 12: 953–973.

MacLeod, J. 2017. "E-commerce and the WTO: A Developmental Agenda?" Discussion Paper, GEG Africa (Global Economic Governance). https://www.africaportal.org/documents/17846/GA_Th3__DP__macleod_20171214.pdf.

Mansfield, E. 1994. “Intellectual Property Protection, Foreign Direct Investment, and Technology Transfer.” International Finance Corporation Discussion Paper, World Bank, Washington, DC.

Marinov, E. 1999. *Regional Economic Integration*. Sofia, Bulgaria: PH Stopanstvo.

Marinov, E. 2014. “Economic Integration Theories and the Developing Countries.” In R. Dautov, P. Gkasis, A. Karamanos, T. Lagkas, A. Prodromidou and A. Ypsilanti (Eds.), *Infusing Research and Knowledge in South-East Europe*, 164–177. Thessaloniki, Greece: South-East European Research Centre.

Markusen, J. R., and K. E. Maskus. 2002. “Discriminating among Alternative Theories of the Multinational Enterprise.” *Review of International Economics* 10 (4): 695–707.

Maskus, K. E. 1998. “The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer.” *Duke Journal of Comparative & International Law* 9: 109–162.

Maskus, K., and G. Yang. 2000. “Intellectual Property Rights, Foreign Direct Investment and Competition Issues in Developing Countries.” *International Journal of Technology Management* 19 (1): 22–34.

Mathews, J. A. 2002. *Dragon Multinational: Towards a New Model of Global Growth*. New York: Oxford University Press.

Mathews, J. A. 2006. “Dragon Multinationals: New Players in 21st Century Globalization.” *Asia Pacific Journal of Management* 23: 5–27.

Mathis, J., and W. Sand-Zantman. 2014. “Competition and Investment: What Do We Know from the Literature?” Industrial Economic Institute, Toulouse University Capitole.

Mijiyawa, A. G. 2015. “What Drives Foreign Direct Investment in Africa? An Empirical Investigation with Panel Data.” *African Development Review* 27 (4): 392–402.

Morisset, J. 2000. “Foreign Direct Investment in Africa: Policies also Matter.” Policy Research Working Paper 2481, World Bank, Washington, DC.

Moser, P. 2013. “Patents and Innovation: Evidence from Economic History.” *Journal of Economic Perspectives* 27 (1): 23–44.

Naude, W. A., and W. F. Krugell. 2007. “Investigating Geography and Institutions as Determinants of Foreign Direct Investment in Africa Using Panel Data.” *Applied Economics* 39: 1223–33.

Nnadozie, E., and A. E. Njuguna. 2011. “Investment Climate and Foreign Direct Investment in Africa.” Presented at the 6th African Economic Conference in Addis Ababa, Ethiopia, 26–28 October.

OECD (Organisation for Economic Co-operation and Development). 2008. “Fourth Revision of the OECD Benchmark Definition of Foreign Direct Investment.” Paris: OECD Publishing.

Páez, L. 2011. *Liberalizing Financial Services and Foreign Direct Investment: Developing a Framework for Commercial Banking FDI*. London: Palgrave Macmillan.

Pantelidis, P., and E. Nikopoulos. 2008. “FDI Attractiveness in Greece, International Advances.” *Economic Research* 14: 90–100.

Panusheff, E. 2003. *Economic Integration in the European Union*. Sofia, Bulgaria: Nekst PH.

Peukert, A. 2017. “Intellectual Property and Development: Narratives and their Empirical Validity.” *The Journal of World Intellectual Property* 20 (1–2): 2–23.

Pires, G., J. Stanton and I.-D. Salavrakos. 2010. “The Interaction of Foreign Direct Investment with Electronic Commerce in Less Developed Countries.” *Forum for Social Economics* 39 (2): 127–143.

Rekiso, Z. S. 2017. “Rethinking Regional Economic Integration in Africa as if Industrialization Mattered.” *Structural Change and Economic Dynamics* 43: 87–98.

Sekkat, K., and M.-A. Veganzones-Varoudakis. 2007. “Openness, Investment Climate, and FDI in Developing Countries.” *Review of Development Economics* 11 (4): 607–620.

Schlesinger, J. M., B. Kendall and J. D. McKinnon. 2019. “Tech Giants Google, Facebook and Amazon Intensify Antitrust Debate.” *Wall Street Journal*, 12 June. https://www.wsj.com/articles/tech-giants-google-facebook-and-amazon-intensify-antitrust-debate-11559966461.

Thite, M., A. Wilkinson, P. Budhwar and J. A. Mathews. 2016. “Internationalization of Emerging Indian Multinationals: Linkage, Leverage and Learning (LLL) Perspective.” *International Business Review* 25 (1): 435–443.

UNCTAD (United Nations Conference on Trade and Development). 2017a. *Trade and Development Report 2017: Beyond Austerity: Towards a Global New Deal.* Geneva: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2017b. *World Investment Report 2017: Investment and the Digital Economy*. Geneva: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2018. *South–South Digital Cooperation for Industrialization: A Regional Integration Agenda.* Geneva: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2019. *UNCTAD Digital Economy Report 2019*. Geneva: UNCTAD. https://unctad.org/en/PublicationsLibrary/der2019_en.pdf.

Venables, A. J. 2003. “Winners and Losers from Regional Integration Agreements.” *The Economic Journal* 113 (490): 747–761.

Viner, J. 1950. *The Customs Union Issue*. New York: Carnegie Endowment for International Peace. Reprinted in J. Viner and P. Oslington (2014), *The Customs Union Issue*. New York, Oxford University Press.

Vernon, R. 1961. “International Investment and International Trade in the Product Cycle.” *Quarterly Journal of Economics* 80 (2).

Williamson, O. E. 1975. *Markets and Hierarchies: Analysis and Antitrust Implications*. New York: Free Press.

World Bank. 2014. “Foreign Direct Investment, Net Flows (BoP, current US$).” Washington, DC: World Bank. https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD. Accessed 2 March 2021.

World Bank. 2016. *Breaking Down Barriers: Unlocking Africa’s Potential through Vigorous Competition Policy*. Washington, DC: World Bank.

Yu, P. K. 2007. “Intellectual Property, Economic Development, and the China Puzzle.” In D. J. Gervais (Ed.), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPs Plus Era*, 173–220. Oxford, UK: Oxford University Press.

Zekos, G. 2005. “Foreign Direct Investment in a Digital Economy.” *European Business Review* 17 (1): 52–68.

End notes

97 In the mainstream literature, the standard asset-based minimum for FDI is 10 per cent of voting stock or voting power in a firm that operates outside the investor's economy. Capital below that threshold is treated as portfolio investment. See World Bank (2014) and OECD (2008) for commonly used FDI definitions and benchmarks.
98 Traditionally in the literature, investment competition, intellectual property and digitalization (as part of wider ICT regimes) were considered to be policy areas under national regulatory purview, addressed within national confines and hence dubbed as behind-the-border issues. With the expansion of trade agreements and trade regimes, which widened their scope to include such issues, they have increasingly become part of international regulation. The discussions below further details why the lines are blurred in the sense that in today's day and age, and thanks to the advancement of digitalization, these policy areas have transcended national confines and are often found in a regulatory vacuum or regulatory disconnect because neither national nor international regulation have adequately catered for them, or alternatively because existing regulation at the national and international level is disjointed and conflicting, leading to a so-called regulatory disconnect. For digitalization in particular, the discussion in chapter 7 elaborates on the modalities required for overcoming the challenge of regulatory and policy disconnect.
99 For a summary of the various theoretical underpinnings of FDI see Páez (2011) and ECA (2020a).
100 Coase, 1937.
101 Williamson, 1975.
102 Hymer, 1960, 1968, 1970, 1976.
103 Kindelberger, 1969.
104 Akamatsu, 1962.
105 These O/L/I advantages can be replicated against economy-wide policy frameworks in various ways, helping policymakers better understand under what policy channels they can incentivize investment to meeting policy objectives. Examples of complementary policy areas are given in figure 2.1, and more concrete examples of policy responses are given in in figure 7.1.
106 Kinda, 2010; Pantelidis and Nikolopoulos, 2008; Sekkat and Veganzones-Varoudakis, 2007.
107 Luo, Sun and Wang, 2011; Kedia, Gaffney and Camplit, 2012; Thite et al., 2016.
108 Coase, 1937; Hymer, 1960, 1968, 1970, 1976; Kindelberger, 1975.
109 Vernon, 1961; Akamatsu, 1962.
110 Johanson and Vahlne, 1977, 1990; Johanson and Wiedersheim-Paul, 1975.
111 Dunning, 1977, 1993; Mathews, 2002, 2006.
112 Belderbos and Sleuwaegen, 1998; Brainard, 1997; Caves, 1996; Ma, Morikawa and Shone, 2000.
113 Helpman, 1984; Forte, 2004.
114 Borensztein, Lee and De Gregorio, 1998.
115 Barth, Caprio and Levine, 2006; Caprio, Hanson and Litan, 2005.
116 Dunning, 1993; Markusen and Maskus, 2002.
117 Blonigen and Piger, 2014.
118 Marinov, 2014.
119 Marinov, 2014; Rekiso, 2017.
120 Venables, 2003.
121 Balassa, 1961; Cooper and Massell, 1965.
122 Balassa, 1961.
123 Rekiso, 2017.
124 Balassa and Stoutjesdijk, 1975; Corden and Neary, 1982.
125 Panusheff, 2003.
126 Baldwin, Forslid and Haaland, 1995.
127 Marinov, 1999.
128 Anyanwu and Yaméogo, 2015; Bartels, Kratzsch and Eicher, 2009; Hailu, 2010.
129 Anyanwu and Yaméogo, 2015; Asiedu, 2006; Bartels, Kratzsch and Eicher, 2009; Mijiyawa, 2015.
130 Benjamin, 2012; Morisset, 2000; Nnadozie and Njuguna, 2011.
131 Anyanwu and Yaméogo, 2015; Naude and Krugell, 2007.
132 Hailu, 2010.
133 Benjamin, 2012; Bopkin, 2017; Kaplinsky and Morris, 2009.
134 Dupasquier and Osakwe, 2006.
135 Anyanwu, 2012.
136 ECA, 2013.
137 Structural transformation is conceived as a shifting of gears from lower value-added activities and lower productivity to higher value-added activities and higher productivity within and across economic sectors. This is best demonstrated when countries move from the lower end of global value chains, where activities are characteristically extractive and there is little value addition, to activities higher up, which have more advanced and sophisticated production processes, implying a greater adding of value into the final good or service being produced (ECA, 2020a).
138 ECA, 2020a.
139 Krüger and Strauss, 2015.
140 ECA, 2020a.
141 ECA, 2020a.
142 Kudaisi, 2014.
143 Akdogu and MacKay, 2008.
144 Mathis and Sand-Zantman, 2014.
145 World Bank, 2016.
146 ECA, 2019a.
147 World Bank, 2016.
148 Dessemond, 2019.
149 Other situations where the accrual of benefits and profits may not be in the hands of the knowledge creators or innovators relates to profits that accrue to the rightful owners of registered geographical indications and traditional knowledge-based products.
150 Maskus, 1998.
151 Correa, 1995; Maskus and Yang, 2000.
152 Maskus and Yang, 2000.
153 Braga and Fink, 1998.
154 Fink and Maskus, 2005.
155 Lai, 1997.
156 Leahy and Naghavi, 2010.
157 Moser, 2013; Peukert, 2017.
158 Greenhalgh and Rogers, 2010.
159 Maskus and Yang, 2000.
160 Maskus, 1998; Maskus and Yang, 2000.
161 Helpman, 1993.
162 Correa, 1995; Chang, 2002. For China, see Mansfield (1994) and Yu (2007); for South Korea, see Lee and Kim (2010).
163 Peukert, 2017.
164 Pires, Stanton and Salavrakos, 2010.
165 UNCTAD, 2017b.
166 UNCTAD, 2017b; Casella and Formenti 2018.
167 ECA, 2018a; Haskel and Westlake, 2017; UNCTAD, 2017a, 2018.

168 Zekos, 2005.
169 MacLeod, 2017.
170 Cabral, Moodley and Yeboah-Amankwah, 2014.
171 ECA and South Centre, 2017.
172 UNCTAD, 2018.
173 ECA, 2018a, 2019c.
174 UNCTAD, 2018.
175 Pires, Stanton and Salavrakos, 2010.
176 Graham et al., 2017.
177 UNCTAD, 2017b; ECA, 2018a.
178 UNCTAD, 2017b.
179 Al-Azzam and Abu-Shanab, 2014.
180 ECA, 2019b; UNCTAD, 2018. Several such portals do exist. In the field of investment promotion, work has been advanced in developing the electronic investment guides (iGuides). For examples of such portals in the African continent, see chapter 6.
181 Adepoju, 2016; Eniola, 2016.
182 Dessemond, 2019.
183 Schlesinger, Kendall and McKinnon, 2019.
184 Chapter 7 draws attention to some of the policy disconnects between, investment, trade and fiscal policy. Earlier work of ECA on the nexus between digitalization and fiscal policies and digitalization and industrialization is also found in ECA (2019c, 2020c). Analysis on the relationship between investment and taxation in the context of bilateral investment treaties and double taxation treaties is found in ECA (2020b).
185 Chapter 7 of the present publications looks at some of the actions that may be necessary in support of overcoming the existing policy disconnect.

PART 2:

INVESTMENT, COMPETITION, INTELLECTUAL PROPERTY RIGHTS AND THE DIGITAL ECONOMY IN AFRICA: STATE OF PLAY AND IMPLICATIONS FOR AFCFTA PHASE II AND III NEGOTIATIONS

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]

With negotiations over the AfCFTA Investment Protocol slated to begin in 2021, investment policymaking in Africa is entering a new stage.

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]

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

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.

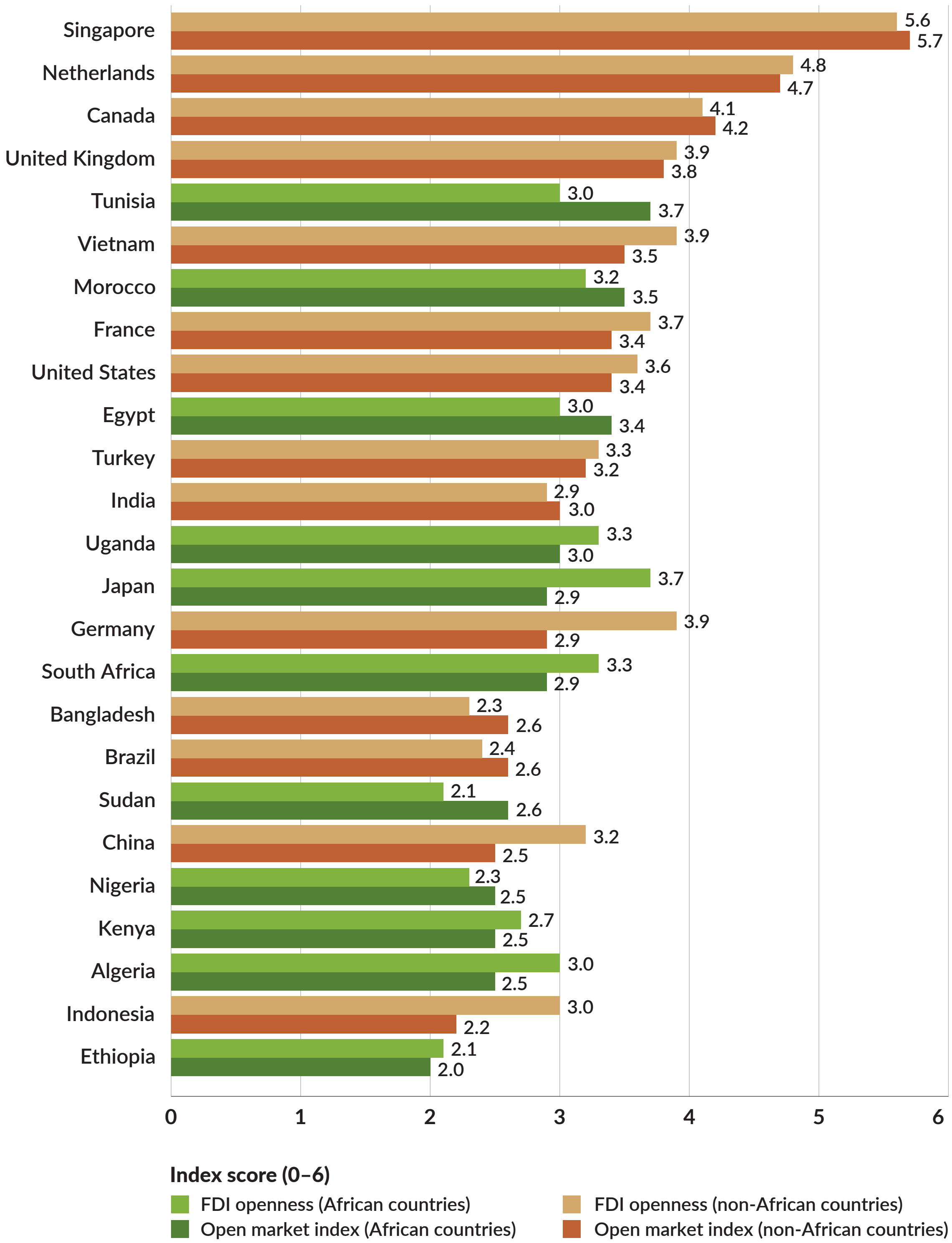
The common law countries tend to be characterized as monist, meaning that upon ratification international treaties are incorporated into national law. Common law countries belong to the dualist group that requires an intermediate step of translation, typically through a legislative act. British and French 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:

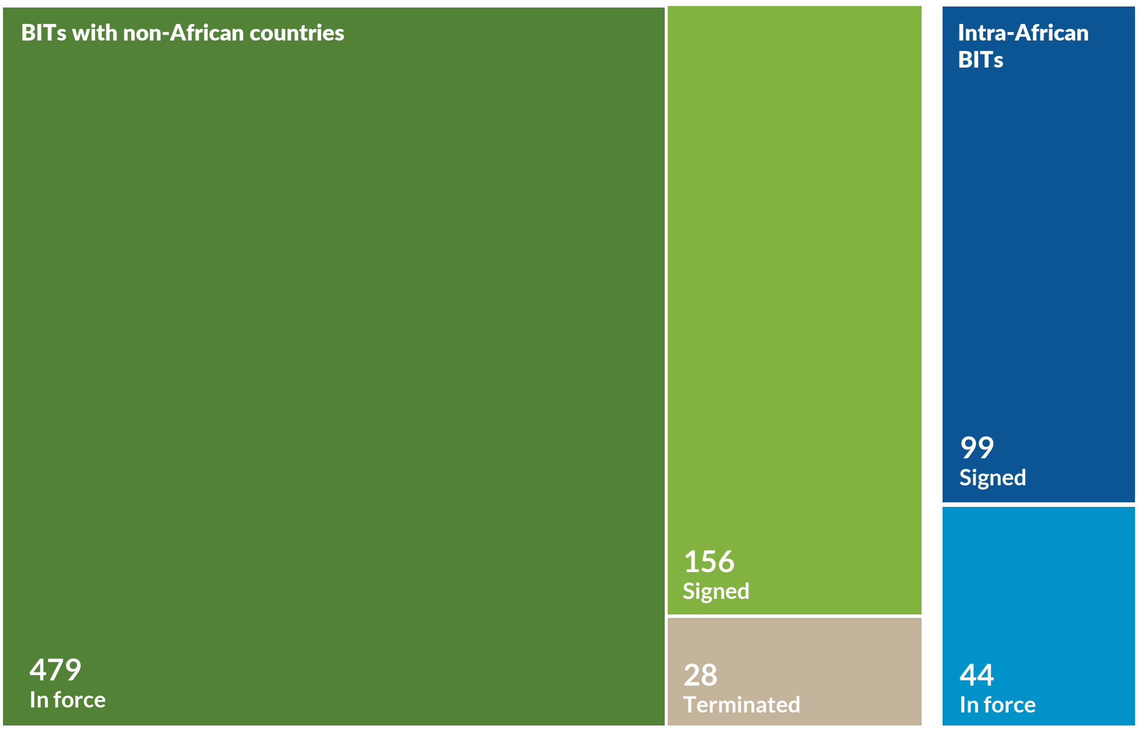
- The 1980 Unified Agreement for the Investment of Arab Capital in the Arab States (in force) and the 2013 Unified Agreement for the Investment of Arab Capital in the Arab States (Amended), concluded under the auspices of the Arab League.
- The 1981 Agreement on Promotion, Protection and Guarantee of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

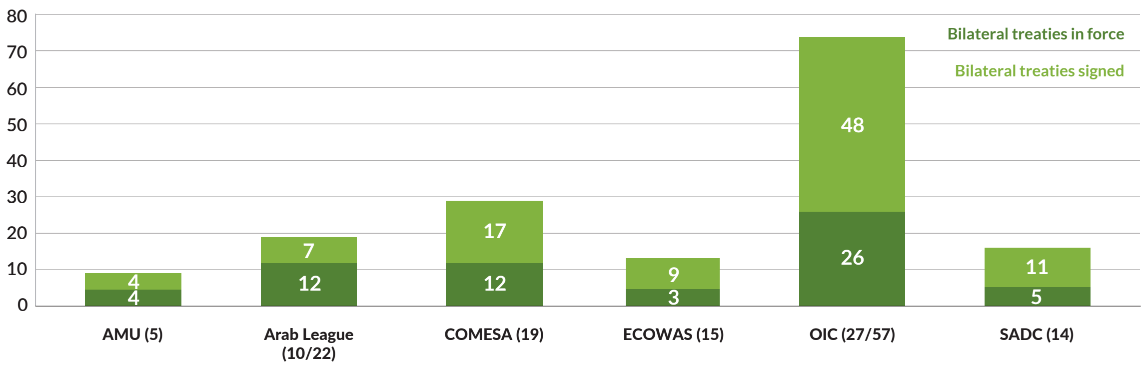
Figure 3.2 Bilateral investment treaties negotiated by African countries



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	Non-binding (a)	Binding (a, b)	Binding	Non-binding (c)	Binding (d)	Binding (b)	Binding (b)
Removal of bureaucratic impediments			Binding	Non-binding (e)			
Facilitation of investment permits		Binding	Binding	Binding		Binding	
Facilitation of entry and sojourn of personnel	Binding				Binding	Binding	
Transparency			Binding	Binding		Binding	Non-binding (f)
Capacity building on investment issues			Binding			Binding	Binding
Investment financing					Binding (g)	Binding	
Foreign investment insurance programmes	Non-binding	Binding	Non-binding		Binding (g)	Non-binding	Non-binding
Pre-establishment investor servicing		Binding		Binding (f)		Binding	
Post-establishment investment aftercare				Binding		Binding	
Relations with investors/ private sector	Non-binding (g)		Binding	Binding		Binding	
Cooperation and treaty bodies on facilitation	Non-binding		Binding	Binding		Binding	Binding
Access to local labour	Binding	Binding	Binding				
Recognition of documents and qualifications	Binding			Non-binding			
Exchange of information on investors	Non-binding		Binding	Binding		Binding	
Domestic sector encouragement				Binding	Binding	Binding	
Negotiation of double taxation treaties			Binding	Non-binding		Binding	Non-binding
Alternative dispute mechanisms	Non-binding (h)	Non-binding (i)	Binding	Binding	Non-binding		Binding
Technical cooperation between states			Binding	Binding			Non-binding
Harmonization of investment rules				Binding		Binding	Non-binding (d)
Collaboration on investment promotion			Binding	Binding		Binding	Binding

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.

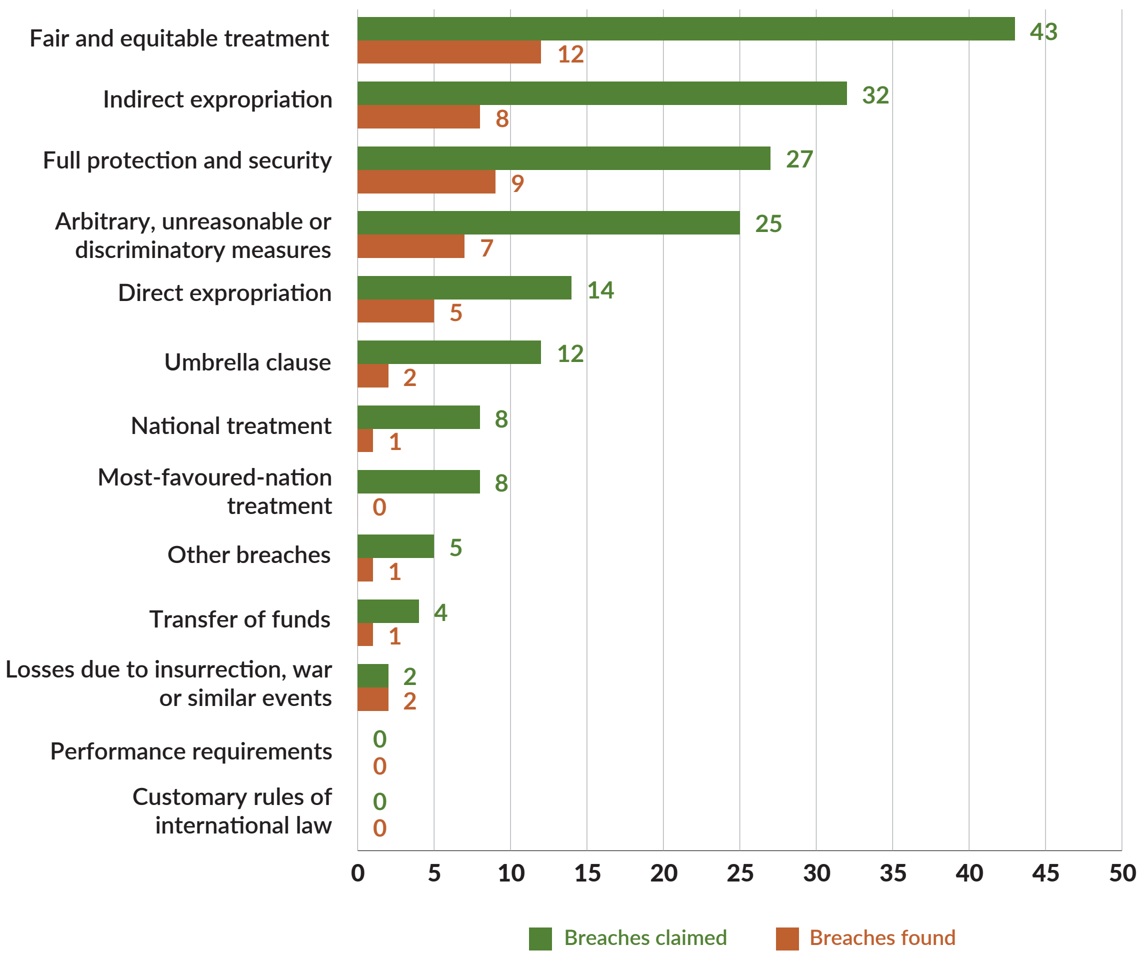
Table 3.4 Criteria for investments in the COMESA and ECOWAS investment treaties

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.

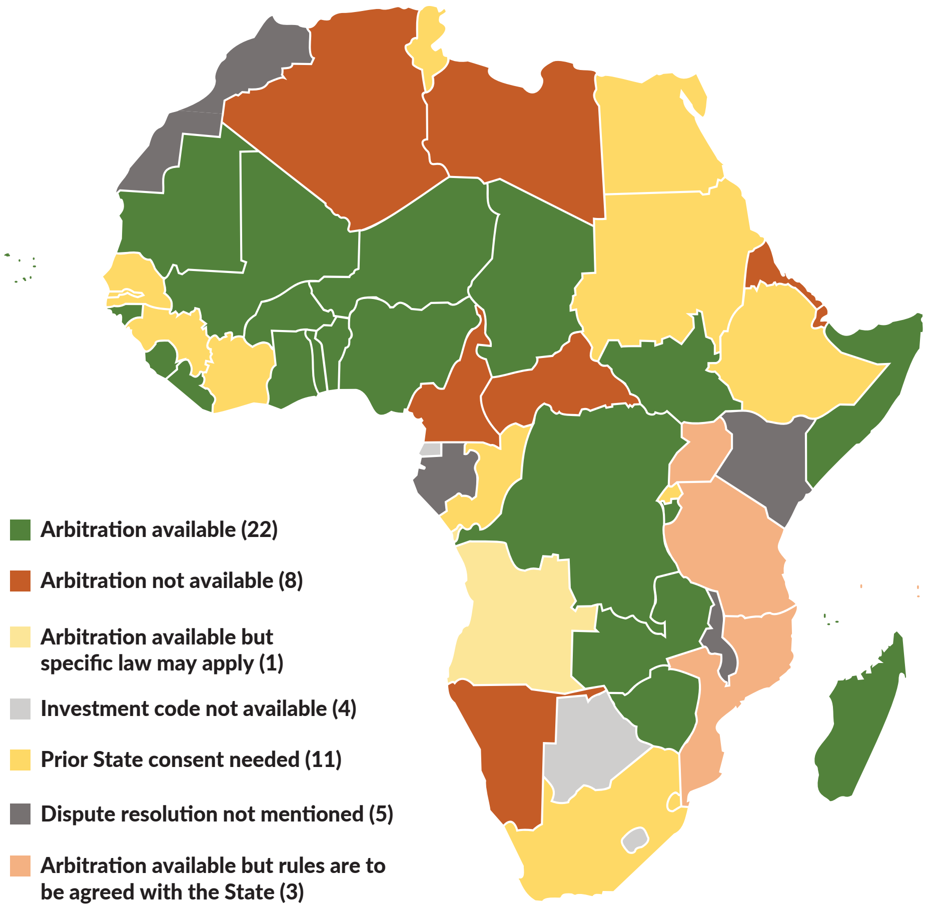
Municipal legal frameworks usually provide investors with various types of binding and non-binding dispute settlement. The increasing attention to facilitating investment and detecting and reducing problems early raises the importance of domestic institutions able to develop and maintain relations with 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.
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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	Binding (a)	Non-binding (a)	Binding	Binding	Binding	Binding	Binding
Human rights			Binding				Binding
Corruption			Binding	Binding			Binding
Labour standards				Binding			Binding
Environment/use of natural resources				Binding			Binding
Corporate social responsibility			Binding	Binding			Binding
Corporate governance			Binding	Binding			Binding
Transfer/import of technology				Binding			Non-binding
Skills transfer				Binding			
Transfer pricing practices				Binding			
Protection of traditional knowledge				Binding			
Sociopolitical obligations			Binding	Binding			Binding

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.

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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	
Regional integration		Liberalization			Binding	Binding		Binding	
Regional integration		Policy cooperation and/or harmonization			Binding	Binding		Binding	Non-binding
Regional integration		Investment attractiveness			Binding				
Regional integration		Home State obligations				Binding			
Regional integration		Support for least-developed countries						Binding	
Regional integration		Taxation			Non-binding	Binding		Binding	Non-binding
Regional integration		Transfer pricing				Binding			
Regional integration		Corruption			Binding	Binding			
Regional integration		Entrepreneurs and productive capacities						Binding	
Regional integration		Cooperation on financial regulation and supervision							Non-binding
Regional integration	AfCFTA Phase I and II policy issues	Trade				Binding		Binding	
Regional integration	AfCFTA Phase I and II policy issues	Competition policy			Binding	Non-binding			Binding
Regional integration	AfCFTA Phase I and II policy issues	Consumer protection			Binding	Binding			Binding
Regional integration	AfCFTA Phase I and II policy issues	Intellectual property right				Binding			Binding
Sustainable development		Race to the bottom				Binding		Non-binding	Non-binding
Sustainable development		Social inclusion				Binding			
Sustainable development		Adherence to international treaties				Binding			
Sustainable development		Cultural and linguistic diversity							Non-binding
Sustainable development		Environment and natural resource				Binding		Binding	Binding
Sustainable development		Labour and capacity development			Binding	Binding			Non-binding
Sustainable development		Corporate governance			Non-binding	Binding			Non-binding
Sustainable development		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

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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.

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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.

References

Abdel Wahab, M. S. 2019. "ICSID's Relevance for Africa: A Symbiotic Bond Beyond Time." *ICSID Review: Foreign Investment Law Journal* 34 (2): 519–41.

Acemoglu, D., and J. A. Robinson. 2013. "Economics versus Politics: Pitfalls of Policy Advice." *Journal of Economic Perspectives* 27 (2): 173–192.

AU (African Union). 2018. "Combined Comments on Working Group 1." https://icsid.worldbank.org/sites/default/files/amendments/state-input/African%20Union_CombinedComments_12.28.18.pdf.

AUC (African Union Commission) and ECA (United Nations Economic Commission for Africa). 2013. *Illicit Financial Flow Report of the High Level Panel on Illicit Financial Flows from Africa*. Addis Ababa: AUC and ECA.

Ahooja, K. 1964. "Investment Laws and Regulations in Africa." *The Journal of Modern African Studies* 2 (2): 300–303.

Akinkugbe, O. D. 2019. "Reverse Contributors? African State Parties, ICSID and the Development of International Investment Law." *ICSID Review: Foreign Investment Law Journal* 34 (2): 434–54.

Alcolea, L. C. 2020. "The COVID–19 Crisis: Core Investment Law Issues Revisited." *Transnational Dispute Management* (forthcoming).

Aleksandrovskaia, L., I. Matsenko and A. Schultz. 1976. "Experience and Problems of Nationalization in African Countries." *International Journal of Politics* 6 (4): 66–86.

Alet, C. 2018. "L'arbitrage, une justice d'exception." *Alternatives économiques*, 4 September. https://www.alternatives-economiques.fr/larbitrage-une-justice-dexception/00085813.

Alschner, W. 2020. "Correctness of Investment Awards: Why Wrong Decisions Don't Die." *The Law & Practice of International Courts and Tribunals* 18 (3): 345–68.

Alschner, W., and D. Skougarevskiy. 2016. "Mapping the Universe of International Investment Agreements." *Journal of International Economic Law* 19 (3): 551–88.

Alter, K. J., J. T. Gathii and L. R. Helfer. 2016. "Backlash against International Courts in West, East and Southern Africa: Causes and Consequences." *European Journal of International Law* 27 (2): 293–328.

Alvarez, G. M., B. Blasikiewicz, T. van Hoolwerff, K. Koutouzi, N. Lavranos, M. Mitsi, E. Spiteri-Gonzi, A. Verdegay Mena and P. Willinski. 2016. "A Response to the Criticism against ISDS by EFILA." *Journal of International Arbitration* 33 (1): 1–36.

Álvarez Zárate, J. M., C. Baltag, D. Behn, J. Bonnitcha, A. De Luca, H. Hestermeyer, M. Langford, L. Mistelis, C. López Rodríguez, G. Schaffer and S. Weber. 2020. "Duration of Investor–State Dispute Settlement Proceedings." *Journal of World Investment and Trade* 21 (2–3): 300–35.

Alvik, I. 2020. "The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy." *European Journal of International Law* 31 (1): 289–312.

Anyanwu, J. C. 2006. "Promoting of Investment in Africa." *African Development Review* 18 (1): 42–71.

Anseeuw, W., L. Alden Wily, L. Cotula and M. Taylor. 2012. *Land Rights and the Rush for Land: Findings of the Global Commercial Pressures on Land Research Project*. Rome: International Land Coalition.

Arato, J., C. Brown and F. Ortino. 2020. "Parsing and Managing Inconsistency in Investor–State Dispute Settlement." *Journal of World Investment and Trade* 21 (2–3): 336–73.

Aréou, G. 2020. "The African States' Diverging Policies Towards International Arbitration." *Transnational Dispute Management* 17 (4).

Arriagada Peters, C. 2020. "Investment Aftercare Matters." Columbia FDI Perspectives 276, Columbia Center on Sustainable Investment, Columbia University, New York.

Atanasova, D. 2019. "Applicable Law Provisions in Investment Treaties: Forever Midnight Clauses?" *Journal of International Dispute Settlement* 10 (3): 396–422.

Avayiwoe, G. 2019. "The Republic of Ghana and Bilateral Investment Treaties: A Burgeoning Expert?" *ICSID Review: Foreign Investment Law Journal* 35 (2): 1–13.

Baltag, C., and Y. Dautaj. 2020. "Investors, States, and Arbitrators in the Crosshairs of International Investment Law and Environmental Protection." *Brill Research Perspectives in International Investment Law and Arbitration* 3 (1): 1–77.

Baruti, R. 2017. "Investment Facilitation in Regional Economic Integration in Africa: The Cases of COMESA, EAC and SADC." *Journal of World Investment and Trade* 18 (3): 1–37.

Behn, D., T. L. Berge and M. Langford. 2017–2018. "Poor States or Poor Governance: Explaining Outcomes in Investment Treaty Arbitration." *Northwestern Journal of International Law & Business* 38 (3): 333–89.

Behn, D., and M. Langford. 2017. "Trumping the Environment? An Empirical Perspective on the Legitimacy of Investment Treaty Arbitration." *Journal of World Investment and Trade* 18 (1): 14–61.

Behn, D., and A. M. Daza. 2019. "The Defense Burden in Investment Arbitration?" PluriCourts Working Paper. Presented at the ISDS Academic Forum Workshop on Reforming International Investment Arbitration, University of Oslo, 1–2 February.

Behn, D., M. Langford and L. Létourneau-Tremblay. 2020. "Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?" *Journal of World Investment and Trade* 21 (2–3): 188–250.

Ben Hamida, W. 2013. "A Fabulous Discovery: The Arbitration Offer under the Organization of Islamic Cooperation Agreement Related to Investment." *Journal of International Arbitration* 30 (6): 637–64.

Ben Hamida, W. 2019. "L'intégration imparfaite de l'arbitrage d'investissement dans le droit de l'OHADA." *Revue de l'arbitrage* 4: 1109–1140.

Bennadji, K. 2019. "The PCA's Assistance in the Constitution of an Arbitral Tribunal: Last Breath for Investor–State OIC Arbitrations?" *Kluwer Arbitration Blog*, 15 April. http://arbitrationblog.kluwerarbitration.com/2019/04/15/the-pcas-assistance-in-the-constitution-of-an-arbitral-tribunal-last-breath-for-investor-state-oic-arbitrations/?doing_wp_cron=1596401089.2176539897918701171875#comments.

Berge, T. L. and Ø. Stiansen. 2016. "Negotiating BITs with Models. The Power of Expertise." PluriCourts Research Paper 16-13, University of Oslo.

Berger, A., Dadkhah, A. and Z. Olekseyuk. 2020. "Quantifying Investment Facilitation at Country Level: Introducing a New Index." Discussion Paper, DIE (Deutsches Institut für Entwicklungspolitik), Bonn, Germany.

Berger, A., and S. Gsell. 2019. "How Can an International Framework for Investment Facilitation Contribute to Sustainable Development?" Briefing Paper 15/2019, German Development Institute, Bonn, Germany.

Berger, T. L., and T. St John. 2020. "Asymmetric Diffusion: World Bank 'Best Practice' and the Spread of Arbitration in National Investment Laws." *Review of International Political Economy* (forthcoming).

Bermann, A., J. N. Calamita, M. Chi and K. P. Sauvant. 2020. "Insulating a WTO Investment Facilitation Framework from ISDS." Columbia FDI Perspectives 286. Columbia Center on Sustainable Investment, Columbia University, New York.

Bernardini, G. 2017. "Reforming Investor–State Dispute Settlement: The Need to Balance Both Parties' Interests." *ICSID Review: Foreign Investment Law Journal* 32 (1): 38–57.

Bernasconi-Osterwalder, N. 2019. “Inclusion of Investor Obligations and Corporate Accountability Provisions in Investment Agreements.” In J. Chaisse, L. Choukroune and J. Sufian (Eds.), *Handbook of International Investment Law and Policy*. Singapore: Springer.

Bernasconi-Osterwalder, N., C. Dommen, M. Abebe, H. Mann and J. Zhang. 2018. “Harnessing Investment for Sustainable Development: Inclusion of Investor Obligations and Corporate Accountability Provisions in Trade and Investment Agreements.” Background document for the expert meeting co-hosted by the International Institute for Sustainable Development and Friedrich Ebert Stiftung, Versoix, Switzerland, 11–12 January.

Bernasconi-Osterwalder, N., L. Johnson and F. Marshall. 2010. *Arbitrator Independence and Impartiality: Examining the Dual Role of Arbitrator and Counsel*. IISD: Winnipeg, MB.

Bjorklund, A. K., D. Behn, S. D. Franck, C. Giorgetti, W. Kidane, A. de Nanteuil and E. Onyema. 2020. “The Diversity Deficit in International Investment Arbitration.” *Journal of World Investment and Trade* 21 (2–3): 410–40.

Bonnitcha, J., L. N. Skovgaard Poulsen and M. Waibel. 2017. *The Political Economy of the Investment Treaty Regime*. Oxford, UK: Oxford University Press.

Botchway, F. N. 2019. “Consent to Arbitration: African States’ Practice.” *ICSID Review: Foreign Investment Law Journa*l 34 (2): 278–95.

Bottini, G., C. Titi, F. P. Aznar, J. Chaisse, M. Jovanovic and O. Puigdemont Sola. 2020. Excessive Costs and Recoverability of Costs Awards in Investment Arbitration. *Journal of World Investment and Trade* 21 (2–3): 251–99.

Boyle, A. 2012. “Human Rights and the Environment: Where Next?” *European Journal of International Law* 23 (3): 613–42.

Branson, D. 2014. “Sympathetic Party-Appointed Arbitrators: Sophisticated Strangers and Governments Demand Them.” *ICSID Review: Foreign Investment Law Journal* 25 (2): 367–92.

Burger, L. 2013. “The Trouble with Salini (Criticism of and Alternatives to the Famous Test).” *ASA Bulletin* 31 (3): 521–36.

Castro de Figueiredo, R. 2019. “Celebrating 50 Years of the VCLT: Misapplying the General Rule of Treaty Interpretation—The Salini Test.” *Kluwer Arbitration Blog*, 4 December. http://arbitrationblog.kluwerarbitration.com/2019/12/04/celebrating-50-years-of-the-vclt-misapplying-the-general-rule-of-treaty-interpretation-the-salini-test/?doing_wp_cron=1596400331.6671009063720703125000.

Ceesay, B. 2020. “The Effectiveness of the Harmonization Tool Adopted under the OHADA Regime.” Unpublished working paper.

Chaisse, J. 2015. “The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration.” *Hastings Business Law Journal* 11 (2): 225–306.

Chidede, T. 2019a. “South Africa’s Submission on UNCITRAL ISDS Reforms: Comments and Implications.” *tralacBlog*, 16 October. https://www.tralac.org/blog/article/14276-south-africa-s-submission-on-uncitral-isds-reforms-comments-and-implications.html.

Chidede, T. 2019b. “The Right to Regulate in Africa’s International Investment Law Regime.” *Oregon Review of International Law* 20 (2): 437–68.

Choudhury, B. 2020. “Investor Obligations for Human Rights.” *ICSID Review: Foreign Investment Law Journal* (forthcoming).

Coleman, J., B. Güven, L. Johnson and L. Sachs. 2018. “What Do We Mean by Investment Facilitation?” Columbia Center on Sustainable Development blog, 21 February. http://ccsi.columbia.edu/2018/02/22/what-do-we-mean-by-investment-facilitation/.

CommmsUpdate. 2012. "Licence of Madamobil to Be Revoked." *CommsUpdate*, 15 May. https://www.commsupdate.com/articles/2012/05/15/licence-of-madamobil-to-be-revoked/.

Cotula, L. 2016. "Human Rights and Investor Obligations in Investor–State Arbitration." *Journal of World Investment and Trade* 17 (1): 148–57.

Cotula, L. 2018. "Raising the Bar on Responsible Investment: What Role for Investment Treaties?" IIED Briefing March 2018, International Institute for Environment and Development, London.

Cotula, L. 2020. Personal correspondence. On file with author.

Cotula, L., and J. T. Gathii. 2019. "Cortec Mining Kenya Limited, Cortec (Pty) Limited, and Stirling Capital Limited v. Republic of Kenya." *American Journal of International Law* 11 (3): 574–81.

Da Cruz, V. M. 2020. "Investing in Angola." *Thompson Reuters Practical Law*. https://uk.practicallaw.thomsonreuters.com/7-610-3705. Accessed 24 September 2020.

De Brabendere, E. 2017. "Fair and Equitable Treatment and (Full) Protection and Security in African Investment Treaties Between Generality and Contextual Specificity." *Journal of World Economics and Trade* 18 (3): 530–55.

De Oliveira, R. F. 2020. "The Useful Institution of an Investment Ombudsperson." Columbia FDI Perspectives 273, Columbia Center on Sustainable Investment, Columbia University, New York.

Denters, E., and T. Gazzini. 2017. "The Role of African Regional Organizations in the Promotion and Protection of Foreign Investment." *Journal of World Investment and Trade* 18 (3): 449–92.

Dimitropoulos, G. 2020. "The Conditions for Reform: A Typology of "Backlash" and Lessons for Reform in International Investment Law and Arbitration." *The Law and Practice of International Courts and Tribunals* 18 (3): 416–435.

Dolzer, R. 2005. "The Impact of International Investment Treaties on Domestic Administrative Law." *International Law and Politics* 37 (4): 953–72.

Dolzer, R., and C. Schreuer. 2012. *Principles of International Investment Law*. Oxford, UK: Oxford University Press.

Donaubauer, J., E. Neumayer and P. Nunnenkamp. 2018. "Winning or Losing in Investor-to-State Dispute Resolution: The Role of Arbitrator Bias and Experience." *Review of International Economics* 26 (4): 892–916.

Douajni, G. F. 2020. "Recent Developments in OHADA Arbitration." *Global Arbitration Review*, 20 April. https://globalarbitrationreview.com/print_article/gar/chapter/1225815/recent-developments-in-ohada-arbitration.

Douglas, Z. 2003. "The Hybrid Foundations of Investment Treaty Arbitration." *British Yearbook of International Law* 74 (1): 151–289.

Doward, J. 2020. "Global Firms Expected to Sue UK for Coronavirus Losses." *The Guardian*, 15 August. https://www.theguardian.com/law/2020/aug/15/global-law-firms-expected-to-sue-uk-for-coronavirus-losses.

Duggal, K. A. N., and L. H. van de Ven. 2019. "The 2019 Netherlands Model BIT: Riding the New Investment Treaty Waves." *Arbitration International* 35 (3): 347–74.

Dumberry, P., and G. Aubin. 2013. "How to Incorporate Human Rights Obligations in Bilateral Investment Treaties?" *Investment Treaty News*, 22 March. https://www.iisd.org/itn/2013/03/22/how-to-incorporate-human-rights-obligations-in-bilateral-investment-treaties.

Ebere, S. 2016. "The Phoenix of Multilateral Investment Treaties: The Agreement for the Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference—What Impact on Sub-Saharan Africa?" *Transnational Dispute Management* 13 (4).

EC (European Commission). n.d. "SOLVIT: Solutions to Problems with your EU Rights." https://ec.europa.eu/solvit/index_en.html.

ECA (United Nations Economic Commission for Africa). 2014. *Guiding Principles on Large Scale Land Based Investments in Africa*. Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa). 2016a. *Investment Policies and Bilateral Investment Treaties in Africa*. Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa). 2016b. *Transformative Industrial Policy for Africa*. Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa). 2018a. *Base Erosion and Profit Shifting in Africa: Reforms to Facilitate Improved Taxation of Multinational Enterprises*. Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa). 2018b. *Report of the Regional Conference on Corruption and the Challenge of Economic Transformation in Southern Africa*. Gaborone, Botswana, 18–20 June. Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa). 2019a. *Assessing Regional Integration in Africa IX (ARIA IX): Next Steps for the African Continental Free Trade Area*. Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa). 2019b. *Economic Report on Africa 2019: Fiscal Policy for Financing Development in Africa*. Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa). 2019c. *Financial Regulation for Inclusive Growth in Africa*. Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa). 2020a. *Drivers for Boosting Intra-African Investment Flows towards Africa's Transformation*. Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa). 2020b. *Linkages between Double Taxation Treaties and Bilateral Investment Treaties*. Addis Ababa: ECA.

Economist. 2014. "The Arbitration Game: Governments Are Souring on Treaties to Protect Foreign Investors." *The Economist*, 14 October. https://www.economist.com/finance-and-economics/2014/10/11/the-arbitration-game.

Egan, M., and M. H. Guimarães. 2017. "The Single Market: Trade Barriers and Trade Remedies." *Journal of Common Market Studies* 55 (2): 294–311.

Ejims, O. 2019. "The 2016 Morocco–Nigeria Bilateral Investment Treaty: More Practical Reality in Providing a Balanced Investment Treaty?" *ICSID Review: Foreign Investment Law Journal* 34 (1): 62–84.

Ejims, O. 2020. Personal correspondence. On file with author.

El-Kady, H. 2014. "The Amendments to the 1980 Arab League Investment Agreement: Implications on the Right to Regulate Investment in Arab Countries." *Transnational Dispute Management* 11 (3).

El-Kady, H. 2020. "The New Landmark African Investment Protocol: A Quantum Leap for African Investment Policy Making?" *Kluwer Arbitration Blog*, 24 September. http://arbitrationblog.kluwerarbitration.com/2020/09/24/the-new-landmark-african-investment-protocol-a-quantum-leap-for-african-investment-policy-making/.

El-Kady, H., and M. De Gama. 2019. "The Reform of the International Investment Regime: An African Perspective." *ICSID Review: Foreign Investment Law Journal* 32 (2): 482–95.

El-Kady, H., and Y. Rwananga. 2020. "Morocco's New Model BIT: Innovative Features and Policy Considerations." *Investment Treaty News*, 20 June. https://cf.iisd.net/itn/2020/06/20/moroccos-new-model-bit-innovative-features-and-policy-considerations-hamed-el-kady-yvan-rwananga/.

Enaw, T. 2018. "The Enforcement of Arbitral Awards in Harmonized Legal Systems: Challenges in the Application of the OHADA Uniform Act on Arbitration." *Transnational Dispute Management* 15 (1).

Escobar, A. A., and E. F. De Jesús. 2017. "PCA Imports UNCITRAL Arbitration Rules through MFN Clause to Designate an Appointing Authority in Arbitration under Different Rules." *Baker Botts*, 27 October. https://www.bakerbotts.com/insights/publications/2017/10/arbitration.

EU (European Union). 2020. "Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union." *Official Journal of the European Union* L 169/1.

Faure, M., and W. Ma. 2020. "Investor–State Arbitration: Economic and Empirical Perspectives." *Michigan Journal of International Law* 41 (1): 1–6.

Fernández Masiá, E., and M. Salvadori. 2020. "Lo que se está discutiendo en la CNUDMI: evolución o revolución en el sistema de solución de controversias inversor-Estado (What Is Being Discussed in the UNCITRAL: Evolution or Revolution in the Investor–State Dispute Settlement System)." *Cuadernos de derecho internacional* 12 (1): 203–18.

Fouchard Papaefstratiou, A., and T. Shihoor. 2019. "Investors' Obligation to Comply with Domestic Law." *Transnational Dispute Management* 16 (4).

Franck, S. D. 2005. "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions." *Fordham Law Review* 73 (4): 1521–1625.

Franck, S. D., and L. E. Wyllie. 2015. "Predicting Outcomes in Investment Treaty Arbitration." *Duke Law Journal* 65 (3): 459–526.

Francke, M. 2020. "Intervention at "What Can We Learn from Regional Initiatives on Investment Facilitation.'" Webinar, 5 October. International Trade Centre and German Development Institute.

Garcia, F. J. 2018. "Third-Party Funding as Exploitation of the Investment Treaty System." *Boston College Law Review* 59 (8): 2911–34.

Galetta, D.-U. 2014. "Informal Information Processing in Dispute Resolution Networks: Informality versus the Protection of Individual's Rights?" *European Public Law* 20 (1): 71–88.

Gáspár-Szilágyi, S. 2020. "Let Us Not Forget about the Role of Domestic Courts in Settling Investor–State Disputes." *The Law & Practice of International Courts and Tribunals* 18 (3): 389–415.

Gaukrodger, D. 2014. "Investment Treaties and Shareholder Claims." OECD Working Papers on International Investment 2014/03, OECD Publishing, Paris.

Gazzini, T. 2014. "Bilateral Investment Treaties and Sustainable Development." *Journal of World Investment and Trade* 15 (5–6): 929–63.

Ghanaweb. 2020. "Ghana's New Investment Law Delayed until 2021." *Ghanaweb*, 15 March. https://www.ghanaweb.com/GhanaHomePage/business/Ghana-s-new-investment-law-delayed-until-2021-894805.

Gharavi, H. 2020. "Cocorico! French Approach to the OIC Treaty Gives Cause to Crow." Derains & Gharavi International, 21 February. http://www.derainsgharavi.com/2020/01/cocorico-french-approach-to-the-oic-treaty-gives-cause-to-crow-2/.

Government of Republic of Guinea. 2019. "Summary of the Intersessional Regional Meeting on Investor–State Dispute Settlement (ISDS) Reform Submitted by the Government of the Republic of Guinea (A/CN.9/WG.III/WP.183)." United Nations Commission on International Trade Law Working Group III (Investor–State Dispute Settlement Reform), Thirty-eighth session, Vienna, 14–18 October.

Grabowski, A. 2014. "The Definition of Investment under the ICSID Convention: A Defense of Salini Defense of Salin." *Chicago Journal of International Law* 15 (1): 287–309.

Guven, B., and L. Johnson. "2019. The Policy Implications of Third-Party Funding in Investor–State Dispute Settlement." Working Paper, Columbia Centre on Sustainable Investment, Columbia University, New York.

Haggard, S., A. MacIntyre and L. Tiede. 2008. "The Rule of Law and Economic Development." *Annual Review of Political Science* 11: 205–34.

Hamdani, K., Y. Kagan, K. P. Sauvant and M. Stephenson. 2020. *An Inventory of Concrete Measures to Facilitate the Flow of Sustainable FDI: What? Why? How?* International Trade Centre and German Development Institute.

Hanessian, G., and K. Duggal. 2015. "The 2015 Indian Model BIT: Is This Change the World Wishes to See?" *ICSID Review: Foreign Investment Law Journal* 30 (3): 729–40.

Happold, M. 2018. "The ECOWAS Court of Justice as an Investment Tribunal." *African Law and Business*, 14 December. https://iclg.com/alb/8888-the-ecowas-court-of-justice-as-an-investment-tribunal.

Happold, M., and R. Radović. 2018. "The ECOWAS Court of Justice as an Investment Tribunal." *Journal of World Investment and Trade* 19 (1): 95–117.

Harding, T., and B. S. Javorcik. 2012. "Foreign Direct Investment and Export Upgrading." *Review of Economics and Statistics* 94 (4): 964–980

Harding, T., and B. S. Javorcik. 2013. "Investment Promotion and FDI Inflows: Quality Matters." *CESifo Economic Studies* 59: 337–359.

Harrison, J. 2019. "Significant International Environmental Law Cases: 2018–19." *Journal of Environmental Law* 31 (3): 547–57.

Hasaan, A. A. 2019. "The 2013 Amendments to the Arab Investment Agreement." *ICSID Review: Foreign Investment Law Journal* 34 (1): 107–35.

Hees, F., and P. Mendonça Cavalcante. 2017. "Focusing on Investment Facilitation: Is It That Difficult?" Columbia FDI Perspectives 202, Columbia Center on Sustainable Investment, Columbia University, New York.

Hees, F., H. C. Moraes and P. Mendonça Cavalcante. 2018. "Investment Facilitation: Leaving the Past behind." Columbia FDI Perspectives 240, Columbia Center on Sustainable Investment, Columbia University, New York.

Hepburn, J. 2017. *Domestic Law in International Investment Arbitration*. Oxford, UK: Oxford University Press.

ICC (International Chamber of Commerce). 2017. *ICC Open Markets Index*. Paris: ICC.

ICCA (International Council for Commercial Arbitration), and Queen Mary–University of London. 2018. *Report of the ICCA–Queen Mary Task Force on Third-Party Funding in International Arbitration*. ICCA and Queen Mary–University of London.

IMF (International Monetary Fund). 2019. *Annual Report on Exchange Arrangements and Exchange Restrictions 2018*. Washington, DC: IMF.

Ishikawa, T. 2019. "Counterclaims and the Rule of Law in Investment Arbitration." *American Journal of International Law Unbound* 113: 33–37.

Kabra, R. 2019. "Return of the Inconsistent Application of the 'Essential Security Interest' Clause in Investment Treaty Arbitration: CC/Devas v. India and Deutsche Telekom v. India." *ICSID Review: Foreign Investment Law Journal* 34 (3): 723–53.

Kahale III, G. 2012. "Is Investor–State Arbitration Broken?" *Transnational Dispute Management* 9 (7).

Kanth, D. R. 2017. "Large Majority of South Nations Opposed to "Investment Facilitation." *Third World Network*, 14 April. https://www.twn.my/title2/wto.info/2017/ti170406.htm.

Kelsey, J., D. Schneiderman and G. Van Harten. 2019. "Phase 2 of the UNCITRAL ISDS Review: Why 'Other Matters' Really Matter." Osgoode Legal Studies Research Paper 328, Osgoode Hall Law School, York University, Toronto, ON. https://dx.doi.org/10.2139/ssrn.3329332.

Khattar, M. 2019. "Recent Investor–State Arbitration Trends in the Middle East: #YoungITATalks in Dubai." *Kluwer Arbitration Blog*, 20 January. http://arbitrationblog.kluwerarbitration.com/2019/01/20/recent-investor-state-arbitration-trends-in-the-middle-east-youngitatalks-in-dubai/?doing_wp_cron=1587131011.7179510593414306640625.

Kidane, W. L. 2017. *The Culture of International Arbitration*. New York: Oxford University Press.

Kidane, W. L. 2018. "Contemporary Trends in International Investment Law and Africa's Dilemmas in the Pan-African Investment." *The George Washington International Law Review* 50 (3): 523–79.

Kokolia, E. 2018. "Strengthening the Single Market through Informal Dispute-resolution Mechanisms in the EU: The Case of SOLVIT." *Maastricht Journal of European and Comparative Law* 25 (1): 108–17.

Krajewski, M. 2020. "A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application." *Business and Human Rights Journal* 5 (1): 105–29.

Kurtz, J. 2014. "Building Legitimacy Through Interpretation in Investor–State Arbitration: On Consistency, Coherence and the Identification of Applicable Law." Legal Studies Research Paper 670, University of Melbourne, Melbourne, Australia.

Langford, M., D. Behn and R. Lie. 2017. "The Ethics and Empirics of Double Hatting." *ESIL Reflections* 6 (7).

Langford, M., M. Potestà, G. Kaufmann-Kohler and D. Behn. 2020. "Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions." *Journal of World Investment and Trade* 21 (2–3): 167–87.

Lavroff, D. G. 1969. "Le Régime Juridique des Investissements Etrangers dans les Etats d'Afrique Noire." *Africa Spectrum* 4 (3): 64–73.

Leikin, E., S. Gadodia and C. Loudon. 2018. "The State Doesn't Strike Back After All: India's Final Model BIT Takes the Bite out of Investor Obligations and Eliminates State Counterclaims." *Transnational Dispute Management* 15 (2).

Malik, M. 2011. "The Full Protection and Security Standard Comes of Age: Yet Another Challenge for States in Investment Treaty Arbitration?" IISD Best Practice Series, International Institute for Sustainable Development, Winnipeg, MB.

Mann, H., and M. D. Brauch. 2019. "Investment Facilitation for Sustainable Development: Getting It Right for Developing Countries." Columbia FDI Perspectives 259, Columbia Center on Sustainable Investment, Columbia University, New York.

Mbengue, M. M. 2012. "Consent to Arbitration through National Investment Legislation." *Investment Treaty News*, 27 July. https://www.iisd.org/itn/en/2012/07/19/consent-to-arbitration-through-national-investment-legislation/.

Mbengue, M. M. 2016. "The Quest for a Pan-African Investment Code to Promote Sustainable Development." *Tralac*, 21 June. https://www.tralac.org/news/article/9927-the-quest-for-a-pan-african-investment-code-to-promote-sustainable-development.html.

Mbengue, M. M. 2017. "Special Issue: Africa and the Reform of the International Investment Regime." *Journal of World Investment and Trade* 18 (3): 371–78.

Mbengue, M. M. 2019. "Africa's Voice in the Formation, Shaping and Redesign of International Investment Law." *ICSID Review: Foreign Investment Law Journal* 34 (2): 1–27.

Mbengue, M. M. 2020. “Intervention at ‘What Can We Learn from Regional Initiatives on Investment Facilitation.’” Webinar, 5 October. International Trade Centre and German Development Institute.

Mbengue, M. M., and S. Schacherer. 2017. “The ‘Africanization’ of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime.” *Journal of World Investment and Trade* 18 (3): 414–48.

Mo Ibrahim Foundation. 2018. *Agendas 2063 & 2030: Is Africa on Track? African Governance Report*. London: Mo Imbrahim Foundation.

Moehlecke, C. “The Chilling Effect of International Investment Disputes: Limited Challenges to State Sovereignty.” *International Studies Quarterly* 64 (1): 1–12.

Monebhurrun, N. 2017. “Novelty in International Investment Law: The Brazilian Agreement on Cooperation and Facilitation of Investments as a Different International Investment Agreement Model.” *Journal of International Dispute Settlement* 8 (1): 79–100.

Morosini, F., N. Perrone and M. R. Sanchez-Badin. 2019. “Strengthening Multi-stakeholder Cooperation in the International Investment Regime: The Brazilian Model.” Columbia FDI Perspectives 263, Columbia Center on Sustainable Investment, Columbia University, New York.

Mouawad, C., and L. Khoury. 2016. “Investment Arbitration under Multilateral Treaties in the Middle East.” *Bahrain Chamber for Dispute Resolution International Arbitration Review* 3 (2): 243–265.

Moussly, O. 2019. “Same Concept, Different Interpretation: The Full Protection and Security Standard in Practice.” *Kluwer Arbitration Blog*, 27 October. http://arbitrationblog.kluwerarbitration.com/2019/10/27/same-concept-different-interpretation-the-full-protection-and-security-standard-in-practice/?doing_wp_cron=1596115393.0367789268493652343750.

Ndulo, M. B., and A. B. Chase. 2020. *International Law and Foreign Direct Investment*. Durham, UK: Carolina Academic Press.

Ngobeni, L., and B. Fagbayibo. 2010. “The Investor–State Dispute Resolution Forum under the SADC Protocol on Finance and Investment: Challenges and Opportunities for Effective Harmonisation.” *Law, Democracy and Development* 19: 175–92.

Nichols, S. 2018. “Expanding Property Rights under Investor–State Dispute Settlement (ISDS): Class Struggle in the Era of Transnational Capital.” *Review of International Political Economy* 25 (2): 243–69.

Novik, A., and A. Crombrugghe. 2018. “Towards an International Framework for Investment Facilitation.” OECD Investment Insights, Organization for Economic Co-operation and Development, Paris.

Nunnenkamp, P. 2017. “Investor–State Dispute Settlement: Are Arbitrators Biased in Favour of Claimants?” Kiel Policy Brief 105, Kiel Institute for the World Economy, Kiel, Germany.

Ofodile, U. E. 2014. “Managing Foreign Investment in Agricultural Land in Africa: The Role of Bilateral Investment Treaties and International Investment Contracts.” *Law and Development Review* 7 (2): 329–67.

Ofodile, U. E. 2019. “African States, Investor–State Arbitration and the ICSID Dispute Resolution System: Continuities, Changes and Challenges.” *ICSID Review: Foreign Investment Law Journal* 34 (2): 296-364.

Oluonye, C. O. P. 2020. Personal correspondence. On file with author.

OECD (Organisation for Economic Co-operation and Development). 2004. “Indirect Expropriation” and the ‘Right to Regulate’ in International Investment Law.” Working Papers on International Investment 2004/4, OECD, Paris.

Ortino, F. 2012. “Legal Reasoning of International Investment Tribunals: A Typology of Egregious Failures.” *Journal of International Dispute Settlement* 3 (1): 31–52.

Ortino, F. 2018. “The Obligation of Regulatory Stability in the Fair and Equitable Treatment Standard: How Far Have We Come?” *Journal of International Economic Law* 21 (4): 845–65.

Páez, L. 2017. “Bilateral Investment Treaties and Regional Investment Regulation in Africa: Towards a Continental Investment Area?” *The Journal of World Investment and Trade* 18 (3): 379–413.

Pauwelyn, J. 2015. “The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus.” *American Journal of International Law* 109 (4): 761–805.

Pelc, K. 2017. “What Explains the Low Success Rate of Investor–State Disputes?” *International Organization* 71 (3): 559–83.

Perrone, N. M. 2019. “The “Invisible” Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime.” *American Journal of International Law Unbound* 113: 16–21.

Perry, S. 2017. “PCA Ends Standoff over Islamic Treaty Claim.” *Global Arbitration Review*, 3 April. https://globalarbitrationreview.com/article/1138857/pca-ends-standoff-over-islamic-treaty-claim.

Perry, S. 2020. “Egyptian Court Hears Billion-dollar BIT Claim.” *Global Arbitration Review*, 20 July. https://globalarbitrationreview.com/article/1229079/egyptian-court-hears-billion-dollar-bit-claim.

Pohl, J. 2018. “Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence.” OECD Working Papers on International Investment 2018/01, Organization for Economic Co-operation and Development, Paris.

Polanco Lazo, R. 2018. *Facilitation 2.0: Investment and Trade in the Digital Age*. Geneva: International Centre for Trade and Sustainable Development and Inter-American Development Bank.

Puig, S., and A. Strezhnev. 2016. “Affiliation Bias in Arbitration: An Experimental Approach.” Arizona Legal Studies Discussion Paper 16-31, University of Arizona, James E. Rodgers College of Law, Tucson, AZ.

Ramos Codeço, R., and H. Martins Sachetim. 2020. “ICSID Rule Amendment: An Attempt to Remedy Some of the Concerns Regarding ISDS Identified by UNCITRAL WG III.” *Investment Treaty News*, 2 October. https://cf.iisd.net/itn/2019/10/02/icsid-rule-amendment-an-attempt-to-remedy-some-of-the-concerns-regarding-isds-identified-by-uncitral-wg-iii-rafael-ramos-codeco-henrique-martins-sachetim/.

Rajput, A. 2016. “India’s Shifting Treaty Practice: A Comparative Analysis of the 2003 and 2015 Model BITs.” *Jindal Global Law Review* 7 (2): 201–26.

Rao, W. 2019. “Development Status and Decision-making in Investment Treaty Arbitration.” *International Review of Law and Economics* 59: 1–12.

Rempel, R. 2008. “Periodizing African Development History.” *African Economic History* 36: 125–58.

Rivas, J. A., and J. Choi. 2015. “Three Recent Decisions Further Shaping Investment Treaty Case Law on Counterclaims: Part II.” *Kluwer Arbitration Blog*, 14 October. http://arbitrationblog.kluwerarbitration.com/2015/10/14/three-recent-decisions-further-shaping-investment-treaty-case-law-on-counterclaims-part-ii/?doing_wp_cron=1596401071.0743629932403564453125.

Roberts, A., and T. St John. 2019a. “UNCITRAL and ISDS Reform: Visualising a Flexible Framework.” *EJIL:Talk!*, 24 October. https://www.ejiltalk.org/uncitral-and-isds-reform-visualising-a-flexible-framework/.

Roberts, A., and T. St John. 2019b. “UNCITRAL and ISDS Reforms: Agenda-Widening and Paradigm-Shifting.” *EJIL:Talk!*, 20 September. https://www.ejiltalk.org/uncitral-and-isds-reforms-agenda-widening-and-paradigm-shifting/.

Rodríguez-Pose, A., and G. Colls. 2017. “The Determinants of Foreign Direct Investment in Sub-Saharan Africa: What Role for Governance?” *Regional Science Policy and Practice* 9 (2): 63–82.

Rood, L. L. 1976. "Nationalisation and Indigenisation in Africa." *The Journal of Modern African Studies* 14 (3): 427–47.

Salacuse, J. W. 2013. *The Three Laws of International Investment*. Oxford, UK: Oxford University Press.

Santacroce, F. G. 2019. "The Applicability of Human Rights Law in International Investment Disputes." *ICSID Review: Foreign Investment Law Journal* 34 (1): 136–55.

Santosuosso, T., and R. Scarlett. 2019. "Third-Party Funding in Investment Arbitration: Misappropriation of Access to Justice Rhetoric by Global Speculative Finance." *Boston College Law Review* 60 (9): 8–16.

Sasson, M. 2017. *Substantive Law in Investment Treaty Arbitration*. Alphen aan den Rijn, Netherlands: Kluwer Law International.

Sattorova, M. 2019. "Investor Responsibilities from a Host State Perspective: Qualitative Data and Proposals for Treaty Reform." *American Journal of International Law Unbound* 113: 22–27.

Sauvant, K. P. 2020. "The Potential Value-added of a Multilateral Framework on Investment Facilitation for Development." *Transnational Dispute Management* 17 (2).

Sauvant, K. P., A. Berger, A. Ghouri, T. Ishikawa and M. Stephenson. 2019. "Towards G20 Guiding Principles on Investment Facilitation for Sustainable Development." Policy Brief prepared for the Japanese Presidency of G20. *G20 Insights*, 7 May. https://www.g20-insights.org/policy_briefs/towards-g20-guiding-principles-on-investment-facilitation-for-sustainable-development/.

Schill, S. W. 2017a. "Editorial: The New (African) Regionalism in International Investment Law." *Journal of World Investment and Trade* 18 (3): 367–369.

Schill, S. W. 2017b. "Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework." *Journal of International Economic Law* 20 (3): 649–72.

Schill, S. W., and V. Djanic. 2017. "Wherefore Art Thou? Towards a Public Interest-Based Justification of International Investment Law." *ICSID Review: Foreign Investment Law Journal* 33 (1): 29–55.

Schill, S. W., and G. Vidigal. 2020. "Designing Investment Dispute Settlement à la Carte: Insights from Comparative Institutional Design Analysis." *The Law & Practice of International Courts and Tribunals* 18 (3): 314–44.

Schreuer, C. 1996. "Commentary on the ICSID Convention." *ICSID Review: Foreign Investment Law Journal* 11 (2): 318–492.

Schreuer, C. 2010. "Interaction of International Tribunals and Domestic Courts in Investment Law." In A. W. Rovine (Ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2010*, 71–94. Leiden, Netherlands: Koninklijke Brill.

Schreuer, C. 2012. "The Protection of Investments in Armed Conflicts." *Transnational Dispute Management* 9 (3).

Schwebel, S. M. 2015. "In Defense of Bilateral Investment Treaties." *Arbitration International* 32 (2): 181–92.

Singh, K. 2018. "Investment Facilitation: Another Fad in the Offing?" Columbia FDI Perspectives 232, Columbia Center on Sustainable Investment, Columbia University, New York.

Soopramanien, R. D., and S. O. Soopramanien. 2016. "Spotlight on Africa: Problems of Legitimacy and Inclusivity in International Arbitration." *Transnational Dispute Management* 13 (4).

Sornarajah, M. 2017. *The International Law on Foreign Investment*. Cambridge, UK: Cambridge University Press.

Spears, S. 2010. "The Quest for Policy Space in a New Generation of International Investment Agreements." *Journal of International Economic Law* 13 (4): 1037–75.

Stephan, P. B. 2014. “International Investment Law and Municipal Law: Substitutes or Complements?” *Capital Markets Law Journal* 9 (4): 354–72.

Sweet, A. S., M. Y. Chung and A. Saltzman. 2017. “Arbitral Lawmaking and State Power: An Empirical Analysis of Investor–State Arbitration.” *Journal of International Dispute Settlement* 8 (4): 579–609.

Thakur, T. 2020. “Reforming the Investor–State Dispute Settlement Mechanism and the Host State’s Right to Regulate: A Critical Assessment.” *Indian Journal of International Law* (forthcoming).

Tienhaara, K. 2006. “What You Don’t Know Can Hurt You: Investor–State Disputes and the Protection of the Environment in Developing Countries.” *Global Environmental Politics* 6 (4).

Tienhaara, K. 2018. “Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor–State Dispute Settlement.” *Transnational Environmental Law* 7 (2): 229–50.

Titi, C. 2018. *The Evolution of Substantive Investment Protections in Recent Trade and Investment Treaties*. Geneva: International Centre for Trade and Sustainable Development and Inter-American Development Bank.

UNCITRAL (United Nations Commission on International Trade Law). 2018. “Possible Reform of Investor–State Dispute Settlement (ISDS): Note by the Secretariat (A/CN.9/WG.III/WP.149).” Working Group III (Investor–State Dispute Settlement Reform) Thirty-sixth session, Vienna, 29 October–2 November.

UNCITRAL (United Nations Commission on International Trade Law). 2020. “Status of Work: UNCITRAL Working Group III (presentation).” https://uncitral.un.org/sites/uncitral.un.org/files/wgiii_status_of_work_as_of_20-july_2020_en.pdf.

UNCTAD (United Nations Conference on Trade and Development). 1995. *Foreign Direct Investment in Africa*. Geneva and New York: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 1999. *Foreign Direct Investment in Africa: Performance and Potential.* Geneva and New York: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2007. “Aftercare: A Core Function in Investment Promotion.” *Investment Advisory Series*, Series A, No. 1. Geneva and New York: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2008. “Investment Promotion Agencies as Policy Advocates.” *Investment Advisory Series*, Series A, No. 2. Geneva and New York: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2012. *Expropriation: A Sequel*. Geneva and New York: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2013a. “Investment Promotion in an Era of GVCs: Maximizing Impact through Business Linkages.” *The Investment Promotion Agency Observer* 2. Geneva: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2013b. “Optimizing Government Services: A Case for Joint Investment and Trade Promotion?” *The Investment Promotion Agency Observer* 1. Geneva: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2014a. *Economic Development in Africa Report 2014: Catalysing Investment for Transformative Growth in Africa*. Geneva: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2014b. “Skills and Foreign Direct Investment Promotion: What Can an Investment Promotion Agency Do?” *The Investment Promotion Agency Observer* 3. Geneva: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2015. “Outward Investment Agencies: Partners in Promoting Sustainable Development.” *The Investment Promotion Agency Observer* 4. Geneva: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2016. *Global Action Menu for Investment Facilitation*. Geneva: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2017. "Investment Facilitation: The Perfect Match for Investment Promotion." *The Investment Promotion Agency Observer* 6. Geneva: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2018a. "Bahrain, India, Lesotho and South Africa win Investment Promotion Awards." Press Release, 22 October. https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1889.

UNCTAD (United Nations Conference on Trade and Development). 2018b. "Promoting Investment in the Sustainable Development Goals." *Investment Advisory Series*, Series A, No. 8. Geneva: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2018c. *UNCTAD's Reform Package for International Investment Regime (2018 Edition)*. Geneva: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2018d. *World Investment Report 2018: Investment and New Industrial Policies*. Geneva: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2019. "Taking Stock of IIA Reform: Recent Developments." *IIA Issue Notes: International Investment Agreements* 3. Geneva: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2020a. *Economic Development in Africa Report 2020: Tackling Illicit Financial Flows for Sustainable Development in Africa*. Geneva: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2020b. *Investment Policy Hub*. https://investmentpolicy.unctad.org/. Accessed 17 February 2021.

UNCTAD (United Nations Conference on Trade and Development). 2020c. "Investment Policy Responses to the COVID–19 Pandemic." *Investment Policy Monitor* Special Issue 4. Geneva: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2020d. Post-COVID–19: Investment Promotion Agencies and the "New Normal." *The Investment Promotion Agency Observer* Special Issue 9. Geneva: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2020e. *World Investment Report 2020: International Production Beyond the Pandemic.* Geneva: UNCTAD.

UNEP (United Nations Environment Programme) and IISD (Institute for Sustainable Development). 2016. *A Sustainability Toolkit for Trade Negotiators: 5.3.1 Investor Obligations*. https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/5-investment-provisions/5-3-investor-and-home-state-obligations/5-3-1-investor-obligations.

Van Harten, G. 2018. "Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010." *European Journal of International Law* 29 (2): 504–49.

Van Harten, G., and M. Loughlin. 2006. "Investment Treaty Arbitration as a Species of Global Administrative Law." *The European Journal of International Law* 17 (1): 121–50.

Volpe Martincus, C., J. Carballo, I. Marra de Artiñano. and J. Blyde. 2020. "How Effective is Investment Promotion? Firm-level Evidence." Discussion Paper IDB-DP-00741, Inter-American Development Bank, Washington, DC.

Volterra Fietta. 2017. "PCA Designates Appointing Authority in an Investment Case against Libya under the Organisation of Islamic Cooperation Investment Agreement." *Volterra Fietta*. https://www.volterrafietta.com/pca-designates-appointing-authority-in-an-investment-case-against-libya-under-the-organisation-of-islamic-cooperation-investment-agreement/.

Voon, T., and A. D. Mitchell. 2016. "Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law." *ICSID Review: Foreign Investment Law Journal* 31 (2): 413–33.

WAIPA (World Association of Investment Promotion Agencies). 2019. *Overview of Investment Promotion: Report of the findings from the WAIPA Annual Survey of 2018*. Geneva: WAIPA.

WAIPA (World Association of Investment Promotion Agencies). 2020. *The Impact of COVID–19 from the Perspective of IPAs*. Geneva: WAIPA.

Wehland, H. 2019. "Domestic Courts and Investment Treaty Tribunals: The Effect of Local Recourse against Administrative Measures on the Breach of Investment Protection Standards." *Journal of International Arbitration* 36 (2): 207–29.

Wells, L. T., and A. G. Wint. 2000. *Marketing a Country: Promotion as a Tool for Attracting Foreign Investment*. Washington, DC: World Bank.

WJP (World Justice Project). 2020. *WJP Rule of Law Index*. Washington, DC: World Justice Project. https://worldjusticeproject.org/rule-of-law-index/.

World Bank and WAIPA (World Association of Investment Promotion Agencies). 2020. *State of Investment Promotion Agencies: Evidence from WAIPA–WBG's Joint Global Survey*. Washington, DC: World Bank and WAIPA.

WTO (World Trade Organization). 2017. "Joint Ministerial Statement on Investment: Facilitation for Development (WT/MIN(17)/59)." Geneva: WTO.

Yimer, B., N. Cisneros, L. Bisiani and R. Donde. 2011. "Application of International Agreements by Domestic Courts." Trade Law Clinic E780, Graduate Institute, Geneva.

Zarra, G. 2018. "The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?" *Chinese Journal of International Law* 17 (1): 137–85.

Zugliani, N. 2019. "Human Rights in International Investment Law: The 2016 Morocco–Nigeria Bilateral Investment Treaty." *International & Comparative Law Quarterly* 68 (3): 761–70.

Živković, V. 2019. "Fair and Equitable Treatment between the International and National Rule of Law." *Journal of World Investment and Trade* 20 (4): 513–52.

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.

Chapter 4 The nexus between competition and investment: Competition as an investment enabler

Theoretically the relationship between competition and investment is ambiguous, and empirical studies have shown that competition can either enhance or constrain investment (see chapter 2). Conversely, investment can affect the parameters that influence competition. The actual effect of competition on investment is case-specific and depends on the type of investment and the precise competition-enhancing measures in place.[383]

As predicted by economic theory, competition affects investment through its influence on factors that are key to investment decisions. These factors can be structural or behavioural barriers as well as regulatory.

Structural barriers to entry are the sunk costs that firms must bear upon entry—costs that cannot be recovered in the event of a firm's exit from the industry. Sunk costs act as a barrier to entry when they push the total cost of the project above the expected net present value of the investment.

Theoretically the relationship between competition and investment is ambiguous, and empirical studies have shown that competition can either enhance or constrain investment.

Behavioural barriers to entry are the ways that incumbent domestic, foreign or state-owned firms impede market access by abusing their market power. Incumbent firms do this by maintaining exclusionary arrangements with suppliers of inputs or with market outlets that prevent competitors from accessing the market. Such conduct is often taken as normal business practice and includes setting contractual provisions with wholesalers, restricting retailers from selling competitors' products or requiring contractual clauses in lease agreements that restrict property owners from leasing to competitors. Such provisions are usually accepted by market players, but they are often challenged when competition regulations and enforcement are introduced.

Links between competition, open markets and investment

The relationship between competition and investment requires that competition policy be consistent with policies promoting investment. There are four ways in which competition and investment policies may interact and these must be considered in shaping competition policy (figure 4.1).

Figure 4.1 What investment policy can do

INVESTMENT POLICY CAN:

CONTRADICT COMPETITION POLICY

Investment policy may encourage, or even require conduct or conditions that would otherwise be in violation of the competition law. For example, investment policy may permit price co-ordination or require territorial market division, which may be considered anti-competitive under competition law.

USE COMPETITION POLICY METHODS

Instruments to achieve investment regulatory objectives can be designed to take advantage of market incentives and competitive dynamics. Co-ordination may be necessary to ensure that these instruments work as intended in the context of competition law requirements.

REPLACE COMPETITION POLICY

Investment policy may try to control market power directly, by setting prices and controlling entry and access, especially where monopoly has appeared inevitable. Changes in technology and other institutions may lead to reconsidering the basic premise in support of regulation—that competition policy and institutions would be inadequate to the task of preventing monopoly and the exercise of market power.

REPRODUCE COMPETITION POLICY

Investment rules and regulations may prevent co-ordination or abuse in an industry, just as competition policy does. For example, regulations may set standards of fair competition.

Source: ECA

It has been argued that one of the best ways to deal with barriers to market entry is to maintain open trade and investment policies. The reasoning behind this line of argument is that competition from potential foreign investors or from imports will discipline those firms seeking to exercise some form of market power. In effect, by maintaining open trade and investment regimes the market is no longer limited to the national market.

Experience suggests, however, that open market regimes are insufficient for maintaining contestability in national markets.[384] Even in the context of liberal trade and investment regimes, structural characteristics in an economy can buffer incumbent firms from competition. Such characteristics can include factors inherent in the local nature of some markets, such as the non-tradability of certain products and services, cultural values that promote secrecy and deterrence from whistleblowing, and regulations that are not restrictive from an investment perspective—for example, standards and licensing requirements. Further, restrictive business practices, such as collusion, may inhibit investment.

While trade liberalization opens markets to competition, structural characteristics of the market and the behaviour of incumbent firms in that market may lead to less or no competition. Competition policy helps to make markets more competitive and ensures that it leads to desired development outcomes. It serves as a surrogate competitor in a market where structural conditions make it difficult for competition to occur. Surrogate competition is common in markets where competition does not exist and where regulations that are enforced are used to promote and create a competitive market.

Policies that maintain conditions favourable to competition make markets efficient. Enforcement of competition policy prevents private market abuses from reversing the benefits of economic reforms. A complement to competition enforcement is competition advocacy, which is the promotion of competitive market principles in policy and regulatory processes. Together with enforcement, advocacy leads to increased competition. This creates opportunities for entry by more efficient firms while at the same time facilitating the exit of less efficient firms. Increased competition also incentivizes the efficient use of resources and triggers innovation, thus improving productivity and, ultimately, economic growth and improved consumer welfare.

Traditionally, policies underpinning open markets were based on a perfect competition model that, among other things, assumes the existence of many sellers dealing in homogeneous products or services, who sell their products or services at prices set by a market with low entry and exit barriers. Such policies are relevant in the context of the existing trade configuration and the prevailing international trading environment. However, the composition of trade and the international trading environment are changing. Technological advantages, economies of scale and multinational corporations are playing growing roles in international trade. Government involvement in ownership of businesses and its championing of some enterprises are also more common. Furthermore, the shares of total trade and production for resource- and labour-intensive commodities have shrunk steadily, and shares for science-based, scale-intensive and differentiated commodities and services have grown.[385] Imperfect competitive behaviour thus seems increasingly relevant, and perfect competition less so. Consequently, equilibrium in global markets is often determined by small numbers of large agents, not by large numbers of small agents. Such oligopolistic equilibria have a different character from perfectly competitive equilibria and respond to government policy initiatives quite differently.

While trade liberalization opens markets to competition, structural characteristics of the market and the behaviour of incumbent firms in that market may lead to less or no competition.

The status of the AfCFTA Competition Protocol and challenges to Phase II

Negotiations for the protocol on competition have yet to commence. They were scheduled to start in March 2018, immediately following the signing of the agreement establishing the AfCFTA. But in the Thirty-third Ordinary Session of the AU Heads of State and Government, held in Addis Ababa, February 2020, it was reported that negotiations would commence immediately after the summit and conclude by December 2020. The negotiations were put on hold because of the COVID–19 pandemic and a new deadline of 31 December 2021 for the conclusion of negotiations was subsequently agreed.

Given the market disruption caused by COVID–19, defending competition has become increasingly difficult. Market failures have caused harm to firms and consumers alike, and competition concerns include excessive pricing for health-related products, abusive price increases and collusion. Competition authorities have continued to monitor markets, and, in April 2020, the United Nations Conference on Trade and Development (UNCTAD) recommended governments take five key actions during the COVID–19 crisis to protect competition in markets:[386]

- Ensure equal conditions exist between companies to maintain a level playing field.
- Temporarily allow cooperation arrangements to ensure the supply and distribution of essential affordable products to all consumers to prevent shortages.
- Closely monitor markets of essential products—disinfectants, masks and gels—to ensure their availability, if necessary through temporary prices caps, to protect the health of consumers during the pandemic.
- Vigorously enforce competition law against companies who create cartels or abuse their market power to take advantage of the crisis.
- Adapt competition procedures and deadlines to address the extraordinary circumstances created by the pandemic.

In light of the growing pressures on continental markets due to COVID–19, it is more important than ever to have the AfCFTA Competition Protocol in place as soon as possible.

Despite the challenges in starting the negotiations, it is unclear which of three forms the Competition Protocol should take:

- A supranational AfCFTA competition authority.
- A competition cooperation framework.
- A sequential approach in which a supranational authority follows an initial competition network.

The debate is about which of the three is the best approach or whether there should be a hybrid of two. Informed by the lenses of these three approaches, this chapter examines how the AfCFTA Competition Protocol may be formulated and enforced.

Competition policy in Africa: State of play and challenges

The interactions between competition and investment policies underline the level of analysis required to develop coherent policies at the heart of the AfCFTA's Phase II negotiations. Phase I, which continued well into 2019, was concerned with negotiations on tariff concessions, rules of origin, and services concessions. The preamble of the Agreement Establishing the African Continental Free Trade Area calls for common rules to govern trade in goods and services, the Competition Protocol, and Investment and Intellectual Property (IP) Protocols among state parties under the AfCFTA. The rules are required to be clear, transparent, predictable and mutually advantageous to achieve policy coherence and to resolve the challenges of multiple and overlapping trade regimes, including relations with third parties. Member countries are thus obligated by statute to come up with a Competition Protocol that is consistent, not only with the policies adopted under the AfCFTA, but also those adopted by member countries.

Countries in Africa have put in place different measures aimed at promoting investment, including bilateral investment treaties, tax holidays and other targeted incentives. Such incentives may be counterproductive if they are found to be inconsistent with the competition policy to be adopted under AfCFTA.

Markets in most African countries are characterized by low competition. According to the World Bank, more than 70 percent of African countries rank in the bottom half on the intensity of local competition measure and on the existence of fundamentals for market-based competition.[387] In many African countries, competition is restricted by businesses practices that undermine competitive dynamics and by government interventions and regulations that create obstacles to healthy competition. In a number of African countries, this is aggravated by the absence of competition laws or weak enforcement of existing laws.[388] Among African countries, 23 have both competition laws in force and competition authorities to enforce them. A further 10 have laws but no authority, 4 have competition legislation in an advanced stage of preparation and 17 have no competition law. Also, fewer than 50 percent of national economies have the necessary policy instruments required for a larger and more liberalized market.

The Competition Protocol under the AfCFTA may be informed by AfCFTA states' domestic policies. But to achieve a level of harmonization, the states will have to reform policies to align with continental policy governing competition and investment. This also points to an opportunity for countries to harmonize existing regulations through the AfCFTA protocol on competition.[389] The AfCFTA Competition Protocol will be an opportunity to address competition regimes among African countries that are diverse in their provisions and in their types of institutions.

While competition policy is ordinarily addressed at the domestic level through national laws that regulate domestic markets (see chapter 2), the effects of competition with liberalized trade are now flowing over borders. Regional economic communities (RECs) are creating harmonized competition rules for their members. The competition regulation landscape in Africa also includes subregional frameworks, and most African countries have overlapping memberships in multiple subregional economic blocs. With deepening regional and continental integration, it will be worth examining these arrangements and seeing how others can be effectively and successfully implemented. The AfCFTA protocol can provide a continental framework for connecting the layers and addressing substantive shortfalls or gaps.

At the REC level, five regional economic communities have enacted competition laws, and they are at different stages of implementation. As of 2019 (ARIA IX), some existing RECs, such as the Common Market for Eastern and Southern Africa (COMESA), have established systems for competition law and for dealing with cross-border anti-competitive practices. Others, such as the East African Community (EAC), have set up the necessary institutions, and Economic Community of West African States (ECOWAS) and West African Economic and Monetary Union (WAEMU) are setting up enforcement regimes. The Southern African Development Community (SADC) and the Southern African Customs Union (SACU) enforcement cooperation framework complicates the situation since some members of these two RECs are also members of COMESA. Countries that belong to both COMESA and

SACU or SADC have the option of applying the COMESA rules, making uniformity across all three RECs difficult. Since competition authorities have recently been established in EAC and ECOWAS, jurisdictional practices between EAC (within COMESA) and WAEMU (within ECOWAS) will need to be defined. This overlapping and fragmented coexistence reflects the challenges in regulating competition in African countries and RECs.

The elimination of tariffs and nontariff barriers under the AfCFTA is likely to open opportunities for competition to a wider continental market, as economic activities will no longer be restricted to national borders but combined in one community market. However, the prevalence of anti-competitive business practices and regulatory impediments to competition, coupled with imperfect market structures, raises the risk that opportunities for competition may be impeded. These opportunities include innovation, increased choices, growth of markets, lower consumer prices, job creation and other socioeconomic benefits. States often must strike a balance between increased profits for investors and improved consumer and public welfare.

The protocol on competition policy scheduled for negotiation under Phase II of the AfCFTA, alongside investment and intellectual property rights, is intended to provide remedies to address these impediments. In the context of regional trade arrangements, competition policy, in addition to applying to conduct that has negative effects on competition, also applies to business practices that negate trade liberalization by restricting trade flows between countries.[390] In this regard, the protocol on competition policy will reinforce the elimination of tariffs and nontariff barriers by ensuring that no firm, regardless of where it is located within the AfCFTA, can impede trade flows between member countries. Within the context of regional value chains, the AfCFTA will create a conducive environment that ensures effective competition to support intermediary trade in essential goods and services.

Anti-competitive business practices

Anti-competitive practices refer to a wide range of practices firms use to restrict competition in order to maintain or increase their profits and relative market positions without necessarily providing goods and services at a lower cost or at a higher quality.[391] The UN Set of Principles and Rules on Competition defines anti-competitive business practices as behaviour by enterprises that restrains competition or limits access to markets, has or is likely to have adverse effects on international trade, or through formal, informal, written or unwritten agreements has the same impact. Anti-competitive practices lead to market concentration and market failure as the price signal is not allowed to operate to clear the market. The results can be a combination of higher prices, lower supply, economic inefficiency, misallocated resources, reduced consumer choice than under competitive conditions and ultimately lower consumer surplus.

Besides the behaviour of private operators, state aid can also intervene in the operation of markets. Table 4.1 flags examples of anti-competitive conduct across the world that warranted regulatory action.

Table 4.1 Sample cases of anti-competitive trade practices

ANTI-COMPETITIVE PRACTICES	
1. Companies collectively engage in strategies that create quasi-monopolistic conditions under which they are able to inflate consumer prices. Colluding businesses maximize their joint profits. 2. Cartels (sometimes referred to as conspiracies or combinations) are underpinned by an explicit arrangement. Conscious parallelism is based on tacit collusion whereby enterprises fix output or price based on the behaviour of the market leader. 3. Anti-competitive practices may be horizontal (companies operating on the same level of the supply chain) or vertical (companies are active at different levels).	
TYPES OF BEHAVIOUR	**EXAMPLE**
Price/margin fixing Companies agree to set a price or profit margin for a certain product.	Private schools in Malawi colluded in fixing their tuition fees.
Output restrictions Businesses supply the market at a lower rate to provoke a price increase.	Poultry industry operators restricted their chicken meat output in Chile.
Market allocation (or division) Businesses segment the market or customers so as not compete against each other. Collusive tenders in bidding represent a particular subtype of market division.	Brazilian suppliers of industry gases (used in the health care and water utility sectors) engaged in customer allocation, bid rigging and price fixing.
Group boycott Businesses agree not to deal with a certain provider. Some countries prohibit this practice.	Physicians in the US orchestrated group boycotts against insurance providers to force higher reimbursements.

ABUSE OF DOMINAT MARKET POSITION	
An enterprise exploits its dominant position to discourage or eliminate competitors through exclusionary practices	
TYPES OF BEHAVIOUR	**EXAMPLE**
Vertical restrictions (restraints) Entities at different levels of the supply chain enter into exclusive agreements. These agreements designate a single dealer, possibly belonging to the same company's group, who enjoys the exclusive right to market products. This may amount to exclusive dealing, also named exclusive territory market restrictions and selective distribution. Selectivity clauses enforcing exclusive purchasing compel buyers and sellers to only purchase or sell the given good or services exclusively from the dominant company. Exclusive territorial restrictions can partition markets, which negates the objective of continental integration. Selective distribution is normally assessed on a rule of reason basis as there may be economic/technical justifications for such restrictions and these outweigh the anti-competitive effects. Under resale market price maintenance, the supplier of goods upstream enforces a minimum price at which the reseller downstream must sell the goods to the final consumers. The supplier in the upstream market controls and maintains minimum prices of the product sold to the downstream reseller.	Total Kenya prevented its distributors from selling competitors' products in the vicinity of their filling stations. A COMESA example is Coca Cola Beverages Africa (CCBA). CCBA had resale price maintenance clauses in agreements with independent distributors throughout the Common Market.
Market (vertical) foreclosure Companies prevent competitors' access to upstream supplies or suppliers or downstream buyers. Pre-emptive purchase of facilities and long-term and exclusive contracts represent typical foreclosure strategies. Patent misuse, or refusal to license essential patents to competitors, is illegal in some jurisdictions.	Qualcomm paid Apple for the exclusive purchase of its baseband chipsets and thus drove out other chipset manufacturers.
Excessive or unreasonable pricing The dominant company applies a price to its products that significantly exceeds the market competition level.	Turkish website Sahibinden.com was found commanding excessive prices in the online markets of real estate sales and rental and car sales.
Predatory pricing Producers sell products at artificially suppressed prices that smaller companies or new entrants cannot match. Dumping* denotes the practices of selling product in export markets at prices below cost.	Finnish dairy company Valio pushed down its prices to thwart milk imports.
Tied selling Buyers of a certain product are obliged to buy an otherwise unrelated product. Under full-line forcing, the purchaser must not only buy the desired product but also an entire line of products.	Google compelled manufacturers to pre-install the Chrome browser and Google Search applications on mobile devices running the Android operating system.

ANTI-COMPETITIVE MERGERS AND ACQUISITIONS	
Mergers (amalgamation of two or more companies into one) and acquisitions (purchase of equity by one firm in another firm) can impact the competitive conditions in the market and result in lower efficiency and consumer welfare.	
TYPES OF BEHAVIOUR	**EXAMPLE**
Horizontal mergers These are mergers between two companies competing in the same market. They result in higher market concentration, and, if they involve major players, they may create an entity with a high market concentration that may decrease competition. **Vertical mergers** These are mergers between two companies at different rungs of the supply chain. The newly created entity may engage in upstream foreclosure when one part of the company also provides essential inputs to other rival downstream companies. An alternative, and less definitive, way of foreclosing access is by selling the input to competitors at a higher prices or lower quality.	Merger between Sainsbury's and Asda in the UK was blocked by the national regulator over fears of the impact on prices and choices for consumers. In the Rubis/Galana merger, which involved an importer of fuel and a retail distributor of fuel, the merging parties provided undertakings to the COMESA Competition Commission that they would not engage in discriminatory practices against their downstream competitors. Similarly, in Orange/MTN joint venture, the COMESA Competition Commission obtained undertakings from the parties to the joint venture that the services of the joint venture company would be available on an equal basis to all mobile services operators.

* Dumping is not addressed under competition law and would normally be addressed under the main trade agreement between the Member States (for example, Section 51 of the COMESA Treaty).

Note: Examples based on cases where the conduct was found anti-competitive by national regulators or the EU Commission (Qualcomm and Google cases).

Source: COMESA Competition Commission, Competition and Fair Trading Commission Malawi, Geradin, Layne-Farrar and Petit (2012), Gibbs (2018), Arizona v. Maricopa County Medical Society 102 S. Ct. 2466 (1982).

Cross-border competition issues

The realization that competition policy is pivotal to development has spread across the continent. Enforcement is catching up as regional groups organize to protect their markets from abuses and anti-competitive practices imported from other continents through e-commerce and cross-border trade. So it is essential to encourage the proliferation of competition policies in Africa and thus encourage growth and development across the continent.[392]

In the absence of regulation, African economies continue to struggle when faced with import competition. As the barriers to trade have fallen and regional trading blocs have formed, African economies are increasingly connected to each other and the global economy.[393] Regional enforcement solutions are needed as problems from competition stretch across countries. Also important is cooperation between competition authorities and regional competition bodies.[394]

The most significant competition-related issues are problems created by regional mergers and by cartels spread across the SACU region, especially by a cartel in the cement industry. A number of lessons can be drawn from the operation of this cartel. At the heart of the cartel arrangement was market division and information exchange done through the industry association. This effectively removed price competition since the commitment by the major producer to a pricing structure meant other producers could readily align their prices, while market sharing meant there was no incentive to discount.[395] The companies in the arrangement were well aware of the provisions of competition legislation and regulations, as they had previously been granted an exemption, which allowed the legal cartel to continue until 1996 when it was ended by the then-Competition Board of South Africa.

Faced with cross-border competition issues, African countries have not necessarily been caught unawares. They have developed cross-border competition regulations that are now operational, even though cross-cutting issues such as e-commerce, procurement and inter-agency collaboration need to be further addressed, possibly within the framework of the AfCFTA Competition Protocol.

Supranational competition regimes covering a number of regions in Africa have formed. In 2013, the Common Market for Eastern and Southern Africa (COMESA) Competition Commission was established to promote and encourage competition within the region by preventing business practices that restrict the efficient operation of the market. The ultimate goal is to enhance the welfare of consumers in the region.

Other regional trading blocs have advanced into regional competition regimes. In 2006, the East African Community (EAC) agreed to competition legislation for the bloc, and the organization has established an operational competition authority.

Other regional trading blocs have advanced into regional competition regimes. In 2006, the East African Community (EAC) agreed to competition legislation for the bloc, and the organization has established an operational competition authority. The West African Economic and Monetary Union (WAEMU) operates a voluntary merger regime where the parties file with the regulator without being compelled to do so by an order or by meeting a compulsory threshold. The Competition Commission and the Court of Justice can take action under Articles 88–90 of the WAEMU Treaty of Union against anti-competitive agreements or any transaction that creates or strengthens a dominant position within the WAEMU common market or a substantial part of it.

The Central African Economic and Monetary Community (CEMAC) has introduced a mandatory merger control regime and, while its competition authority is not yet fully operational, it has recently started to accept merger notifications. The CEMAC Regulation also prohibits anti-competitive agreements.

The Economic Community of West African States (ECOWAS) first introduced competition legislation in 2008, including a prohibition on anti-competitive mergers. The ECOWAS Regional Competition Authority was launched in 2019 and is based in Banjul in Gambia.[396]

There is membership overlap across the African regional blocs, particularly among COMESA, EAC and SADC.

As for the Southern African Development Community (SADC), it does not have a regional competition law, but its members are committed to cooperating in the application of their national competition laws. In May 2016, SADC members entered into a memorandum of understanding that enables heightened cooperation on competition policy. When conducting merger reviews, SADC members collaborate on evidence gathering, remedy design and implementation.

There is membership overlap across the African regional blocs, particularly among COMESA, EAC and SADC. As a result, complexities in enforcement arise when rules, procedures and enforcement approaches differ. Enforcing AfCFTA competition policy will soften these challenges, particularly if the continental jurisdiction criteria match those adopted under the regional blocs. Adopting a uniform continental regime through the AfCFTA will ease difficulties by harmonizing the multiple regimes and by creating a supra-national competition enforcement regime on a par with the European Union.

Protecting intellectual property rights and enhancing competition

To improve the investment climate in Africa, intellectual property (IP) and competition require that the two protocols be deliberated in a complementary way (chapter 5.) A competition policy should be balanced, and innovation should not be punished by disregarding intellectual property rights (IPRs). Implementation of competition policy should not unduly sanction conduct that creates efficiencies and contributes to development.

IPR and competition policies are both concerned with promoting technical progress to benefit consumers. They complement each other. Firms are more likely to innovate if they are protected against free-riding by other firms. And they are more likely to innovate if they face strong competition. The problem is that, at least in the short run, legitimate uses of intellectual property rights can restrict competition, thus producing a trade-off between the benefits of increased competition and the gains from further innovation.[397] However, maximum protection may hinder innovation by “making inputs to future innovation too costly and too cumbersome to sustain over time.”[398] As the protection of intellectual property rights is an example of a limit to competition that is considered beneficial, competition policies need to be formulated and implemented in a manner that creates proper balance between innovation and protection.

The IP system is designed to reward innovation, diffuse new knowledge and solutions to technical problems and promote competition based on quality, originality and innovation of products and services. Effective enforcement procedures add to the value of IP rights. As a private right, IP enforcement is primarily through civil and administrative procedures. Criminal law applies when the infringement of IP rights is at a scale and in a manner that harms public interest. According to WTO's TRIPS agreement, trademark counterfeiting and copyright piracy on a commercial scale are criminal offences. National laws extend criminal liability to other IP infringements, such as breach of confidence by employees of enterprises leading to the disclosure of trade secrets.

In international trade negotiations, IP enforcement is largely considered a matter of law and law enforcement.

In international trade negotiations, IP enforcement is largely considered a matter of law and law enforcement. Developed countries have attempted to consolidate enforcement standards under the Anti-Counterfeiting Trade Agreement (ACTA), concluded in 2011.[399] While the ACTA was signed by several countries, it never came into force. Some of ACTA's proposed measures raised constitutional questions for some countries, and the European Parliament rejected ratifying the agreement.[400] Some trade agreements between African countries and the European Union or United States have increased the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) minimum standards for enforcement.

IP enforcement should address three broad areas:

First is the effectiveness and fairness of enforcement standards. Do the national laws and regulations provide adequate procedures and effective remedies—including awards sufficient to compensate the losses of the right holder—to deter further infringement?

Laws and regulations should enable the enforcement of IPRs and clearly identify the responsibilities of rights holders and law enforcement agencies.[401] Not only must the judicial authorities have power to issue orders—say, for the preservation of evidence and injunctions—but law enforcement officials should be able to execute judicial orders promptly and efficiently. If compensation for infringement is not seen as fair and adequate, it could discourage right holders from using enforcement procedures and so fail to deter infringement. At the same time, standards should also protect defendants. For example, in ordering discovery of evidence, the judicial authorities should preserve defendants' trade secrets.

The second area for IP enforcement is investing in non-legal solutions. Are enforcement standards provided under the law the appropriate approach for effective enforcement of IPRs?

There is a limit to what laws, judges and law enforcement officials can do. The loss of revenue by the music industry is an example. Despite major legislative reforms, led by the 1998 United States Digital Millennium Copyright Act, the music industry in the United States had lost significant revenue since the advent of digital technology. The peak for the industry in the United States was in 1999, when revenue was $21.5 billion. It declined continuously until 2015, when it reached $6.9 billion. The downward trend demonstrated how copyright enforcement laws, whether civil or criminal, have become less effective in the context of the digital economy. Although all forms of copyrighted materials have been affected by digital technology, its disruption of the music industry has been the most significant.[402] Surprisingly, since 2015, US music industry revenue has recovered. A new business model involving streaming services though major digital platforms, as opposed to enforcement, appears to be the driving force behind the recovery.[403] The case demonstrates why copyright law by itself is not a solution for critical challenges of protecting audio-visual works in the digital context.[404]

It is also important to consider the economic incentives behind counterfeiting and piracy from both the supply side and the demand side.[405] Considering the purchasing power of consumers, insufficient limitations and exceptions to copyright could compel students to reproduce educational materials. For some developing countries, the price of software and reference materials is so high that consumers may have no other option than to use unauthorised copies or forgo accessing the software or material altogether.

Third is competition policy and abuse of enforcement procedures. Do competition regulations and enforcement procedures sufficiently address the potential abuse of IPRs?

IPR enforcement could be used strategically to affect competition in the marketplace.

IPR enforcement could be used strategically to affect competition in the marketplace. The problem of standard essential patents (SEPs) is a good example. These patents are essential parts of a specific digital technology, for example patent technology that makes up Wi-Fi or 5G. If patent holders refuse to license a patent or conceal a claim of patent from standard setting agencies—for instance, the International Standards Organisation (ISO)—the patent holder could prevent the deployment of new technologies or even demand excessive licensing fees and royalties for use of the patent. The holders of an SEP could use IP enforcement procedures to extract more value than their technology is worth. In 2014, the European Commission found that seeking and enforcing an injunction on the basis of an SEP constituted an abuse of a dominant position, and this was prohibited by European Union competition rules.[406] In such a situation, judicial authorities may refuse to grant an injunction to stop defendants from using the SEP. Instead, judicial authorities may only authorise the payment of royalties that they think are fair and adequate. Standard setting organisations have adopted the fair, reasonable and non-discriminatory (FRAND) principles to address the challenges of SEP and enforcement.[407]

In the era of the digital economy, the conflicts between intellectual property and competition can be mitigated through advocacy initiatives and by cooperation and partnership between the regulators of these two specialized areas, and by promoting convergence of ideas and enforcement priorities.

E-commerce and the digital economy

The rise of the digital economy and e-commerce cannot be ignored, since they are transforming societies globally. In this chapter, the digital economy is defined as "that part of economic output derived solely or primarily from digital technologies with a business model based on digital goods and services."[408] The quick pace of technological development has changed the nature of markets and business models. This has posed challenges for competition law and policy, which need to be adapted to the new market realities and business models. To ensure competitive and contestable markets in the African context, competition policy needs to complement digital policy and policies should address the market imperfections that are worsened by e-commerce.[409] Regulation of the digital space is critical. Just as investment regulation in the digital space needs careful attention, so does competition regulation of the digital economy.

Cross-border competition issues are likely to grow as businesses transition from brick and mortar to trade through e-commerce. E-commerce, however, comes with challenges that can raise competition risks. Uncompetitive delivery infrastructure, fragmented markets and rising barriers to cross-border e-payments can stifle competition or even result in market foreclosure. Unfortunately, regulations have not kept pace with digital developments. According to the United Nations, 32 of Africa's 54 countries have laws in place that govern e-transactions (online exchanges), 23 have laws on data protection and privacy and only 20 address online consumer protection.[410] So it is imperative for the AfCFTA Competition Protocol to have provisions in place that will regulate e-commerce and online markets and that will complement the protocol on e-commerce (to be negotiated by AfCFTA states in Phase III of the AfCFTA).

Online marketplaces provide an opportunity to drive inclusive growth across Africa, with e-commerce likely to create as many as 3 million jobs by 2025.

Online marketplaces provide an opportunity to drive inclusive growth across Africa, with e-commerce likely to create as many as 3 million jobs by 2025. Benefits will include servicing Africa's fast-growing consumer class, offering women access to new business opportunities and opening markets to otherwise isolated rural communities.[411] Much as competition principles are pro-innovation, there is a need to strike a balance between innovation that stifles competition and innovation that is pro-competition.

Experiences from other regions highlight the need for such a balance. For example, in 2017, the European Commission launched three separate investigations to assess whether certain online sales practices prevented consumers from enjoying cross-border competitive price choices in consumer electronic, video game and hotel accommodations. The commission came up with a Digital Single Market Strategy that identified barriers hindering cross-border e-commerce and proposed initiatives to address these. The strategy is built on three pillars:

- Enabling better access to digital goods and services for consumers and businesses across Europe.
- Creating the right conditions and a level playing field for digital networks and innovative services to flourish.
- Maximizing the growth potential of the digital economy.

The strategy also included an anti-trust competition inquiry into the e-commerce sector to identify possible competition concerns requiring regulatory action. Possible areas of concern were anti-competitive online distribution agreements and restrictions on the development of internet sales in general. National competition authorities continue to monitor these and other pressure points.

The strategy also included an anti-trust competition inquiry into the e-commerce sector to identify possible competition concerns requiring regulatory action.

The African continent is a lucrative market for exploring e-commerce investments, especially as liberalization and competition have opened up markets. For instance, Uber, the ride hailing app, has asserted itself and taken up significant market share. Since launching in Johannesburg in August 2013, Uber has expanded to 14 cities in Sub-Saharan Africa. It has consolidated in major hubs in Cape Town, Lagos and Nairobi, while moving into secondary cities and broadening its services beyond the sedan vehicles that dominate mature markets.[412] Uber has also spurred innovation in the taxi industry in Africa, encouraging other businesses to introduce taxi hailing apps.

Uber has, however, faced regulatory challenges, labour disputes, technical challenges, passenger security issues and violent protests in some countries because of the disruption the technology has brought to the passenger transport sector. In 2019, the COMESA Competition Commission called for the notification of Uber's acquisition of Careem and imposed a number of behavioural remedies regarding Uber's service quality and the fees Uber charges drivers. As the Uber case illustrates, e-commerce has the potential to displace smaller, weaker and traditional market players who rely on their businesses for their livelihoods.[413] This makes e-commerce a competition issue worthy of regulatory oversight. In the absence of proper regulation, stronger and technologically more advanced firms can monopolise some industries by pushing informal sector players to the fringes. This is why it is imperative for e-commerce players to be pro-regulation and cooperate with competition authorities from the onset. (Chapter 6 explores how the digital economy and e-commerce require some form of regulatory framework for Africa to reap their full benefits).

Internet use in Africa, e-commerce, competition and foreign direct investment

E-commerce thrives when internet use is also high as this creates a conducive environment for viable business ventures. So Africa needs to boost internet penetration across the continent thus growing e-commerce and enhancing the competitive conduct of firms. However, as costs are high, only a quarter of Africa's population regularly uses the internet. On average, across Africa 1 GB of data costs 9 per cent of monthly income. The International Telecommunication Union (ITU) estimated that at the end of 2019, 54 per cent of the global population, or 4.1 billion people, were using the internet.[414] At 25 per cent, Africa is lagging behind and needs to catch up if some markets are to rely on e-commerce for operations, especially in the critical areas of internet-based payments and the management of information.

In terms of the volume of business done online in Africa, the region lags behind the rest of the world on the UNCTAD B2C E-commerce Index, which measures four composite indicators relevant to online shopping. Mauritius—with a ranking of 55—is the highest ranked African country, and as many as nine of the bottom ten countries are in Africa. However, the continent is showing progress in key indicators related to B2C e-commerce.[415]

Most shopping is still done offline through brick and motor shops or through informal trade. This is largely because of weak regulatory frameworks that do not support online businesses and to low investment in e-commerce because of entry barriers across the continent to e-markets. A competitive e-commerce ecosystem attracts FDI[416] and venture capital, as in Thailand where in 2017 e-commerce was the largest recipient sector of venture capital funding.

> *Although some e-commerce strategies and policies are at play, Africa falls behind on adopting key regulations, and legal uncertainty exists on multi-jurisdictional issues—privacy, e-transactions, digital identity and consumer protection.*

Although some e-commerce strategies and policies are at play, Africa falls behind on adopting key regulations, and legal uncertainty exists on multi-jurisdictional issues—privacy, e-transactions, digital identity and consumer protection. According to the World Economic Forum, Africa needs an inclusive pan-African perspective for e-commerce and the digital economy. It is anticipated the AfCFTA will come up with an enabling regulatory environment that is multifaceted and appropriate to meet the challenges. So it is critical to view the AfCFTA and its Competition Protocol as an opportunity to strategically address areas of e-commerce and to catch up with the rest of the world in creating an enabling environment that attracts investment and new players to the market.

Public procurement policies and their effect on competition

Economic activity can also be through public procurement. Public procurement is an area where competition for contracts is not only a political issue, but also a socioeconomic process. In Malawi and South Africa, procurement legislation includes provisions for empowerment of local firms by giving them priority in public sector contract awards. This is done through legislation of procurement strategies that supports the government's socioeconomic objectives.[417] Public procurement can also exclude rivals from national markets, as in the construction industry, when it is used together with other policies—such as state aid and subsidies—that give a competitive edge on pricing to local and not foreign firms.

Traditionally public procurement was thought of as an administrative task with a set of fair and transparent rules and procedures to ensure adequate fiduciary control. Now, because a significant volume of public expenditure passes through procurement, countries increasingly recognize it as a strategic function and an important development policy tool for supplying quality goods, delivering services effectively and efficiently to citizens, and implementing civil works with a focus on performance while obtaining more value for money. There are important prerequisites for these functions to be achieved—institutions need to perform well, professionals need to be qualified, technology needs to be used strategically and contract management needs to be nimble. Conversely, poor procurement outcomes reduce development effectiveness through reduced fiscal space for social investment, high costs of doing business and reduced competitiveness.[418]

If approached progressively, public procurement can enable competition. But it can also be abused to foreclose markets, discourage or limit players in a market, or result in price distortions. Kenya's public procurement and disposal law includes guidance in price determination, especially in the construction industry.[419] The guidelines ensure that the procurement process is competitive and follows due process. It also ensures participation of local contractors in construction projects, while boosting local capacity in the construction industry. The law requires that 40 per cent of foreign contract business be handled in Kenya or by local contractors, thereby passing on technical skills to local firms.[420]

Governments are increasingly using their procurement policies to support socioeconomic objectives that are not core to the procurement process but directly influence the effectiveness of public expenditures, and the quality of services and infrastructure investments, and promote national industries and employment. Protection provisions in national laws and regulations are important in reducing the pressure of competition from foreign players, and these provisions are common in public procurement legislation and economic empowerment policies.

Such protection provisions require clear national policies that are well articulated independently of any procurement framework. More important, these policies should provide a balance between specific procedures supporting socioeconomic objectives and sound procurement frameworks to avoid negative impact or inconsistency with international agreements if they shut out participation from foreign firms, which in itself is anti-competitive and defeats regional integration objectives.

Public procurement policies regulate the public sector's interactions with domestic and international markets in ways that directly affect their efficiency and competitiveness. Bidding and contractual procedures are affected as the role of private businesses evolves from that of service providers to that of partners, including through public–private partnerships (PPPs) and outsourcing. With the increasing use of such contracts in Africa, the private sector has made progress in developing its technical and financial capacity. So, it is important that governments develop mechanisms to promote local competition and engage stakeholders frequently, openly and equitably. This requires deep market assessment of the overall investment and business environment.[421]

A significant and pervasive recent trend in public procurement is the increasing use of technology-based tools that open participation to firms beyond a country's borders. The range of options—from open websites to e-tendering—is large. E-procurement enables easier and faster access to information, helps lower transaction costs, allows for participation of a larger pool of firms from broader markets and expedites the bidding process. It also builds trust, improves interactions with bidders and enhances transparency and accountability in the use of public funds. The interface of procurement with public financial management and budgeting is also facilitated through the growing use of technology, and this is essential to better managing resources and improving service delivery.[422]

As globalization has blurred the distinction between bidders from developed and developing countries, procurement policies can be crucial to government efforts to gain from trade by creating a level playing field for both foreign and national firms or by protecting domestic markets from competition. So the interplay between competition and public procurement should be properly interrogated within an AfCFTA context and woven into the fabric of subsequent deliberations.

Anti-trust bodies and capacity building

Anti-trust bodies—commonly referred to as competition authorities or regulators—undertake investigations under legal mandate in the markets where they have jurisdiction. So it is important that national and regional competition authorities have the capacity to act effectively as regulators.

There are several bottlenecks that affect effective enforcement of competition at national and regional level. One of the most obvious obstacles is the different levels of maturity of anti-trust bodies across Africa. This can be illustrated by statistics compiled by the World Bank in partnership with the African Competition Forum (ACF).[423] The number of jurisdictions with competition regimes has expanded from 13 in 2000 to more than 30 in 2017, reflecting the growing role of competition policy in the development agenda. Some agencies, however, are in their infancy, while others are mature. Nigeria's competition authority that has been in existence for less than five years, but South Africa's has been in existence for more than 15 years.

Capacity building can help address gaps in research, strategy, expertise and other areas. This institutional arrangement can be best facilitated through the AfCFTA Competition Protocol which goes further to delineate the policies, institutional arrangements and enforcement modalities. This will strengthen anti-trust bodies across Africa and will achieve the aspirations expressed in the African Competition Forum.

Capacity building can help address gaps in research, strategy, expertise and other areas.

Investment in effective institutional arrangements should not be ignored. Full capacity in terms of financial, human and legal instruments will improve the integrity of the work of enforcement agencies. Competition authorities must invest in training their staff in competition legislation, rules of evidence collection and handling, and rules of procedure for summoning witnesses, interviewing techniques and referrals. While such training is indispensable, there should also be a knowledge-application monitoring system within organizations to ensure that those trained in a specific area actually apply their knowledge and do not continue to seek further training repeatedly but fail to put what they learn into practice.

International donors can also provide legal and technical capacity building as needed. This will be particularly important where local authorities do not have the resources to investigate, or the alleged infringer has few operations physically based in the jurisdiction.

Over and above agency capacity building, the interface between these agencies is critical for successful regional integration, which requires close cooperation between the competition bodies of the different countries. For this to be effective, each member country also needs to develop its own effective competition law and implementation of the law.[424]

Competition provisions in regional and international trade agreements

Despite the signing of many memorandums of understanding, African trading blocs still aspire to incorporate competition provisions into international trade agreements. Depending on the different legal systems, this is often hard to achieve as it requires legislative approval and ratification. This aspiration, however, provides a window of opportunity for harmonizing the competition value system across Africa.

A maturing competition regulatory ecosystem is taking shape in different places and at different times across the continent. So, the task for regional authorities is to ensure that competition policy frameworks are consistent with membership in multiple regional authorities. Regional authorities will also need to avoid duplication of compliance requirements that create barriers for investors. This is important as competition policy is increasingly taking up space in African trade agreement negotiations. One example is the Tripartite Trade Agreement. Although still not yet ratified by all states, the agreement between COMESA, EAC and SADC aims to conclude negotiations on competition policy within two years of the agreement coming into force.

Considering its inherently borderless potential, policymakers must ensure that they create an enabling environment for e-commerce investments. This calls for firmly anchoring e-commerce within the African Continental Free Trade Area negotiations and encouraging more African governments to join the plurilateral negotiations on e-commerce at the World Trade Organization.[425] In February 2020, there was discussion on a progressive approach for incorporating e-commerce into the AfCFTA—whether as a standalone chapter or protocol or by building on existing African Union instruments. E-commerce barriers have every chance of being overcome through strengthening regulations that allow FDI investments to be made in tech.

Regional integration comes with its own nuances. Unregulated competition can be harmful to smaller economies, so there is a need to set up relevant protocols and implementing institutions so that integration is meaningful to both big and small economies. This points to the important relationship between deeper and more balanced regional integration and industrial policies. Regional integration exacerbates economic polarization if it is not accompanied by appropriate regional development policies.[426] The poultry meat industry in Southern Africa is a good case in point.[427] Eliminating all trade restrictions would be short-sighted, since doing so would be detrimental to the smaller countries' domestic industries. The South African poultry industry is large and well developed, and its scale economies would likely mean that South African poultry, along with imported Brazilian and EU poultry, would flood the smaller domestic markets. Another example is in the cement industry. In at least 18 African countries, one supplier holds more than 50 per cent of the market while the rest of the market is divided among smaller firms.[428]

Competition operates at the regional as well as the national level,[429] and there is an interaction between competitive outcomes and regional integration, such that consumers have competitively priced products and firms make investments to realize the productive potential. At the national level, countries need to depart from protectionist policies that distort competitive performance. Government policies have played an important role in protecting national industries and supporting investments. In the short term, these policies reduce competition from imports and support the market power of domestic suppliers. In the medium term, if the policies are temporary, the investment in expanded supply can mean greater regional competition. But there is a danger that government policies designed to protect and develop local production could decrease competition within a country and that the benefits from these policy interventions could be captured by the large firms and their shareholders.[430]

Policy recommendations

Mutually reinforcing policies in competition, intellectual property and digitalization can level the playing field, thus attracting more intra-African investment and FDI. Creating and improving conditions for competition, innovation and the use of technology will allow companies to access the AfCFTA as a continental market.[431] The ultimate objective is to prepare AfCFTA states for productive investments channelled to competitive activities and to adding value—such as in the knowledge economy, technology and innovation, and the digital space—all while taking advantage of economies of scope and scale in an AfCFTA common investment area. A continental competition framework will invite firms within the free trade area to make investment and location decisions from a regional perspective.

The dynamics of investment decisions that shape the competitive landscape must also be understood over time. The existence of significant scale economies makes competition across the region even more important. It is important to understand that investment decisions and arrangements regarding regional trade are made by considering the nature and extent of competition in national and regional markets.

Supranational authorities have a broad mandate to legislate and detect anti-competitive practices and mergers that have a cross-border impact.[432] Their greater extraterritorial reach helps them address cross-border practices that go beyond the powers of national authorities. However, clarifying the boundaries of supranational jurisdictions is necessary, especially on merger control, as this gives businesses and national authorities legal certainty when making decisions about mergers that cross borders.

It is recommended that:

- Members states conclude the AfCFTA Competition Protocol and ensure that it covers the main substantive issues. These include cartels, merger control, abuse of dominance, anti-competitive agreements and consumer protection. As the ultimate benefit for competition is consumer protection, the adopted protocol should embrace consumer protection as a dedicated chapter.

- National competition authorities conduct competition-related market inquiries into the digital economy to understand how these markets function and how regulations can be enforced. These inquiries should inform the protocol so that it addresses relevant competition issues in the digital economy.

- AfCFTA states, during Phase II negotiations, ensure that the competition protocol has provisions that capture e-commerce and online markets. It is strongly recommended that the protocol include additional criteria for defining the market, for defining dominancy and for setting out the rules of the game in the digital sector.

- National competition authorities invest in capacity building to understand and regulate broader markets. Advancing the digital economy raises challenges for regulators and skills must be harnessed to understand such markets. Since the current capacity of competition authorities is limited, competition authorities should invest in capacity building so they can better identify new developments, players and business models, and thus better regulate the market.

- AfCFTA states, in concluding the Competition Protocol and in future negotiations, deliberate state aid and the exemption of the application of competition law. If these are left in abeyance, they could be counterproductive to the community practice of competition law.

- The Phase II negotiations clarify public procurement and protectionist provisions for infant industries. To achieve national level acceptance, the private sector and other stakeholders will need to be actively engaged in the discussions. If these issues are left untouched the common market could enable export cartels into weaker economies and create continental monopolies that then destabilize markets. A continental procurement policy can complement the Competition Protocol and vice versa. The protocol will ensure predictability, transparency and harmony in procurement policies and make government procurement competitive.

Trade policy without competition policy means no rules or principles to control harmful and distortionary effects on the market. The reduction of barriers to trade and the removal of barriers to entry for domestic and foreign investment need to be regulated. The Competition Protocol can secure gains from trade liberalization and market opening. Without the protocol, firms—especially multinational corporations— can acquire significant market power and thus influence pricing and volumes of supply in ways detrimental to the objectives of market liberalization.

Competition provides safeguards that enable the intentions of trade policy to take effect. The subsequent Phase II expert discussions will focus on firming up the investment, competition and intellectual property rights protocols. As this chapter has shown, these areas are interdependent, and there is a need to produce draft protocols that take into account the linkages between them. On their own and cumulatively, the three protocols hold promise for transforming, harmonizing and simplifying the rules on the continent, thus contributing to a level playing field that is also easier for African companies to navigate.

References

ACTA (Anti-Counterfeiting Trade Agreement). 2011. "Anti-Counterfeiting Trade Agreement." https://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf.

African Competition Forum. 2019. *Competition Challenges in African Construction Markets: A Study Across East and Southern Africa*. http://www.compcom.co.za/wp-content/uploads/2020/02/African-Competition-Forum-Competition-challenges-in-African-construction-markets-A-study-across-East-and-Southern-Africa.pdf.

African Development Bank. 2014. "Policy Framework Paper: Review of ADB's Procurement Policy, Procedures and Processes." https://www.afdb.org/fileadmin/uploads/afdb/Documents/Procurement/Project-related-Procurement/Review_of_AfDB%E2%80%99s_Procurement_Policy__Procedures_and_Processes_-_Policy_Framework_Paper.pdf.

Boonruang, S. 2018. "Surge in Startup Funding Led by E-commerce, Marketplace." *Bangkok Post*, 23 February. https://www.bangkokpost.com/business/news/1416715/surge-in-startup-funding-led-by-ecommerce-marketplace.

Bukht, R., and R. Heeks. 2017. "Defining, Conceptualising and Measuring the Digital Economy." Manchester Centre for Development Informatics Working Paper 68, University of Manchester Global Development Institute, Manchester, UK.

ECA (United Nations Economic Commission for Africa). 2019. *Assessing Regional Integration in Africa IX (ARIA IX): Next Steps for the African Continental Free Trade Area*. Addis Ababa: ECA.

ECOWAS (Economic Community of West African States). 2019. "ECOWAS Launches Regional Competition Authority." Abuja: ECOWAS. https://www.ecowas.int/ecowas-launches-regional-competition-authority/.

European Parliament. 2012. "Everything You Need to Know about ACTA." Brussels: European Parliament. https://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20120220FCS38611&format=XML&language=EN.

Fox, E. 2012. "Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries." In J. Drexl, M. Bakhoum, E. Fox, M. Gal and D. Gerber (Eds.), *Competition Policy and Regional Integration in Developing Countries*. Cheltenham, UK: Edward Elgar.

Geradin, D., A. Layne-Farrar and N. Petit. 2012. *EU Competition Law and Economics*. Oxford, UK: Oxford University Press.

Gibbs, S. 2018. "Qualcomm Fined €997m by EU for Paying Apple to Exclusively Use its Chips." *The Guardian*, 24 January. https://www.theguardian.com/business/2018/jan/24/qualcomm-fined-997m-by-eu-for-paying-apple-to-exclusively-use-its-chips.

ITU (International Telecommunication Union). n.d. ITU Telecommunication Development Sector Statistics. Geneva: ITU. https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx.

Karaganis, J. 2011. "Rethinking Piracy." In J. Karaganis (Ed.), *Media Piracy in Emerging Economies*, 1–73. New York: Social Science Research Council.

Lits, A. 2019a. "African Can Be a Huge Growth Engine for Uber." *African Business*, 29 October. https://african.business/2019/10/economy/africa-can-be-a-huge-growth-engine-for-uber/.

Lits, A. 2019b. "Uber's Ambition Is to Be Everywhere." *African Business*, 14 August. https://african.business/2017/08/economy/ubers-ambition-everywhere/.

Mathis, J., and W. Sand-Zantman. 2014. "Competition and Investment: What Do We Know from the Literature?" Industrial Economic Institute, Toulouse University Capitole.

Ménière, Y. 2015. *Fair, Reasonable and Non-Discriminatory (FRAND) Licensing Terms: Research Analysis of a Controversial Concept*. Brussels: European Commission. https://publications.jrc.ec.europa.eu/repository/bitstream/JRC96258/jrc96258.pdf.

OECD (Organisation for Economic Co-operation and Development). 1987. *Structural Adjustment and Economic Performance*. Paris: OECD Publishing.

OECD (Organisation for Economic Co-operation and Development). 2003. "A Policy Framework for Investment: Competition Policy." Background information for the OECD Conference held in Rio de Janeiro, Brazil.

Pollack, W. 2000. "Tuning In: The Future of Copyright Protection for Online Music in the Digital Millennium." *Fordham Law Review* 68 (6): 2445–2488.

Pratt, A. N., and X. Diao. 2008. "Exploring Growth Linkages and Market Opportunities for Agriculture in Southern Africa." *Journal of Economic Integration* 23 (1): 104–137.

Priest, E. 2008. "Why Emerging Business Models and not Copyright Law are the Key to Monetising Content Online." In B. Fitzgerald (Ed.), *Copyright Law, Digital Content, and the Internet in the Asia-Pacific*. Sydney, Australia: Sydney University Press. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1233782.

Reichmann, J. H. 2009. "Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow?" *Houston Law Review* 46 (4): 1116–1185.

Roberts, S. 2016. "Competition and Economic Development in East and Southern Africa." In *Competition in Africa: Insights from Key Industries*. Pretoria, South Africa: Human Sciences Research Council Press.

Routley, N. 2018. "Visualizing 40 Years of Music Industry Sales." *Visual Capitalist*, 6 October. https://www.visualcapitalist.com/music-industry-sales/.

Schwarz, D. 2017. "The Internationalization of Competition Law in Africa." *Competition Policy International*, 29 August. https://www.competitionpolicyinternational.com/the-internationalization-of-competition-law-in-africa/.

UNCTAD (United Nations Conference on Trade and Development). 1997. *World Investment Report 1997: Transnational Corporations, Market Structure and Competition Policy*. Geneva: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2018. *UNCTAD B2C E-Commerce Index 2018: Focus on Africa*. Technical Notes on ICT for Development 12. Geneva: UNCTAD.

UNCTAD (United Nations Conference on Trade and Development). 2019. "Competition Issues in the Digital Economy: Note by the UNCTAD Secretariat." Geneva: UNCTAD. https://unctad.org/meetings/en/SessionalDocuments/ciclpd54_en.pdf.

UNCTAD (United Nations Conference on Trade and Development). 2020. "UNCTAD Advisory on COVID." Press Release, 8 April. Geneva: UNCTAD. https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2325.

United States Department of Justice. 2006. *Progress Report of the Department of Justice's Task Force on Intellectual Property*. Washington, DC: United States Department of Justice. https://www.justice.gov/archive/opa/docs/ipreport61906.pdf.

World Bank. 2016. *Breaking Down Barriers: Unlocking Africa's Potential through Vigorous Competition Policy*. Washington, DC: World Bank.

World Economic Forum. 2019. *Africa E-Commerce Agenda Roadmap for Action*. Davos, Switzerland: World Economic Forum.

WTO (World Trade Organization). 2019. *Competition Policy, Trade and the Global Economy: Existing WTO Elements, Commitments in Regional Trade Agreements, Current Challenges and Issues for Reflection*. Geneva: WTO.

End notes

383 Mathis and Sand-Zantman, 2014.
384 UNCTAD, 1997; OECD, 2003.
385 OECD, 1987.
386 UNCTAD, 2020.
387 World Bank, 2016.
388 ECA, 2019.
389 ECA, 2019.
390 ECA, 2019.
391 OECD, 2003.
392 Schwarz, 2017.
393 Schwarz, 2017.
394 Roberts, 2016.
395 Roberts, 2016.
396 ECOWAS, 2019.
397 OECD, 2003.
398 Reichmann, 2009.
399 The Anti-Counterfeiting Trade Agreement was a proposed multilateral treaty for the purpose of establishing international standards for intellectual property rights enforcement.
400 European Parliament, 2012.
401 The United States Department of State adopted principles for its initiative on enforcement of IP rights in 2006, that underscored:
Laws protecting intellectual property rights must be enforced.
The federal government and intellectual property owners have a collective responsibility to take action against violations of federal intellectual property laws.
The Department of Justice should take a leading role in the prosecution of the most serious violations of the laws protecting copyrights, trademarks and trade secrets.
The federal government should punish the misappropriation of innovative technologies rather than innovation itself.
Intellectual property enforcement must include the coordinated and cooperative efforts of foreign governments.
See United States Department of Justice (2006).
402 Pollack, 2000.
403 Routley, 2018.
404 Priest 2008.
405 Karaganis, 2011.
406 Ménière, 2015.
407 Ménière, 2015.
408 Bukht and Heeks, 2017.
409 UNCTAD, 2019.
410 World Economic Forum, 2019.
411 World Economic Forum, 2019.
412 Lits, 2019a.
413 Uber's introduction has been controversial especially with traditional taxi drivers who see the app and its legion of drivers as a threat to their livelihoods (Lits, 2019b).
414 ITU, n.d.
415 UNCTAD, 2018.
416 Boonruang, 2018.
417 Preferential Procurement Policy Framework Act ("PPPFA ") have been published and will take effect from 1 April 2017 in South Africa.
418 African Development Bank, 2014.
419 Public Procurement and Disposal Act 2015.
420 African Competition Forum, 2019.
421 African Competition Forum, 2019.
422 African Competition Forum, 2019.
423 World Bank, 2016.
424 Fox, 2012.
425 WTO, 2019.
426 Pratt and Diao, 2008.
427 Roberts, 2016.
428 In North Africa there is a significant presence of Lafarge Holcim with plants in Algeria and Egypt. Dangote's Obajana plant stands out in West Africa. PPC and Lafarge Holcim are the most prevalent in Southeast Africa (African Competition Forum, 2019).
429 Roberts, 2016.
430 Roberts, 2016.
431 ECA, 2019.
432 Roberts, 2016.

Chapter 5 Intellectual property rights and African development

Intellectual property refers broadly to creations of the mind. Notable among such creations are inventions: literary and artistic works, designs, symbols, and names and images used in commerce.[433] Intellectual property is categorized into copyright and related rights, industrial property,[434] and sui generis forms of protection that are customized for certain creations.[435]

This chapter discusses intellectual property and development within the context of investment and competition, and it considers how intellectual property rights (IPRs) can enhance or hinder competition and investment. Intellectual property has been considered in several previous Assessing Regional Integration in Africa (ARIA) reports, and this chapter builds on those reports, specifically the relationship between innovation and intellectual property global regulatory regimes[436] and innovation[437] and the Continental Africa Free Trade Area (AfCFTA) IP Protocol.[438]

The demand for efficient institutions that improve the workings of markets and that support countries in achieving development goals will increase with the establishment of the AfCFTA.

The demand for efficient institutions that improve the workings of markets and that support countries in achieving development goals will increase with the establishment of the AfCFTA. The legal and institutional frameworks governing competition and investment will contribute to market efficiency and other gains by establishing fairness, equity and non-discrimination principles. Similarly, institutions governing IP rights, will contribute through public interest mechanisms such as patent flexibilities and copyright limitations and exceptions.

A flexible patent system can incentivize entrepreneurs and firms to invest in research and development (R&D) to produce more inventions, while the disclosure of these inventions in patent applications enables others to access and use the information and thus contribute further to scientific and technological progress.[439]

The legal protection afforded by IPRs, and the possibility of generating income from their economic exploitation will act as incentives for innovation and the production of goods and services by both existing and new firms. Consumers will benefit from an expanding range of goods and services, and the origin and distinguishing function of trademarks and geographical indications will eliminate or reduce consumer confusion. These mechanisms can prevent or deter such anti-competitive behaviours as unlawful copying and taking undue advantages based on competitor reputation or quality.

Across Africa, concerns are mounting about which IPR rules or provisions, including protection and enforcement, AfCFTA states should pursue to balance the interests of IPR holders and other stakeholders. These rules and provisions need to be in keeping with national development plans, the Sustainable Development Goals (SDGs) and the socioeconomic and developmental needs outlined in the African Union's Agenda 2063. Notable goals relate to R&D; technology transfer; access to food and essential medicines at affordable prices, and the development of competitive markets, local industries and value-added exports. Technologies under consideration include 4IR technologies—specifically how they may be used to enhance development.[440]

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There are two major views on IPR policy among scholars and practitioners. The minority view favours tighter IPR rules or provisions and sees protection and enforcement as the appropriate course of action. The majority view favours protection and enforcement standards in keeping with the minimum standards set out in international agreements, primarily the World Trade Organization (WTO)-administered Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). TRIPS lays down a set of substantive laws on IPR protection and enforcement measures that are binding on WTO member countries. TRIPS also has some attributes that developing countries can use to advance their agendas, such as flexibility. Broadly, flexibility refers to setting general principles in international treaties so that member countries can take into account national policy goals, interests and constraints when they craft national laws. Flexibility allows countries to use rules that are different from those in an international treaty. This makes it easy for them to implement a treaty yet still advance their own development agendas. Flexibility also allows members to not use certain principles for which the required means of implementation are absent. Some African countries have used this flexibility to access affordable essential medicines in response to public health emergencies such as the HIV/AIDs and COVID–19 pandemics. A nuanced use of the IP system can aid development.[441]

TRIPs minimum standards are non-binding on observer and non-WTO member countries.[442] But these countries are bound by other international agreements to which they are party, some of whose provisions have been incorporated into the TRIPS agreement through its article 2. TRIPS provides for enforcement of the WTO dispute settlement mechanism. And it allows member countries to negotiate on emerging and pressing matters at the TRIPS Council, which may be used by developing countries to advance their interests. An example is when, in October and November 2020, the TRIPS Council deliberated on the requested extension of the transition period for least-developed countries (LDC) and on a proposal for a waiver so these countries could meet COVID–19 health priorities.[443]

The development of IP legislation in African regional arrangements

IP policy and regulatory frameworks across Africa are fragmented and guided by three different models:

- Cooperation and experience sharing, such as in the initiatives led by the African Union (AU) and regional economic communities.
- Regional filing systems, such as the anglophone African Regional Intellectual Property Organization (ARIPO).
- Unification of IP law, as in the francophone Organisation Africaine de la Propriété Intellectuelle (OAPI), which aims at developing common, uniform regional IP legislation.[444]

At the multilateral level, the TRIPS Agreement, to which 43 African countries are party, is the main international trade-related instrument on IPRs. At the regional level, various initiatives exist with uneven levels of implementation.

The AU has adopted three significant IP initiatives:

- The 2000 Model Law that serves as a basis for developing national legislation and is an alternative to the revised Convention on the Protection of New Varieties of Plant of the International Union for the Protection of New Varieties of Plants.[445]
- The AU Continental Strategy for Geographical Indications, adopted in 2017 with the objective of supporting sustainable rural development and food security.
- The AU statute for the creation of a Pan-African Intellectual Property Organization (PAIPO) responsible for the promotion of IP systems as tools for economic development. No country has ratified the PAIPO statute.

The regional economic communities (RECs) have adopted the following IP instruments:

- The Common Market for Eastern and Southern Africa's (COMESA) 2011 policy on IPRs and cultural industries, which provides for a common set of definitions and principles to address the relationship between IPRs and trade and development, among other aspects.
- The East African Community's (EAC) 2018 regional policy on the utilization of public health-related TRIPS flexibilities. It has also prepared a draft IP policy that has not yet been adopted.
- Economic Community of West African States' (ECOWAS) 2012 TRIPS Policy and Guidelines.

- The Southern African Development Community's (SADC) 2017 Protocol for the Protection of New Varieties of Plants (Plant Breeders' Rights), which has been adopted but has yet to enter into force. SADC has also started work on an IP framework and guidelines.

ARIPO and OAPI are regional IP organizations. ARIPO, which has 20 Member States (mostly English-speaking countries), is establishing a regional copyright registration system and is assisting members in creating collective management offices.[446] ARIPO operates a two-tiered system where national offices apply national laws, but applicants can apply for regional protection of IPRs. The OAPI has 17 Member States, mostly French-speaking countries.[447] Its Bangui Agreement is a unified IP law covering the acquisition, maintenance and enforcement of IPRs.

Since preparatory work for the AfCFTA negotiations started, IPRs have been considered a key element for boosting intra-African trade. For this reason, IPRs have been given a prominent role under Agenda 2063, with the aim of building Africa's human and social capital through a skills revolution underpinned by science, technology and innovation (Aspiration 1 of Agenda 2063). This call resonates with the ambition of "accelerating progress towards continental unity and integration for sustained growth, trade, exchanges of goods, services, free movement of people and capital" (Aspiration 2 of Agenda 2063). When AfCFTA negotiations were launched, IPRs were included as one of the AfCFTA pillars in accordance with the recommendations of the High-Level African Trade Committee (HATC). The original timeline was to have an IPR protocol negotiated and submitted for adoption to the AU Assembly by February 2020 and appended to the AfCFTA Agreement. But due to COVID-related disruptions, the IPR negotiations have been delayed and they are now expected to be finalized by 31 December 2021.

UNECA previously recommended that the AfCFTA IPR protocol establish a regional intellectual property system to prevent fragmentation of the market, in addition to setting up a platform for WTO-compliant regional provisions on IPRs.[448] It also suggested setting norms to sufficiently or adequately protect African interests under international instruments in areas such as traditional knowledge, genetic resources and traditional cultural expressions. It recommended that the protocol not be a comprehensive statement of continental intellectual property norms because countries already have national laws and have entered international commitments. It also recommended the protocol build on the existing framework, while emphasizing matters of significance to AfCFTA states.

UNECA previously recommended that the AfCFTA IPR protocol establish a regional intellectual property system to prevent fragmentation of the market, in addition to setting up a platform for WTO-compliant regional provisions on IPRs.

TRIPS minimum and TRIPS plus standards

Two major standards used in this chapter are the minimum standards outlined in the TRIPS Agreement and the higher set of standards referred to as TRIPS plus, found in interregional, preferential and bilateral trade agreements. The United States and European Union have increasingly been proposing TRIPS plus standards to their trading partners, including partners from Africa who generally follow TRIPS minimum standards.

TRIPS minimum standards

Provisions concerning availability, scope and use of IPRs

Control of anti-competitive practices in contractual licences. In their national laws, WTO Member States may specify licensing practices or conditions that constitute an abuse of IPRs and that have an adverse effect on competition. Appropriate measures may be used to control or prevent such practices (article 40).

Provisions concerning the enforcement of intellectual property rights

The TRIPS minimum standards concerning IPR enforcement are:

- General obligations: Enforcement procedures are required to provide preventive remedies and remedies aimed at deterring additional infringements, which should be applied in a way that avoids "the creation of barriers to legitimate trade and to provide for safeguards against their abuse" (article 41.1). They should be fair and equitable, affordable and not unduly complicated or "entail unreasonable time limits or unwarranted delays" (article 41.2). Decisions ought to be written and available to the parties within a reasonable period of time (article 41.3). Final administrative decisions should be subject to review, and judicial decisions should be subject to appeal (article 41.4). WTO Member States are not required to establish separate judicial systems for IPR enforcement, nor does TRIPS place any obligation on them regarding resource allocation for IPR enforcement.

- Civil and administrative procedures and remedies: Overall, the rightsholders eligible to pursue civil procedures, include federations and associations having legal standing as defined by domestic laws (article 42). Additional provisions relate to disputes and injunctions.[449]

- Provisional measures: The most important is the provision on infringements on intellectual property (article 50).[450]

- Border measures: The following are among the most important provisions—adopting procedures enabling rightsholders to lodge an application with competent administrative or judicial authorities for suspension by customs authorities of the release into free circulation of counterfeit trademark or pirated copyright goods (article 51).[451]

- Criminal procedures: Wilful trademark counterfeiting and copyright piracy must be prosecuted, and in cases where criminal activity has reached commercial scale, penalties must include imprisonment and/or monetary fines (article 51).

Policy space afforded by TRIPS flexibility measures

TRIPS provides for flexibilities for various forms of IPRs, including copyrights, trademarks and patents. While some assessments have found that flexibilities are not used as effectively as possible,[452] the following examples illustrate their potential:[453]

> *TRIPS provides for flexibilities for various forms of IPRs, including copyrights, trademarks and patents.*

Transitional periods. WTO Member States were not required to implement the TRIPS agreement at the same pace to allow for countries' differing socioeconomic contexts and capabilities. During transition periods states were not required to fully implement the agreement. All Member States were given a transition period of one year following the TRIPS entry into force (article 65.1), and developing countries were granted an additional four years (article 65.2). During this period developing countries were only bound by article 3 (national treatment principle), article 4 (most-favoured nation principle) and article 5 (procedures provided in multilateral agreements concluded under the auspices of World Intellectual Property Organization (WIPO) relating to the acquisition or maintenance of intellectual property rights). Developing countries were granted a further five years to provide patents for products not previously protected (article 65.4). Least-developed countries (LDCs) were granted a 10-year transition period—up to January 2006—plus additional extensions on request. That 10-year period was extended several times and is currently valid until 2021, and an additional request has been made to the TRIPS Council for a further extension. The Doha Declaration extended the deadline for the introduction of patents for pharmaceutical products, which is now set for January 2033. Several African LDCs have forfeited these flexibilities: providing patent protection for pharmaceutical products is one example.[454]

Compulsory licences and government use of patents. In these licences, a government authorizes itself or a third party to use a patent without the permission of the patent holder. These authorizations help governments overcome bureaucratic issues that slow the use of patents and the authorizations to help governments move faster towards solving a public emergency or crisis. Patent holders are expected to be adequately remunerated.[455] In Africa, a number of countries have legislation allowing for compulsory licences and government use, mainly under emergencies. But having the required legislation does not mean that the licence will officially be issued or that the drug will be manufactured and accessible to the public. The process leading to such outcomes is complex, as are the legal grounds for applying for and issuing the licence. In South Africa, for example, no compulsory licence was issued in five cases brought before the courts between 1992 and 1997,[456] and in some of these cases voluntary licences were issued to settle litigation.[457] A country's production infrastructure and supply system readiness is also important. Where these exists, as in Zimbabwe, manufacturing and supply can take place. [458]

National exhaustion is most limited within a regional integration context, where regional exhaustion has more scope to support regional markets.

In other instances, where readiness is insufficient, other legal mechanisms are needed to get the goods manufactured and supplied by a different country. Such was the case with Rwanda when it imported drugs from Canada.[459]

Exhaustion. Under the principle of exhaustion an IPR holder loses its right to further control the distribution of a protected item after it has lawfully entered the national market (national exhaustion), regional market (regional exhaustion) or global market (international exhaustion).[460] Article 6 of TRIPS provides that the selection of an exhaustion regime is a matter of national law. Exhaustion can act as a policy instrument to limit the scope of IPRs and to address anti-competitive abuses of IPRs, including market segmentation and excessive price differentiation.

National exhaustion is most limited within a regional integration context, where regional exhaustion has more scope to support regional markets. OAPI has adopted regional exhaustion,[461] as has the EU. In the EU single market, regional exhaustion has played an important role in facilitating the free movement of goods and services and reducing the anti-competitive behaviour of many IPR holders. International exhaustion, with the broadest scope, has the potential to ease access to learning and teaching resources. Textbooks are an example: access to new textbooks is limited in many African countries partly because of prohibitive costs. So, international exhaustion rules can make textbooks more affordable in the second-hand market as rightsholders have no right to object to used copies being resold at lower prices. International exhaustion may also facilitate access to other goods and services embodying IPRs that are not easy to afford, particularly in a public health context.[462] In Africa, Egypt, Ghana and Kenya have adopted international exhaustion to accelerate parallel importation. While South Africa has not adopted this principle for all IPRs, its Medicines and Related Substances Control Act of 1965 is premised on international exhaustion and permits the parallel importation of medication.[463]

Bolar exception. This flexibility establishes a balance between two major interests—the interests of the patent holders and those of the producers of generic drugs. The exemption does this by reducing delays in regulatory approval for manufacturing. The exemption allows using a pharmaceutical product for testing and the authorization of approval before the patent expires. The exemption allows commercialization of a generic version of a drug after the expiration of the patent.[464] Brazil, Egypt, India, Kenya, Nigeria and Tunisia have the Bolar exception or regulatory review flexibility in their legislation.[465]

Research exception. The research exception, also called the experimental use exception, allows researchers to investigate the effects of inventions as disclosed in the patents and improve them without this activity being considered a patent infringement. The exception is usually allowable through a statute or through case law.[466] Many countries in Africa provide for this exception: Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Côte d'Ivoire, Equatorial Guinea, Egypt, Gabon, Guinea, Guinea Bissau, Kenya, Mali, Mauritania, Mauritius, Morocco, Namibia, Niger, Senegal, Eswatini, Tanzania, Togo and Tunisia.[467]

TRIPS plus standards

Provisions concerning protection and enforcement of IPRs

TRIPS plus goes beyond TRIPS minimum standards and requires restricting or removing flexibilities. Such provisions are increasingly introduced in interregional, preferential and bilateral trade agreements led by the United States, European Union and Organisation for Economic Co-operation and Development countries and countries from other regions, including Africa. Some TRIPS plus standards are detrimental to development. They may increase the monopoly of the rightsholders and shift IRP enforcement costs to states beyond what is expected by TRIPS. Some examples of TRIPS plus enforcement standards are listed below to facilitate a discussion of their potential costs to governments and threats to many areas of development policy. They are in agreements signed between the United States and the following countries: Australia, Bahrain, Colombia, Chile, Jordan, Morocco, Oman, Peru, Singapore and South Korea. It is worth noting that other agreements in which similar provisions can be anticipated are in negotiations between the United States and South Korea and the United States and the Southern Africa Customs Union. The United States is also currently negotiating a free trade agreement (FTA) with Kenya.[468]

Algeria, Egypt, Libya, Morocco and Tunisia have signed Association Agreements with the European Union. The agreement with Libya is not in force.[469] The agreements require higher standards of IPR protection and read: "suitable and effective protection of intellectual, industrial and commercial property rights, in line with the highest international standards" (article 44.1 EU–Algeria Association Agreement; article 37.1 EU–Egypt Association Agreement; article 39.1 EU–Morocco Association Agreement; article 37.1 EU–Tunisia Association Agreement). This standard is higher than that set by Article 41 of the TRIPS agreement described above. It is also not clear what is meant by "highest international standards."[470] There are other aspects of the agreements that are TRIPS plus, such as the requirement to use dispute settlement procedures outside the WTO (article 39.2 of the EU–Morocco Association Agreement). At the time of writing, the contents or the nature of these standards were not available.

Algeria, Egypt, Libya, Morocco and Tunisia have signed Association Agreements with the European Union. The agreement with Libya is not in force.

The following are examples of TRIPS plus provisions relating to patents, copyright, trademarks and plant varieties in the US–Morocco FTA. This is not a comprehensive list of TRIPS plus provisions but serves to illustrate and highlight the types of clauses the IP protocol ought to avoid, since they have negative impacts on development.[471]

Patents: Grants patents to new uses of known substances, including for "the treatment of humans and animals" (article 15.9(2)).

Copyright: The term of protection of copyrights is the life of author plus 70 years, or 70 years from the first authorized publication, or 70 years from the creation of the work (article 15.5.5(a)). TRIPS plus provisions diminish certain flexibilities provided by TRIPS minimum standards, which enable developing countries to pursue a number of their development goals, such as access to and development of knowledge and learning. In the US–Morocco FTA copyright holders have the right to obstruct parallel importation of copyrighted works, including books and musical CDs lawfully sold in foreign markets.

Trademarks: Provides protection for visual, scent and sound marks (article 15.2(1)).

Plant varieties: Requires Morocco to join the International Union for the Protection of New Varieties of Plants (UPOV) (article 15.1(2-3)), while TRIPS presents this as an option and not a requirement.

The potential costs of TRIPS plus to access essential medicines in Africa

Compulsory licensing may be used by WTO Member States to pursue multiple policy objectives central to their development agendas. These efforts may be hindered if TRIPS plus provisions, which restrict compulsory licensing and parallel importations, are deployed. For instance, provisions that restrict competition among potential and existing generic manufacturers by expanding the monopoly on data exclusivity to five years will fail to balance the interests of the public and IPR owners. The provisions will make it difficult for AfCFTA states to achieve some of the goals of their national development plans, Agenda 2063 and the SDGs.

The expanded monopoly power that TRIPS plus standards afford IPR holders has a high potential to restrict competition in markets. For example, for pharmaceuticals the local producers of generic drugs will find it difficult to produce and supply markets because of the restrictions TRIPS plus imposes on the use of patents. The concentration of non-generic producers will likely increase, as will the chances of having higher deadweight losses caused by suboptimal supply. Consequently, the prices of non-generic drugs will be higher. The chances of getting access to essential drugs at affordable prices will diminish, particularly among the poorest and marginalized communities. Metformin, a drug to treat diabetes, costs 800 per cent more in Jordan than in Egypt (table 5.1). In Jordan, metformin is produced by Jordan Merck and covered by the US–Jordan FTA TRIPS plus provisions. In Egypt, the drug is produced by a local generic manufacturer.

Table 5.1 Egyptian prices and Jordanian prices for the same active pharmaceutical ingredient dosage for the same medical use

COUNTRY	ACTIVE PHARMACEUTICAL INGREDIENT DOSAGE	MEDICAL USE	PRICE PER UNIT IN JORDANIAN DINNERS	JORDAN PRICE IN RELATION TO EGYPT PRICE
Egypt – local generic manufacturer	Metformin (850 mg)	Anti-diabetic	0.002	800%
Jordan - Merck			0.16	
Egypt – local generic manufacturer	Atenolol (100 mg)	Anti-hypertensive	0.3	367%
Jordan -Kleva			0.11	
Egypt – local generic manufacturer	Simvastatin (20 mg)	Anti-hyperlipidemic	0.452	498%
Jordan - Merck			2.25	

Source: ECA elaboration based on Oxfam (2007).

Tightening IPR enforcement provisions will reduce the ability of AfCFTA states to imitate, learn and develop technological capabilities. To some extent, this will subsequently constrain progress in other development areas, such as industrial development and digitalization. In some cases, TRIPS plus provisions will place a burden of IPR enforcement on governments, forcing them to reassign resources, thus distracting them from other development goals.

IPRs and technology transfer

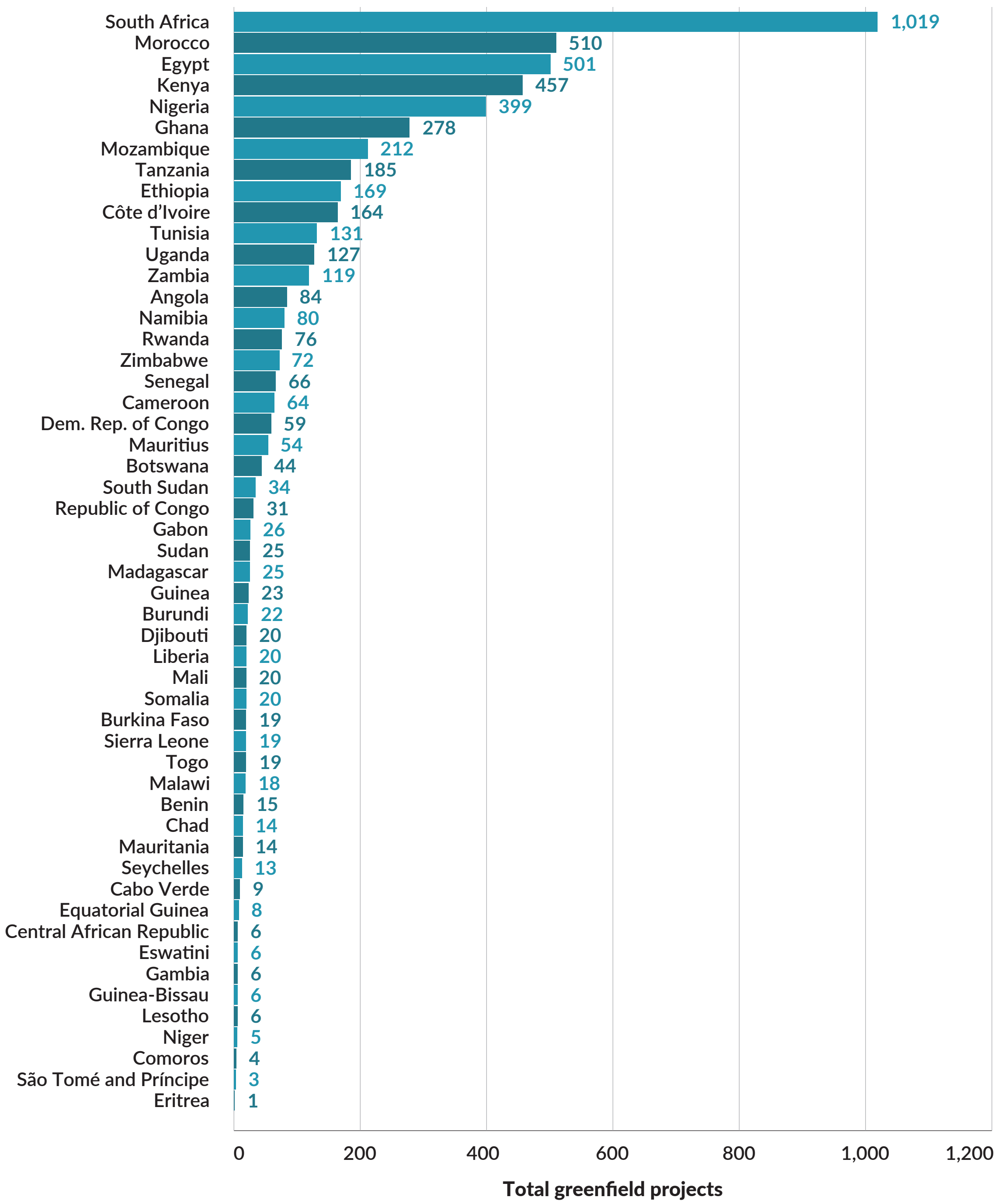
Two main channels of technology transfer are transfer through inward foreign direct investment and IPR licensing.

Greenfield foreign direct investment projects

Greenfield foreign direct investment projects (referred to as fDi) are much more sensitive to IPRs than conventional foreign direct investment (FDI), which mainly covers investments in low-tech sectors where IPRs have little or no relevance. fDi covers manufacturing and technology-related areas or activities, including research and development and design and testing. The main sectors of interest for fDi include transportation, communication, food and tobacco, financial services, business services, renewable energy, industrial equipment, automotive components, and software and IT services. fDi data track wholly owned foreign subsidiary investments, including investments that create jobs.

The numbers of greenfield fDi projects announced in Africa were low (figure 5.1), indicating that the adoption of TRIPS has not yet boosted technology transfer to the levels expected when African governments were first negotiating and signing agreements. Algeria, Côte d'Ivoire, Egypt, Ethiopia, Ghana, Kenya, Morocco, Mozambique, Nigeria, South Africa, Tanzania, Tunisia, Uganda and Zambia and have each announced more than 100 greenfield projects. South Africa, following TRIPS minimum standards concerning IPR protection and enforcement, had the highest number of projects (1,019), almost double the number of Morocco's (510). Morocco has stringent TRIPS plus provisions in its FTAs with the United States. Kenya, following the minimum standards of TRIPS, has 457 announced greenfield projects, like the number in Morocco. This suggests that tightening IPR protection and enforcement to TRIPS plus standards does not necessarily lead to increased fDi. The association between fDi and IPR protection and enforcement should thus be regarded as elusive.

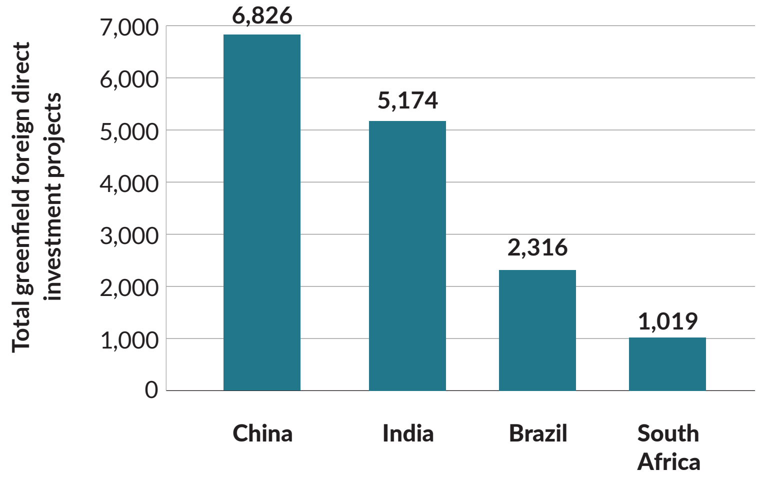
Figure 5.1 Total greenfield projects announced by African countries that have adopted TRIPS plus, 2012–2018



Source: ECA elaboration based on Financial Times data (2020).

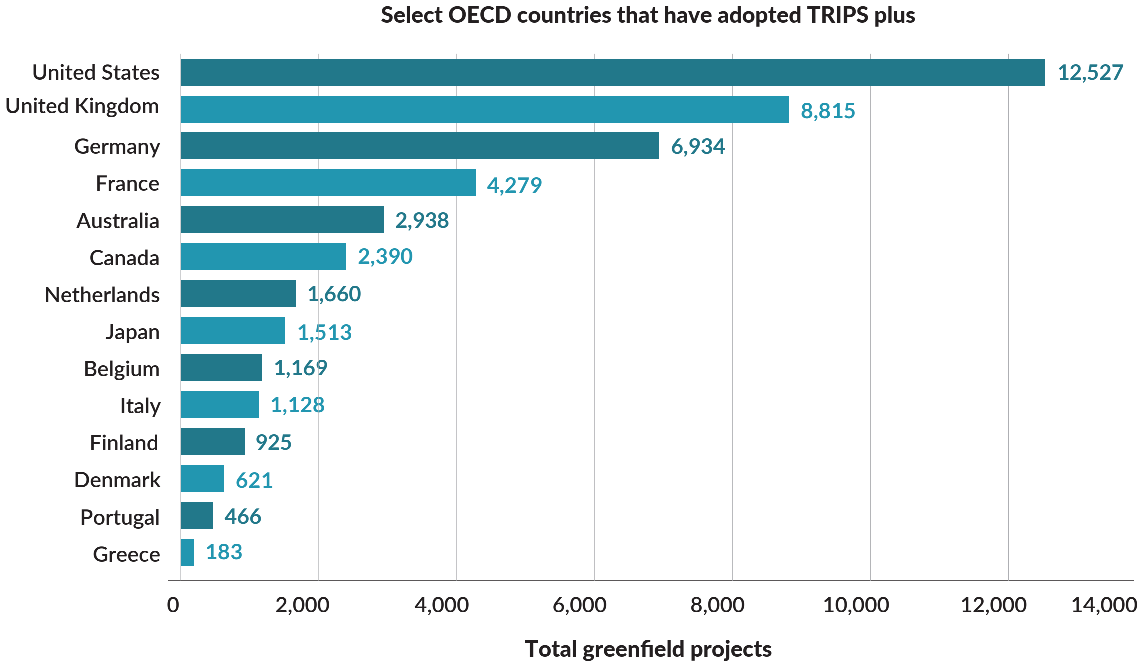
This observation also holds for fDi projects announced in some of the BRICS countries (figure 5.2) —Brazil, India, China and South Africa—that have followed TRIPS minimum standards compared with countries from other regions that have concluded FTAs with the United States under TRIPS plus provisions.

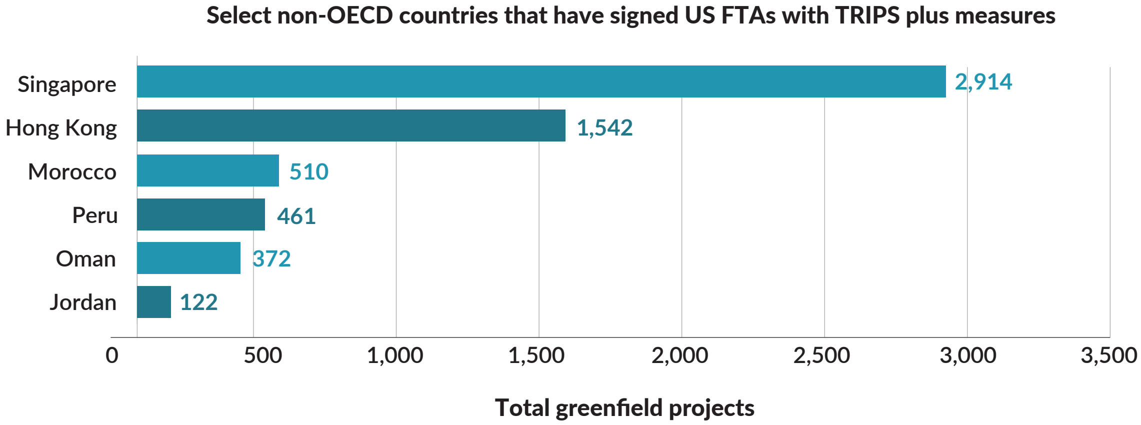
Figure 5.2 Total greenfield foreign direct investment projects announced, by destination, 2012–2018



Source: ECA elaboration based on *Financial Times* data (2020).

Figure 5.3 Greenfield projects announced, by destination, 2012–2018





Source: ECA elaboration based on *Financial Times* data (2020).

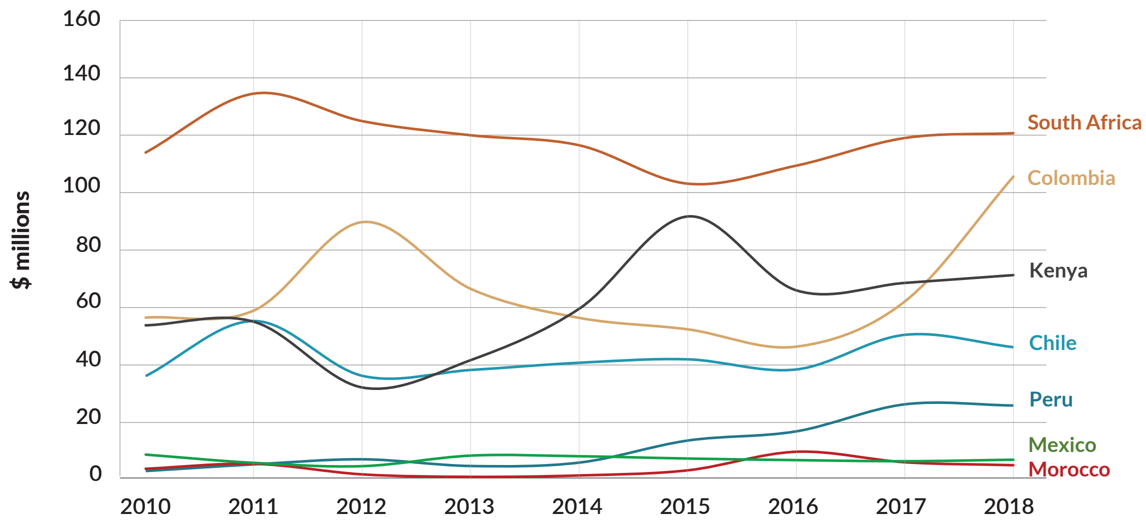
Germany, the United Kingdom, and the United States have higher standards of IPR protection and enforcement (TRIPS plus) and have attracted the highest numbers of greenfield fDi projects (figure 5.3, left panel). But the number of fDi projects announced by China (6,826), which follows TRIPS minimum standards, was close that announced by Germany (6,934) and far higher than numbers observed in France (4,279), Canada (2,390), Japan (1,513) and Belgium (1,169), which all follow TRIPS plus. Similarly, India, which follows TRIPS minimum standards, has more announced fDi projects (5,174) than those observed in many developed countries that have higher standards, including Australia (2,938), Belgium, Canada, Finland, France, Greece and Japan. Brazil (2,316) and South Africa (1,019) followed TRIPS minimum standards and had more fDi projects announced than a number of developed countries with TRIPS plus provisions, such as Denmark, Finland, Greece and Portugal. The numbers for South Africa and Brazil were also higher than those announced in Colombia, Chile, Morocco and Peru (figure 5.3, right panel), which have signed a number of FTAs with the United States covering TRIPS plus provisions. Similarly, the number of fDi projects announced in Egypt (501), Kenya (457) and Nigeria (399) were higher than the number announced in Oman (372) and Jordan (122).

These findings indicate that the relationship between the IPR standards and fDi are elusive. Higher IPR protection and enforcement (TRIPS plus) do not necessarily give rise to higher inward fDi, and TRIPS minimum standards do not necessarily result in lower inward fDi.[472] One reason could be that, in addition to the IPR protection and enforcement available in a location, firms take into consideration many other factors. These include research, infrastructure, human capital and market and business sophistication. Effective use of these factors, along with TRIPS standards and the efficient use of flexibilities, can help developing countries improve inward fDi even to the point of exceeding that achieved by countries observing TRIPS plus. And this can be done without incurring the higher costs of maintaining a TRIPS plus system.

Licensing IPRs

Receipts of charges for the use of intellectual property are the amounts received by residents from non-residents for the authorized use of proprietary rights—patents, trademarks, copyrights, industrial processes and designs, including trade secrets and franchises—and for the use through licensing agreements of produced originals or prototypes—copyrights on books, manuscripts, computer software, cinematographic works, and sound recordings—and related rights such as for live performances and television, cable or satellite broadcasts. The charges received for the licensing of IPRs are low in African countries that have followed TRIPS minimum standards. For instance, the charges received by South Africa from 2010 to 2018 were relatively low, at $118 million a year on average. They were, however, higher than those received by Chile, Colombia, Mexico, Morocco and Peru—non-OECD countries observing TRIPS plus provisions. The charges received by Kenya were also higher than those of Morocco (figure 5.4). This indicates that in the observed countries, TRIPS plus standards did not necessarily increase receipts from IPR licensing.

Figure 5.4 Charges for the use of intellectual property, receipts in African and comparator countries, 2010–2018



Source: ECA elaboration based on World Bank data (2020).

One reason for the limited numbers of IPRs licensed is the limited numbers of IPRs generated. Another potential reason, which still needs further research, may be the poor market for technology and information products in specific sectors or sub-sectors. Allocation of scarce resources to R&D—and other activities that produce technology, information and related products that generally are subject for IPR protection—is stimulated by the presence of large technology and information markets in specific sectors or subsectors. Without such markets, firms find it difficult to justify R&D investment, since the chances of payoffs are limited. Large markets and demand for technology are thus good incentives for firms and enterprises developing or producing technology and information protected by IPRs. Larger markets also increase the opportunity for inter-firm cooperation through which firms acquire or purchase information or technology through licensing and other means. Although this needs additional analysis, efforts aimed at developing markets or demand for technology—such as public investment in digital, biotech and clean tech development, which has long-term snowball effects that result in private investment in R&D—can increase IPR stocks and licensing in African countries.[473]

Research and development financing, patent protection and inventive activity

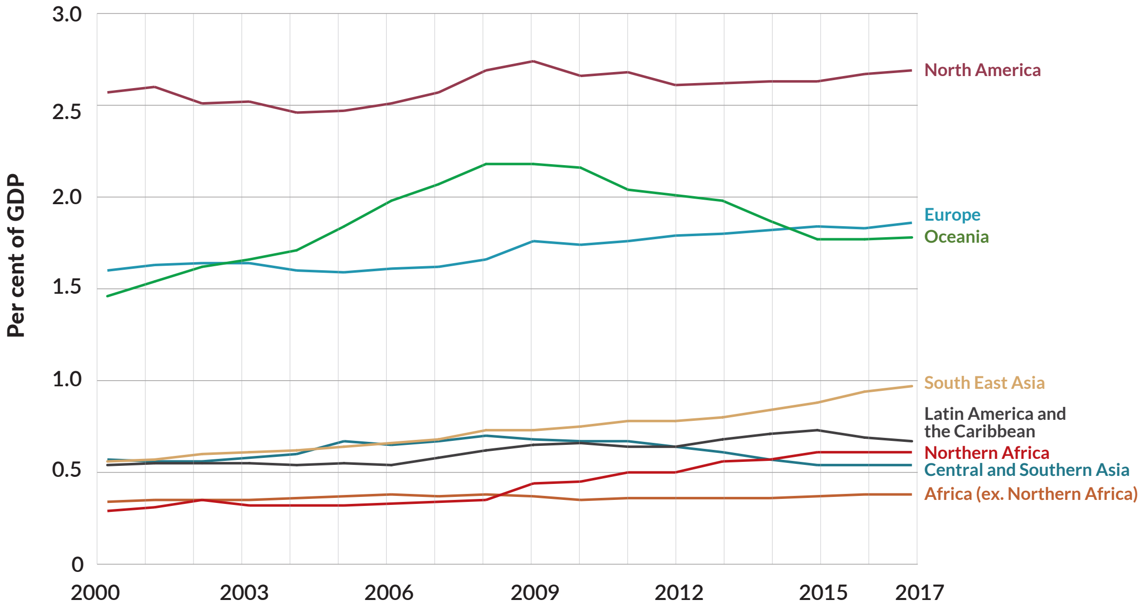
The gross expenditure in R&D (GERD) by the government sector and by business enterprises is a standard indicator of performance of national innovation systems. Among other things, GERD indicates to what extent science, technology and innovation are financed in a country and what capability can be expected.

Public investment in research and development

GERD as a percentage of GDP describes the total expenditure on R&D in a national territory during a specific reference period.[474] Through 2000–2017, the average GERD of Sub-Saharan Africa was about 0.4 per cent of GDP (figure 5.5). In Northern Africa it increased from 0.35 per cent in 2002 to 0.61 per cent in 2017. In Latin America and the Caribbean, GERD was 0.97 per cent of GDP in 2017. In Oceania, Europe and North America, GERD was above 1.5 per cent of GDP from 2008 onwards.

Since 2006, when African Heads of States recommended improving national innovation systems,[475] African GERD has remained below 1 per cent of GDP. At country levels, similar limitations are observed. In 2009, GERD was as follows: 0.14 per cent of GDP in Burundi, 0.08 per cent in Democratic Republic of Congo, 0.43 per cent in Egypt, 0.02 per cent in Ghana, 0.84 per cent in South Africa, 0.71 per cent in Tunisia and 0.35 per cent in Uganda. In 2015, GERD was 0.58 per cent of GDP in Senegal, 0.41 per cent in Democratic Republic of Congo and 0.80 per cent in South Africa. Overall, South Africa and Tunisia have made significant efforts to approach 1 per cent.[476] Given the limited sizes of national budgets, the funds allocated to R&D are thus very limited—a major constraint to technological progress for AfCFTA states.

Figure 5.5 Gross expenditure on research and development, 2000–2016



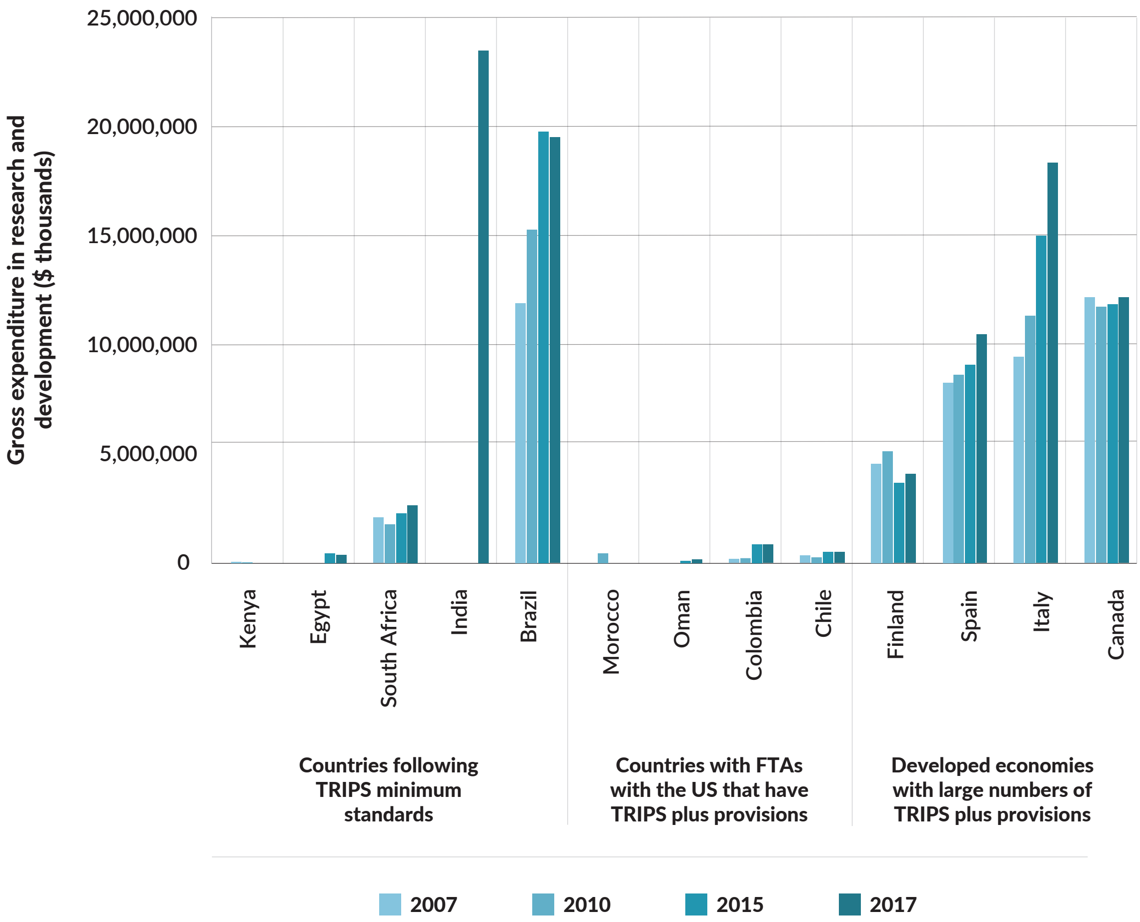
Source: ECA elaboration based on UNESCO data (2019).

Investment in research and development by business enterprises

GERD gauges the extent to which businesses engage in R&D. Examining GERD in three groups of countries over 2007–2017 reveals that the relationship between GERD and IPR protection and enforcement standards is elusive (figure 5.6). Group 1 comprises Brazil, Egypt, India, Kenya and South Africa, countries that have followed the TRIPS minimum standards. Group 2 comprises Chile, Colombia, Mexico, Morocco and Oman, countries that do not have advanced economies but have signed FTAs with the United States that have TRIPS plus provisions. Group 3 comprises Canada, Finland, Italy and Spain, developed economies having large numbers of TRIPS plus provisions. South Africa has followed the TRIPS minimum standards and has higher GERD than Chile, Colombia, Morocco and Oman, which have all followed TRIPS plus. Oman's GERD was not significantly higher than Kenya's, which followed TRIPS minimum standards.

The findings suggest that higher IPR protection and enforcement (TRIPS plus) does not necessary give rise to increased GERD. Minimum IPR protection and enforcement systems (TRIPS) do not necessarily result in lower GERD. A minimum IPR protection and enforcement standard, along with the efficient use of the flexibilities afforded by TRIPS and with improvements in research, infrastructure, human resources and business sophistication can help AfCFTA states improve GERD without incurring the higher costs of maintaining a TRIPS plus system.

Figure 5.6 Higher intellectual property rights protection and enforcement do not necessarily give rise to increased gross expenditure on research and development



Source: ECA elaboration based on UNESCO data (2019).

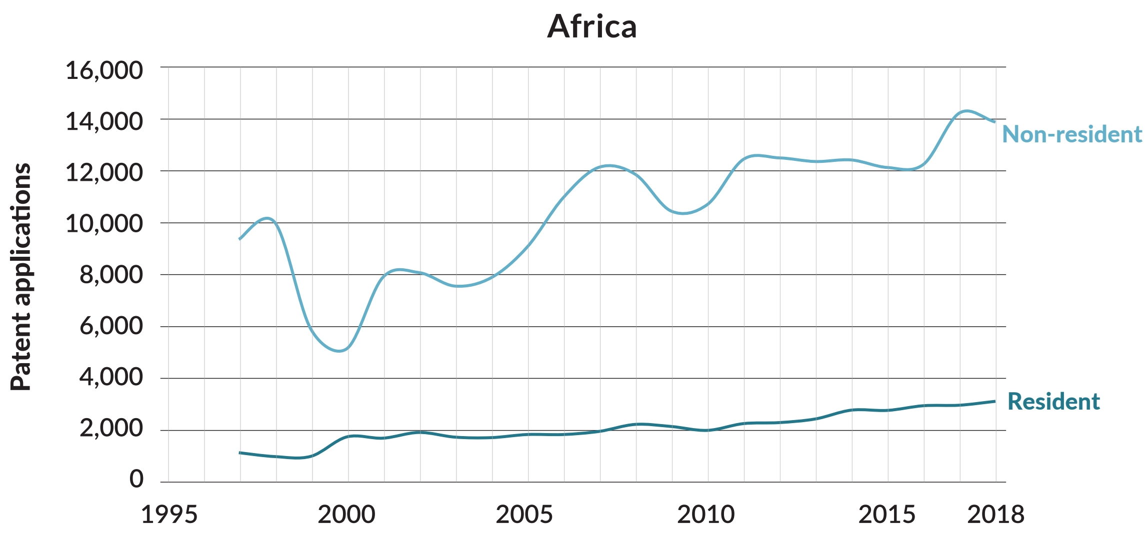
The limitations in GERD by business enterprises in Africa are indicative of business enterprises' limited contributions to technology development across Africa. This constraint can also explain the observed limitations in the numbers of patent applications discussed in the next section.[477]

Trends in patent protection and patenting activities in Africa

Patent applications are a widely used indicator of scientific and technological change, and they can identify how residents and non-residents protect their inventions in Africa after the adoption of TRIPS agreements. In Africa, from 1999 to 2018, patent applications by non-residents and residents increased in number (figure 5.7). Non-residents have much higher numbers of patents protected in Africa than residents do. In 1999, residents had 1,000 patents registered, while non-residents had 5,900. In 2018, residents had only 3,120 patents registered, while non-residents had 13,380. The large numbers of patent applications by non-residents may be because patent owners need to protect the technologies embodied in products exported to the African region. Non-resident firms may also be registering patents in a location in order to block innovation by using defensive patents. The increases, however, indicate that large numbers of patent owners have some trust in the level of protection provided by TRIPS.

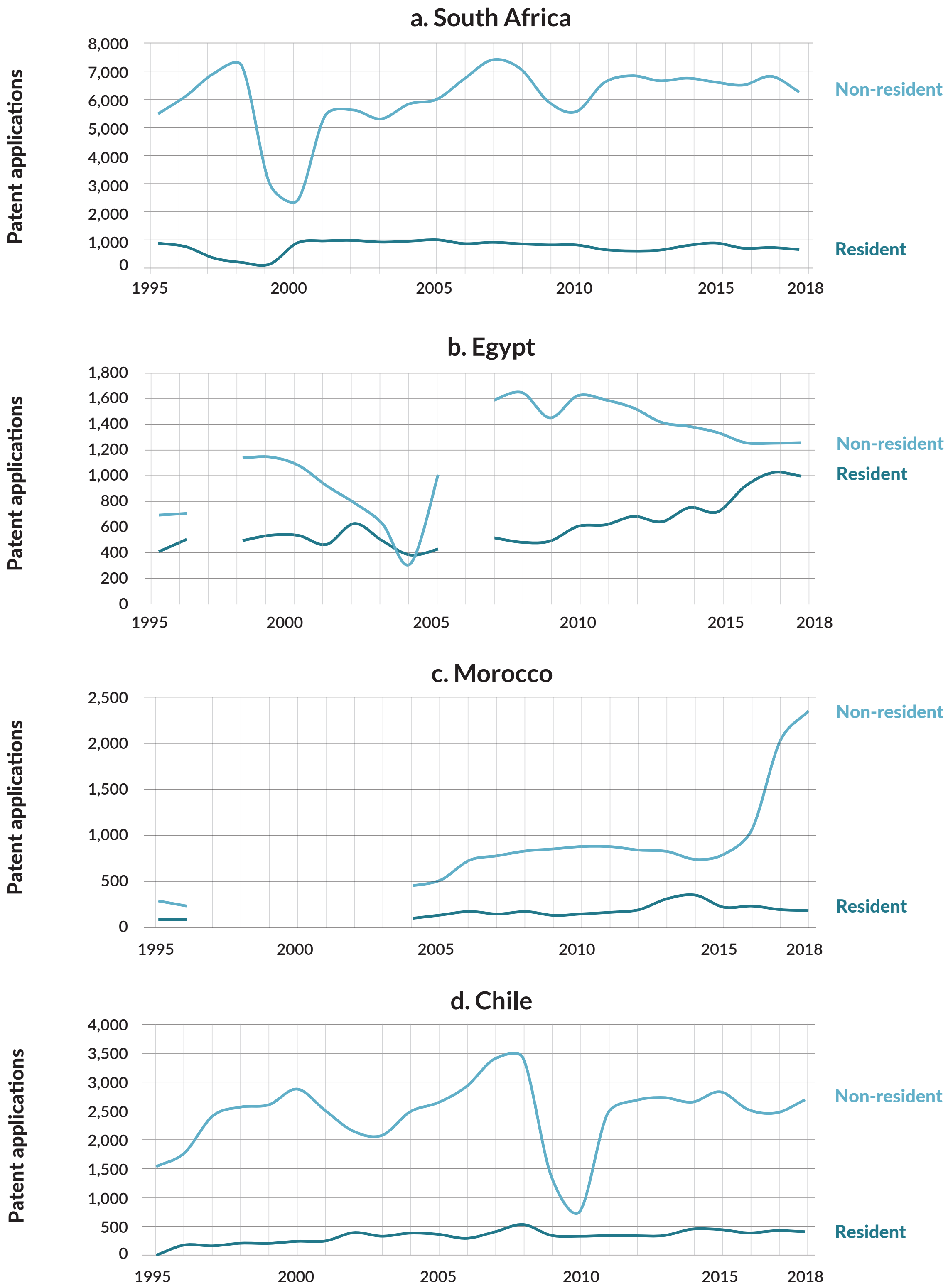
Similar trends in patent applications are also observed at the country level for Egypt, Morocco and South Africa (figure 5.8).

Figure 5.7 Patents application in Africa, 1995–2018



Source: ECA elaboration based on WIPO data (2020).

Figure 5.8 Patent applications by country, 1995–2018

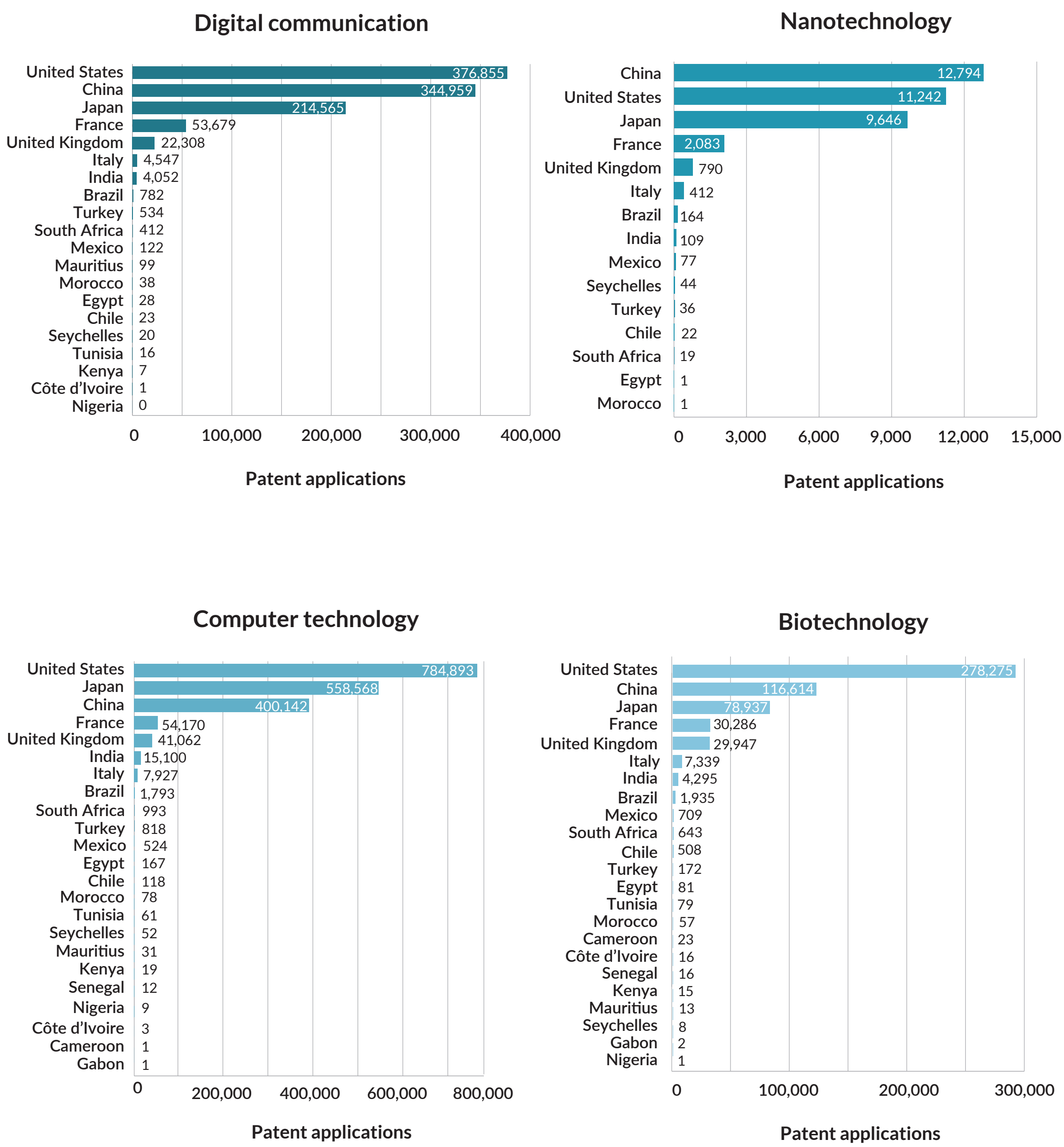


Source: ECA elaboration based on WIPO data (2020).

The high costs of maintaining a TRIPS plus system may be justified in EU countries where residents (taxpayers) have more patents registered than non-residents. For AfCFTA countries, TRIPS plus standards will increase the cost for governments to enforce patents owned largely by non-residents (non-taxpayers) in cases of infringement. This may not be in the best interests of AfCFTA states. TRIPs plus will likely have similar effects in countries, such as Chile (figure 5.8), that have more registered non-residents patents than residents.

Inventions produced by most African countries tend to focus on the mainstream areas of technology, including technology in engines, electrical engines, turbines and pumps, machines and apparatus, basic and organic chemistry, and civil and chemical engineering.[478] Inventions in emerging technology are weak compared with other regions. For example, from 2000 to 2017, the United States had 376,855 patent applications in digital communication, France had 53,679, China had 344,959, and Brazil had 782, while South Africa had 412, Kenya had 7, Côte d'Ivoire had 1 and Nigeria, the largest economy in the African region, had none (figure 5.9, panel a). In computer technology (figure 5.9, panel b), Japan had 558,568 patent applications, France had 54,170, India had 15,100, South Africa had 993, Senegal had 12, Nigeria had 9 and Gabon had 1 over the same period. Similar differences occurred in nanotechnology (figure 5.9, panel c), and biotechnology (figure 5.9, panel d).

Figure 5.9 Total patent applications by sector, 1995–2015



Source: ECA elaboration based on WIPO data (2019).

Policy recommendations

This chapter assessed IPR protection and enforcement standards pursued by AfCFTA states and countries from other regions, distinguishing between the TRIPS minimum and TRIPS plus standards. It has also measured progress on certain aspects of development in countries that have used the different standards, focusing on investment in research and development, technology transfer through inwards investments in greenfield projects (fDi), and invention and protection of patents by non-residents and residents in AfCFTA. The chapter outlined some of the benefits and costs associated with the use of those standards on a number of national development goals, such as access to essential drugs, technological learning, development of competitive markets and anti-competitive behaviour. The findings provide a basis for reflecting on two issues of concern in multilateral, regional and bilateral trade negotiations:

- Will higher standards (TRIPS plus) for IPR protection and enforcement support African countries' development agendas?
- Will TRIPS minimum standards help achieve African countries' development agendas?

This chapter's findings aim to inform future regional and multilateral trade negotiations, as well as FTAs, especially bilateral investment treaties that have IPR chapters that strive to balance various stakeholder interests. Stakeholder interests include those of private owners of IPRs, the public—including consumer groups—and States, whose priorities include the SDGs, regional agendas (such Agenda 2063 and Science, Technology, and Innovation Strategy 2024) and national development goals.

The findings are that TRIPS plus legislation alone does not necessarily give rise to technology transfer, investment in R&D, increased inventive capacity or activities, level of patent protection or expansion of patent protection by monopolists. And TRIPS minimum standards do not necessarily cause a decrease in these. Countries that have followed the minimum standards—such as Brazil, India and South Africa—have outperformed countries that have adopted TRIPS plus standards— Chile, Morocco and Peru. Kenya and Nigeria followed TRIPS minimum standards and outperformed Morocco, which adopted TRIPS plus standards in its FTA with the United States. The numbers of patents held across the AfCFTA by non-residents were overwhelmingly higher than those held by African residents. An important reason for this observation, which holds in a number of other regions, may be non-residents' strategies to protect their exports and expand their global monopoly power. The findings suggest that the interactions between IPRs standards and outcomes are complex. The factors that cause technological progress and drive investment decisions by firms are numerous and cannot be reduced to a single parameter, namely IPRs.

It is possible for AfCFTA states to achieve high levels of technology transfer, investment in R&D and inventive capacity as an important component of technological capacity by using TRIPS minimum standards, adjusted by flexibilities. Flexibilities that can be leveraged in the AfCFTA include:

- ***Transitional periods.*** This flexibility takes into account LDC and developing country limitations concerning their readiness to implement TRIPS in a manner that works for their development needs. AfCFTA states can use this policy to build up capabilities in technological niches—as India did to advance its capabilities in pharmaceutical production—and support other needs, such as learning and imitation in national innovation systems.

- ***Bolar exception.*** This can balance the interests of patent holders and the interests of producers or manufacturers of generic drugs by accelerating the regulatory approval process for drug manufacturing. The exception enables the use of a patent-protected pharmaceutical product for testing and regulatory approval before the patent expires. This is done to facilitate commercialization of a generic version of a drug soon after the expiration of the patent. In AfCFTA this exemption can be used to implement regional strategies, such as the New Partnership for African Development strategy on pharmaceutical manufacturing.

- ***Research/experimental use exception.*** This allows researchers to investigate the effects of inventions disclosed in patents. Improving patented inventions plays an important role in advancing science and technology.

- ***Compulsory licensing and government use.*** This flexibility helps states move faster in a public emergency or crisis, since the licences can facilitate the procurement and supply of essential generic drugs.

- ***Exhaustion.*** Exhaustion can help AfCFTA states facilitate broader distribution of essential goods or services across markets. States have the right to adopt a national, regional or international exhaustion regime. Regional and international exhaustion regimes would best support health policies in AfCFTA such as pooled procurement and other supply policies aiming to respond to emerging diseases such as COVID–19, Ebola and SARS.

A comparison of the costs and benefits of TRIPS minimum and TRIPS plus standards revealed the following:

- TRIPS minimum standards are coupled with flexibilities that allow states to nuance their IP systems and thus enhance their development agendas. In several cases, this was not done effectively, hence the recommendation to use flexibilities in the AfCFTA. TRIPS plus standards disproportionately expand the global monopoly power of rights holders —who are concentrated in advanced economies— while constraining the interests of the public in such rights. The distortionary market effects of these restrictions will be severe for developing countries, especially for AfCFTA states that do not have sufficient resources to build innovation systems, develop the local industries or generate viable technological bases.

TRIPS minimum standards are coupled with flexibilities that allow states to nuance their IP systems and thus enhance their development agendas.

- TRIPS provides policy space to WIPO Members to use IPRs to advance national development goals. TRIPS plus standards impose restrictions on such flexibilities. The standards expand the monopoly power of IPR holders and increase the risks of price differentiation and market segmentation on the free movement of goods and services within AfCFTA. For pharmaceuticals this can constrain access to and distribution of essential drugs for treating communicable and non-communicable diseases. This limits the ability of many AfCFTA states to fulfil their constitutional commitments to protect health and nutrition and to provide access to essential drugs at affordable prices, particularly during public health emergencies.

- TRIPS minimum civil and administrative measures aimed at deterring and preventing infringements allow IPR holders to enjoy their rights to a reasonable extent. Measures, such as injunction relief, must be carried out in a proportional manner. Criminal penalties are only projected in cases where infringements have expanded to a commercial scale. The costs of IPR enforcement must be incurred by the private rightsholders and not by the government. TRIPS plus standards ratchet up the provisions on IPR enforcement. Border measures are strengthened and criminalization goes up, even covering such minor cases as circumventing technologies. The additional provisions reduce the space for technological learning, imitation and growth in developing countries.

- TRIPS plus standards will be difficult to implement and are unrealistic policy options for developing countries. The fixed costs for administering and coordinating a stringent national enforcement system may be wasteful in countries where there is a lack of resources and managerial and technical capabilities to attain even the minimum standards required of TRIPS. These are complex interdependencies between institutions and patterns of industrial development, technological learning and economic growth. The United States during the industrial revolution, Japan through the 1970s and many European countries have faced similar challenges protecting and enforcing IPRs. It is generally when market sophistication has gained momentum, and when local dynamic capabilities have accrued, that higher levels of enforcement standards become realistic and useful to large populations of IP users.[479] TRIPS minimum standards will be the more reasonable, realistic and useful route for the AfCFTA, given the limitations of judiciary and administrative systems to enforce IPRs.

For AfCFTA States to advance their socioeconomic goals and for there to be a balance of interests between IPR holders and the public, TRIPS minimum standards adjusted with flexibility measures are the most appropriate option. But this will not automatically lead to intended outcomes. To maximize opportunities offered by such policies, AfCFTA states should make progress on the following:

- ***Improve IP and other policy environments to boost small and medium-sized enterprises, innovation and industrial development.*** AfCFTA is an important opportunity to make progress in:

  - Using the AU’s Science, Technology and Innovation Strategy 2024 more effectively to raise GERD to at least 1 per cent of GDP, as African Heads of States have recommended.

- Improving IP law enforcement and aligning enforcement with TRIPS so that countries can absorb and learn from fDi and international R&D, thus boosting creativity, innovation and competition.
- Streamlining the costs of IP protection to encourage youth and female entrepreneurs, who generally lack the resources needed to develop inventions and bring their innovations to the marketplace.

- ***Increase public and private investment in the production of inventions and innovations to socially or publicly desirable levels.*** This will reduce the scarcity of inventions and innovations and thus restrict opportunities for counterfeiters to produce substandard, lower-cost substitutes. The increased public and private investment should be coupled with improved enforcement in cases that are threats to public safety or security, such as the counterfeiting of branded medicines. Such cases will require strong interagency coordination and collaboration, including regulatory authority, police services, customs officers and so on. It will be necessary to mobilize additional resources from developed countries, as recommended by TRIPS (Article 69), to supplement national efforts and strengthen the capacity of judiciary and administrative systems to improve IPR enforcement standards.

- ***Build country capacity to use the flexibility measures of the TRIPS agreement.*** It is essential to:
  - Develop the required resources, capabilities and infrastructure to implement compulsory licences and government use to protect health and nutrition, and regional or international exhaustion to accelerate parallel importation.
  - Provide technical assistance to countries that lack the capacity to manufacture generic substitutes for patented medicines under locally granted compulsory licensing to import such medicines.

- ***Accelerate country progress on sustainable and inclusive growth plans.*** This should focus on improving wages, expanding employment away from informal economies, resolving corruption and bribery and ending precarious jobs, which all augment the market and demand for counterfeit and pirated goods.[480]

- ***Integrate the development of IPR enforcement systems in the existing reforms of public institutions.*** Particularly, include in such reforms developing the capacity of relevant officials in the judiciary and administrative systems, including judges, customs officers and police officers, to implement more effectively civil and administrative procedures and remedies. Remedies must be used in keeping with proportionality measures, especially in cases in which infringement has serious impacts on societies and economies.

- ***Increase public awareness campaigns about the role of IPRs to economic development and mobilize a much stronger political will to build efficient IPR enforcement systems.*** These efforts should take into consideration TRIPS flexibilities. The systems must support the development of competitive markets, reduce abuses by the IP rightsholders, avert deceits of consumers and the public, allow innovation in downstream markets, and promote the production of and access to information, knowledge and goods to socially desirable levels.

References

Abbot F. M., T. Cottier and F. Gurry. 2015. *International Intellectual Property in an Integrated World Economy.* New York: Wolters Kluwer.

Adusei, P. 2012. *Patenting of Pharmaceuticals and Development in Sub-Saharan Africa: Laws, Institutions, Practices, and Politics*. Springer.

Arrow, K. 1962. "Economic Welfare and the Allocation of Resources for Invention." In *The Rate and Direction of Inventive Activity: Economic and Social Factors*, 609–626. Universities-National Bureau Committee for Economic Research, Committee on Economic Growth of the Social Science Research Council. Available at http://www.nber.org/chapters/c2144.

AUC (African Union Commission). 2006. "Executive Council Decisions EX.CL/Dec.236 - 277 (VIII)." Addis Ababa: AUC. https://au.int/sites/default/files/decisions/9639-ex_cl_dec_236_-_277_viii_e.pdf.

Baker, B. 2019. A Full Description of WTO TRIPS Flexibilities Available to ARIPO Member States and a Critique of ARIPO's Comparative Study Analyzing and Making Recommendations Concerning Those Flexibilities. https://www.bu.edu/gdp/files/2020/05/ARIPO-Member-States-obligations-and-flexibilities-under-the-WTO-TRIPS-Agreement-March-2019.pdf.

Baker, D., A. Jayadev and J. Stiglitz. 2017. *Innovation, Intellectual Property, and Development: A Better Set of Approaches for the 21st Century*. AccessIBSA.

Correa, C. 2015. "Plant Variety Protection in Developing in Developing Countries: A Tool for Designing a Sui Generis Plant Variety Protection System: An Alternative to UPOV 1991." Association for Plant Breeding for the Benefit of Society.

De Beer J., J. Baarbé and C. B. Ncube. 2018. "Evolution of Africa's Intellectual Property Treaty Ratification Landscape." *The African Journal of Information and Communication* 22: 53–82. https://doi.org/10.23962/10539/26173.

Deere, C. 2009. *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries*. Oxford, UK: Oxford University Press.

ECA (United Nations Economic Commission for Africa). 2014. *African Science, Technology and Innovation Review 2013*. Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa). 2016. *Assessing Regional Integration in Africa VII (ARIA VII): Innovation, Competitiveness and Regional Integration*. Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa). 2017. *Assessing Regional Integration in Africa VIII (ARIA VIII): Bringing the Continental Free Trade Area About*. Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa). 2019a. *Assessing Regional Integration in Africa IX (ARIA IX): Next Steps for African Continental Free Trade Area*. Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa). 2019b. "Financing Digital and Clean Technology Firms alongside Sustainable Infrastructure in Africa." Policy Brief, ECA, Addis Ababa.

El-Said, M. K. 2007. "The European Trips-Plus Model and The Arab World: From Co-Operation to Association—A New Era in the Global IPRS Regime?" *Liverpool Law Review* 28: 143.

European Commission. n.d. "Euro-Mediterranean Partnership." Brussels. https://ec.europa.eu/trade/policy/countries-and-regions/regions/euro-mediterranean-partnership/.

Gathii, J. T. 2016. "Strength in Intellectual Property Protection and Foreign Direct Investment Flows in Least Developed Countries" *Georgia Journal of International and Comparative Law* 44: 499.

Jamea, E. M., and A. Finco. 2008. "Overview and Empirical Analysis of the Free Trade Agreement between the United States and Morocco." *New Medit* 7 (2): 41–49.

Lubango, L. M. 2015. "When Can Strong Patent Regime Boost Counties Stock of Inventions? An Analytical Model Tested in Brazil, Egypt, Nigeria and South Africa in the Energy, Pharmaceuticals, Environment and Related Sectors." *Technology in Society* 42: 150–159.

Marwala, T. 2019. "Preparing Africa for the Fourth Industrial Revolution." *WIPO Magazine*, November. https://www.wipo.int/wipo_magazine/en/2019/si/article_0006.html.

Marwala, T. 2020. *Closing the Gap: The Fourth Industrial Revolution in Africa*. Johannesburg, South Africa: Pan Macmillan SA.

Merges, P. R. 1994. "Of Property Rules, Coase, and Intellectual Property." *Columbia Law Review* 94: 2655–2673.

Musungu, S. 2007. Access to ART and Other Essential Medicines in Sub-Saharan Africa: Intellectual Property and Relevant Legislations. https://www.opensocietyfoundations.org/publications/access-art-and-other-essential-medicines-sub-saharan-africa.

Ncube, C. B. 2013. "Harnessing Intellectual Property for Development: Some Thoughts on an Appropriate Theoretical Framework." *Potchefstroom Electronic Law Journal* 16 (4): 370–396.

NEPAD (African Union New Partnership for African Development). 2010. *African Innovation Outlook 2010*. Pretoria, South Africa: AU–NEPAD.

OECD (Organisation for Economic Co-operation and Development). 2015. *Frascati Manual: Guidelines for Collecting and Reporting Data on Research and Experimental Development*. Paris: OECD Publishing.

Oxfam. 2007. "All Costs, No Benefits: How TRIPS Plus Intellectual Property Rules in the US–Jordan FTA Affect Access to Medicines." Briefing Paper, Oxfam, Oxford, UK. https://policy-practice.oxfam.org.uk/publications/all-costs-no-benefits-how-trips-plus-intellectual-property-rules-in-the-us-jord-114080.

Teece, D. J. 1976. *The Multinational Corporation and the Resource Cost of International Technology Transfer*. Cambridge, MA: Ballinger.

Teece, D. J. 1980. "Economics of Scope and the Scope of an Enterprise." *Journal of Economic Behavior and Organization* 1: 223–247.

UNESCO (United Nations Educational, Scientific and Cultural Organization). 2015. *UNESCO Science Report, Towards 2030*. Paris: UNESCO.

UPOV (International Union for the Protection of New Varieties of Plants). 1991. "International Convention for the Protection of New Varieties of Plants." Publication 221(E), UPOV, Geneva. https://www.upov.int/edocs/pubdocs/en/upov_pub_221.pdf.

USTR (Office of the United States Trade Representative). 2020. "US–Kenya Summary of Specific Negotiating Objectives, May 2020." https://www.tralac.org/documents/resources/external-relations/us-agoa/3626-united-states-kenya-negotiations-summary-of-specific-negotiating-objectives-may-2020-ustr/file.html.

Vadwa, Y. A. 2018. "Compulsory Licensing Jurisprudence in South Africa: Do We Have Our Priorities Right?" Research Paper 90, South Centre, Geneva. https://www.southcentre.int/wp-content/uploads/2018/12/RP90_Compulsory-Licensing-Jurisprudence-in-South-Africa-Do-We-Have-Our-Priorities-Right_EN-1.pdf.

Vadwa, Y. A., and B. Shozi. 2020. "Eighteen Years after Doha: An Analysis of the Use of Public Health TRIPS Flexibilities in Africa." Research Paper 103, South Centre, Geneva. https://www.southcentre.int/wp-content/uploads/2020/02/RP103_Eighteen-Years-After-Doha-An-Analysis-of-the-Use-of-Public-HealthTRIPS-Flexibilities-in-Africa_EN.pdf.

WIPO (World Intellectual Property Organization). n.d. "What is Intellectual Property?" https://www.wipo.int/about-ip/en/. Accessed 12 March 2021.

WIPO (World Intellectual Property Organization). 2010. "Patent Related Flexibilities in the Multilateral Legal Framework and Their Legislative Implementation at the National and Regional Levels (CDIP/5/4 Rev.)." Committee on Development and Intellectual Property, Fifth Session, Geneva, 26–30 April.

WIPO (World Intellectual Property Organization). 2018. "Reference Document on Research Exception." Standing Committee on the Law of Patents, Twenty-Ninth Session, Geneva, 3–6 December. https://www.wipo.int/edocs/mdocs/scp/en/scp_29/scp_29_3.pdf.

World Bank. 2020. "Charges for the Use of Intellectual Property, Receipts." https://data.worldbank.org/indicator/BX.GSR.ROYL.CD?end=2018&locations=KE-ZA-MA-PE-MX-CL-CO&start=2010. Accessed 11 March 2020.

WTO (World Trade Organization). n.d. "Compulsory Licensing of Pharmaceuticals and TRIPS." https://www.wto.org/english/tratop_e/trips_e/public_health_faq_e.htm. Accessed 5 February 2021.

WTO (World Trade Organization). 1994. "TRIPS Agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights)." Geneva: WTO. https://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

WTO (World Trade Organization). 2020. "Council for TRIPS." Geneva: WTO. https://www.wto.org/english/tratop_e/TRIPs_e/intel6_e.htm.

End notes

433 WIPO, n.d.
434 Industrial property includes patents, trademarks, industrial designs, geographical indications, layout designs of integrated circuits, protection of undisclosed information and control of anti-competitive practices in contractual licences.
435 Sui generis forms of protection that are customized for certain creations are appropriate for traditional knowledge and traditional cultural expressions. This is demonstrated by the AU's Model Law the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (2000), and the African Regional Intellectual Property Organization's (ARIPO) Swakopmund protocol on the Protection of Traditional Knowledge and Expressions of Folklore (2010).
436 ECA, 2016.
437 ECA, 2017.
438 ECA, 2019a.
439 Arrow, 1962; Merges, 1994.
440 Marwala, 2019, 2020.
441 Baker, Jayadev and Stiglitz, 2017; Ncube, 2013; Gathii, 2016.
442 This chapter does not detail African states' membership in international IP agreements since this has been done elsewhere: ECA, 2016, pp. 61–81; de Beer, Baarbé and Ncube, 2018.
443 WTO, 2020.
444 ECA, 2019a.
445 UPOV, 1991; see also Correa (2015) for discussions on how UPOV may reduce policy space and ignore the nature of seed supply in small-scale agriculture in developing countries.
446 Member States: Botswana, Eswatini, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mauritius, Mozambique, Namibia, Rwanda, São Tomé and Príncipe, Sierra Leone, Somalia, Sudan, Tanzania, Uganda, Zambia and Zimbabwe. Observer States: Angola, Burundi, Egypt, Ethiopia, Eritrea, Mauritius, Nigeria, Seychelles and South Africa.
447 Member States: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Mauritania, Niger, Senegal and Togo.
448 ECA, 2019a.
449 Sufficient claims and evidence submitted by the concerned party in administrative and judicial proceedings subject to the protection of undisclosed information (article 43.1) must substantiate disputes. Injunctions must be applicable (Article 44), damages must be resolved fairly (article 45), and infringing goods must be seized, and further delivery of related services must be prevented (article 46).
450 Prompt and effective provisional measures must be used to prevent infringement and particularly entry of infringing goods in market channels (article 50.8).
451 Notice of suspension of the release of goods (article 51) to importer and applicants (article 54). Indemnification of the importer and of the owner of the goods (article 56). Remedies (article 59). Prima facie evidence of impending infringement is required (article 52), and reasonable security measures must be provided to protect the interests of the defendants (article 53).
452 Adusei 2012; Baker, 2019; Vadwa and Shozi, 2020.
453 The chapter does not present a holistic statement and evaluation of African states' use of flexibilities.
454 Adusei 2012; Deere 2009.
455 WTO, 2020.
456 Compulsory licenses had not yet been granted at the time the CIP website was accessed. Sarachem (Pty) Ltd v British Technology Group PLC 1992 BP276 (CC); Africa (Pty) Ltd and Another v Carlton Paper of SA (Pty) Ltd 1992 BP 331 (CC); Circuit Breaker Industries Ltd v Backer and Nelson (Pty) Ltd 1993 BP 431 (CC); Syntheta (Pty) Ltd v Janssen Pharmaceutica NV and Another 1998 BIP 264 (AD); Atomic Energy Corporation of South Africa Ltd v The Du Pont Merck Pharmaceutical Company 1997 BIP 90 (CC). The first three cases were prior to TRIPS.
457 Vawda, 2018.
458 It has been noted that the Minister of Justice, Legal and Parliamentary Affairs has, in terms of section 34 as read with section 35 of the Patents Act [Chapter 26:03] made the following notice: 1. This notice may be cited as the Declaration of Period of Emergency (HIV/AIDS) Notice, 2002. 2. In view of the rapid spread of HIV/AIDS among the population of Zimbabwe, the Minister hereby declares an emergency for a period of six months, with effect from the date of promulgation of this notice, for the purpose of enabling the State or a person authorized by the Minister under section 34 of the Act (a) to make or use any patented drug, including any antiretroviral drug, used in the treatment of persons suffering from HIV/AIDS or HIV/AIDS related conditions; (b) to import any generic drug used in the treatment of persons suffering from HIV/AIDS or HIV/AIDS-related conditions.
459 The government of Rwanda informed the WTO that it intends to import 260,000 packs of TriAvir (antiretroviral) over two years. The drug is to be made in Canada by Apotex, Inc. Canada made a favourable notification. This eased the way for countries with public health problems to import cheaper generics made under compulsory licensing elsewhere when they are unable to manufacture the medicines themselves.
460 Abbot, Cottier and Gurry, 2015.
461 Musungu 2007.
462 WTO, n.d.
463 Medicines and Related Substances Control Act 1965, s15C.
464 Abbot, Cottier and Gurry, 2015.
465 WIPO, 2010.
466 WIPO, 2018.
467 WIPO, 2010.
468 USTR, 2020.
469 European Commission, n.d.
470 El-Said, 2007, p. 160.
471 Jamea and Finco, 2008.
472 Gathii, 2016; Ncube, 2013.
473 ECA, 2019b.
474 Total domestic expenditure on R&D during a given year divided by the GDP (that is, the sum of gross value added by all resident producers in the economy, including distributive trades and transport, plus any product taxes and minus any subsidies not included in the value of the products) and multiplied by 100 (OECD, 2015).
475 AUC, 2006.
476 United Nations Educational, Scientific and Cultural Organization (UNESCO) data for 2019.
477 NEPAD, 2010; UNESCO, 2015; ECA, 2014.
478 ECA, 2019b.
479 Teece, 1976, 1980; Lubango, 2015.
480 Communication with the Executive Secretary of ECA (2019).

Chapter 6 The nexus between the digital economy and investment

In today's fast-paced global business environment, cross-border investment decisions are perhaps the quintessence of the digital economy. Without digital payment platforms and e-banking, the flow of international capital across borders would be inconceivable in today's business world.

Beyond the well-established financial transactions of formal banking and stock exchange platforms, there are many digital innovations taking centre stage. These include financial technology (fintech), virtual money and blockchain technologies. Digitalization in today's era offers endless opportunities to generate investment instruments and services, enabling investors to pair themselves with opportunities at the click of a mouse. For example, there is an array of mutual funds and crowdfunding platforms that aggregate investors from multiple jurisdictions and allow them to channel resources to specific business sectors in new and profitable ways. Digitalization is not only a means to an end, but it is the technological backbone driving the growth of private equity as an alternative form of investment financing in Africa, making private equity one of the strongest performing sectors.[481]

A word of caution is needed. Digitally-driven investment vehicles and models require both evolved regulatory supervision within national borders and cross-border cooperation. In Nigeria in 2016, the popular Mavrodial Mundi Moneybox digital platform (also known as MMM) collapsed, leaving individual investors with significant losses when financial regulators were unable to intervene or provide compensation. Regulators had their hands tied because the platform was not registered as a financial institution or product in Nigeria (see chapter 2).

Just as investment regulation in the digital space needs careful attention, so does regulation on investment-related issues, such as taxation. When firms operate in the digital economy and collect payments for their goods and services, the remittance of value-added tax (VAT) or payment of corporate income tax may only be captured by the source country if the recipient country (that is, the jurisdictions where transactions take place) does not have adequate regulations covering these transactions.[482]

When it comes to e-commerce, digital trade takes place on trading platforms that are outside Africa—Alibaba, eBay, Amazon—and payments through these platforms also take place through systems that are mostly not on the continent—Visa, Mastercard, PayPal. This leaves African countries with few opportunities for reaping the direct benefits of such trade, and it takes away opportunities for raising revenue through taxing these activities. Down the line, the continent may miss out on opportunities for domestic resource mobilization. Hence the need for regulating the development of digital platforms within the continent.

The main challenge of taxation in the digital economy is that existing international rules are not fit for purpose for digital transactions. The permanent establishment rule (PE), for example, allocates a country's taxing rights to businesses that have sufficient physical presence in its jurisdiction.[483] But in an increasingly digital world, consumers are able to purchase goods and services online, and sellers can cater to buyers from anywhere in the world, while maintaining minimal or no physical presence in the user's jurisdiction. Tax authorities struggle to properly tax foreign-domiciled companies, even in cases where significant economic value is created locally. Facebook, for instance, has 200 million users in Africa but only one physical office on the continent—in Johannesburg.[484] Online transactions can also lead to the undercollection of VAT in two ways: through VAT exemption on low-value parcel imports and due to the complexity of enforcing VAT on services and intangibles (such as digital downloads) purchased by private consumers.[485] These taxation issues can create an unlevel playing field for domestic and foreign firms.

An important counter current to the above is that several locally-focused e-commerce platforms have emerged, such as Jumia and Konga (Nigeria), Takealot and Bidorbuy (South Africa) and Kilimall (Kenya). These platforms bring together African consumers and entrepreneurs. Some also sell goods from outside the continent (or from the continent to the rest of the world), such as Mall for Africa and Aftownmall. There are also some African payment platforms making headway—such as the well-established M-Pesa (Kenya and eastern Africa) and Wari (Senegal and western and central Africa), among others—as well as initiatives by regional bodies and international organizations, indicating that the continent is making progress in increasing presence and bridging the digital divide.

Although such platforms and initiatives can help integrate African economies through networked industries, value chains and institutions, virtually linked economies can also create and amplify concerns around the interplay between investment, competition and intellectual property in the presence of market failures. The benefits of digitalized economies will be maximised where there is coherence of regulations and where supervisory structures balance investment protection, fair competition and enough protection to foster market innovation and also enable compliance with the existing rules and regulations. Such a set-up will level the playing field for investors in terms of their obligations, as well as their ability to access markets, irrespective of the investors' origin, and allow for sustainable and transformative investment in Africa.

The main challenge of taxation in the digital economy is that existing international rules are not fit to purpose for digital transactions.

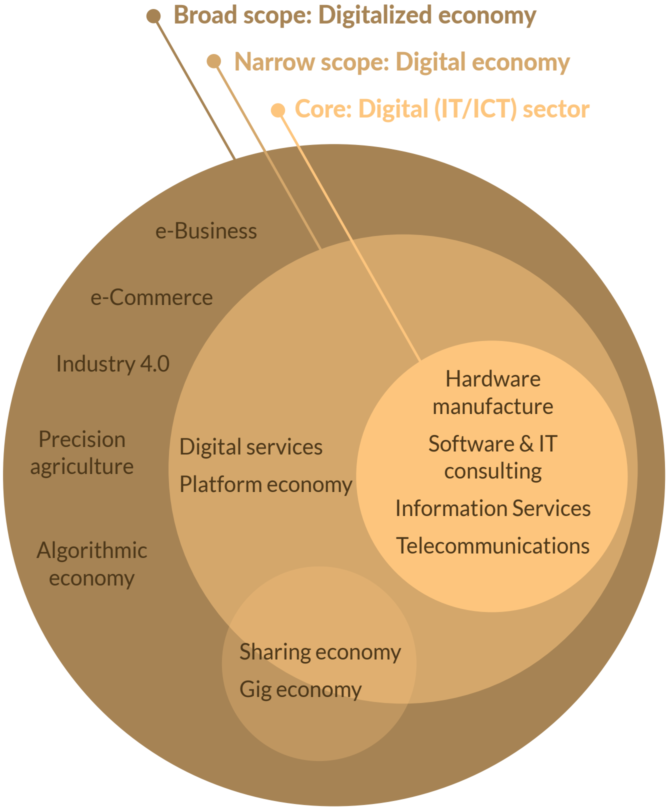
This chapter defines and characterizes the digital economy in Africa, taking account of the players, sectors, components and value of the economy on the continent. It looks at the various initiatives, policies and regulations being developed to support the digital economy—and e-commerce in particular—at the continental, regional and national level and how these efforts could affect investment decisions. The focus is on recent efforts to develop e-commerce in the context of the African Continental Free Trade Area (AfCFTA) and the African Union (AU) Digital Transformation Strategy initiative.

Defining the digital economy

Surprisingly, given its increasing significance, there is no commonly agreed definition of the digital economy, even though there have been multiple initiatives to define the term since it was first coined in the mid-1990s.[486] This chapter adopts the proposal by Bukht and Heeks, who define the digital economy as "that part of economic output derived solely or primarily from digital technologies with a business model based on digital goods and services."[487] Building on this definition, the United Nations Conference on Trade and Development (UNCTAD)[488] identities three main components of the digital economy and suggests a three-scope approach to defining the term (figure 6.1):

- Core digital economy—fundamental innovations (semiconductors, processors), core technologies (computers, electronic devices) and enabling infrastructures (the internet and telecoms networks).
- Narrow scope digital economy—digital and information technology (IT) sectors are comprised of those firms—such as digital platforms, mobile applications and payment services—that produce products or services that rely on core digital technologies and infrastructures.
- Broad scope digital economy—a wider set of traditional sectors where digital products and services are being increasingly used and where new activities or business models have emerged as a result of digital technologies. Examples include retail, commerce, finance, media, tourism and transportation.

Figure 6.1 The three scopes of the digital economy



Source: Bukht and Heeks, 2017.

The core and narrow scopes are the digital economy but, because digital technologies are transforming all sectors, the broad scope can be more accurately called the "digitalized economy." Most efforts to measure the digital economy—some of which are discussed below—cover the core and narrow scopes only.

The digital economy in Africa

Context

For billions of people around the world, many aspects of life are becoming increasingly digital. Africa is no exception. Nigerians can now buy electronic products on the e-commerce website Jumia and watch movies on the streaming app iROKOtv. Many Kenyan adults use mobile money provider M-Pesa to transfer money, pay bills, save and borrow. Breadfast—a food delivery service—brings freshly baked bread and other breakfast items straight to the doorsteps of Egyptian consumers every morning. Office workers in Addis Ababa commute to and from their workplaces using the ride-hailing app Ride. In Zambia, ZEduPad tablets give primary school students access to pre-loaded literacy and numeracy lessons in eight local languages, as well as English. Rwandans can easily and reliably access crucial government services online. They can also settle utility bills, pay in supermarkets and send and receive money through bank and mobile money applications. Across the continent, hundreds of millions of people regularly use social media platforms, such as Facebook and WhatsApp, to stay connected with family and friends.

Consumers are not the only ones to benefit from this digital revolution. African entrepreneurs are using technology to build innovative products and services to serve the specific needs of local and external markets. In 2019, the continent was home to 618 active tech hubs, with major clusters in Egypt, Kenya, Nigeria and South Africa. This was a 40 per cent rise from just a year earlier.[489] Innovations in the tech sector also have spillover effects on traditional industries, where small and medium-sized enterprises (SMEs) and big corporations alike use technology to improve productivity and solve long-standing problems. Governments are similarly leveraging digital technology to improve public administration and to enable citizens to access services online.

This digital transformation is possible because of two key technological developments. First, for the past several decades the internet has been reshaping economies and business models. And more recently, the Fourth Industrial Revolution (4IR)—characterized by rapid advances in robotics, big data, the blockchain, cloud computing, 3D printing, artificial intelligence and the internet of things—is further blurring the boundaries between the digital and physical worlds.

The internet and 4IR provide the digital foundation and technical innovations that drive the digital economy, a phenomenon that poses unique opportunities and risks.

The internet and 4IR provide the digital foundation and technical innovations that drive the digital economy, a phenomenon that poses unique opportunities and risks. Countries, businesses and consumers that can master these developments have the potential to position themselves for success in the 21st century, while those who cannot do so risk lagging behind. Success depends not only on hard infrastructure (electricity grids, telecommunication networks, and access to smartphones and the internet), but also on human capital and soft infrastructure (skills and financing) and enabling regulations and institutions. Unfortunately, there are wide gaps in the abilities among and within countries to take advantage of the digital economy.

Information and communication technology and other supporting infrastructure in Africa—electricity, mobile phones, the internet and digital payments

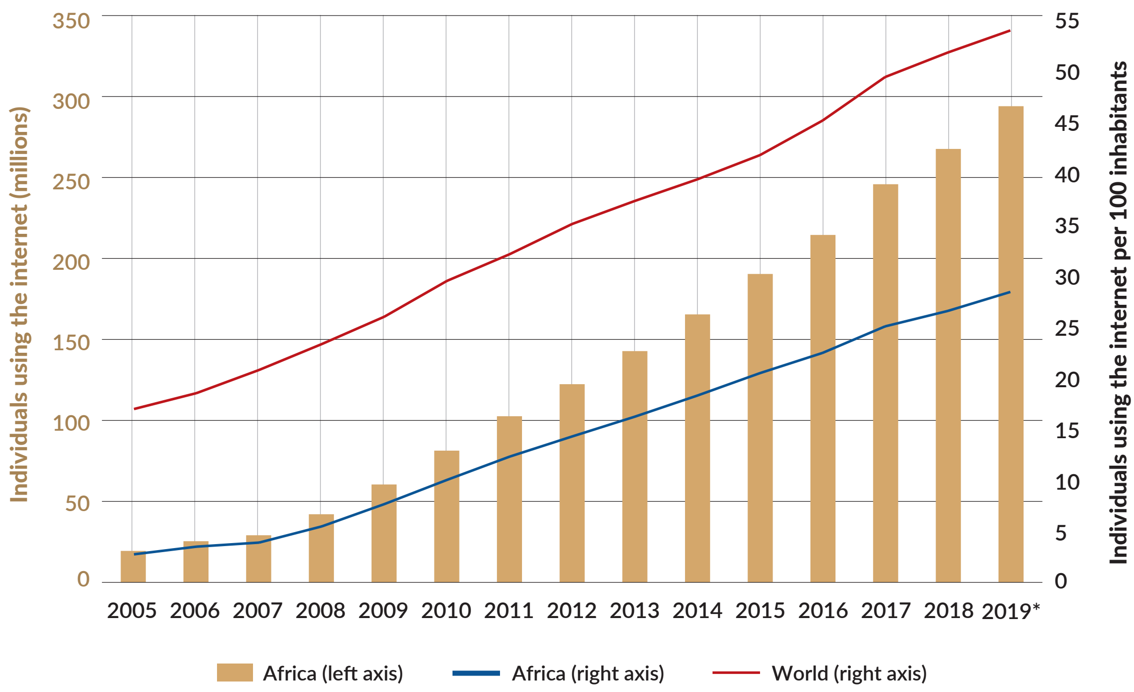
The digital economy's backbone is built on information and communications technology (ICT) infrastructure. At the most basic level, all ICT infrastructure is powered by electricity. Yet electrifying Africa remains a challenge. In 2016, only 43 per cent of the population in Africa[490] had access to electricity, the lowest rate of any region and much lower than the overall global rate of 87 per cent. Household access rates are lower than 50 per cent in two of three countries in the region, and more than 600 million Africans are not connected to grids.[491] Near-universal access is achieved in only Mauritius and Seychelles. For those who are connected, paying for electricity can be burdensome. As a benchmark, the price of powering a refrigerator for a year is much higher in Africa than in the rest of the world. This cost is equivalent to 49 per cent of GDP per capita in Liberia, 23 per cent in Gambia and 21 per cent in Sierra Leone, as opposed to almost zero in developed countries such as Australia, France, Japan, United Kingdom and United States.[492]

Mobile phones are the dominant method of accessing communications and information on the continent. In 2018, there were 456 million unique mobile phone subscribers in Africa.[493,494] This represents a 45 per cent mobile phone penetration rate, 23 percentage points lower than the global average.[495] Thirty-nine per cent of mobile subscribers owned smartphones, and 239 million had access to the internet on their phones.[496] Personal computer ownership is minimal. Only 15 per cent of South Africans between the ages of 15 and 65 have a desktop or laptop. PC ownership rates are 8 per cent in Nigeria, 6 per cent in Lesotho and 2 per cent in Uganda.[497]

Mobile phones are the dominant method of accessing communications and information on the continent.

Africa has made great strides in connecting its citizens to the internet. In absolute numbers, internet users on the continent have risen 14-fold, from fewer than 20 million in 2005 to just under 300 million in 2019 (figure 6.2).[498] This has been possible due to developments in both first- and last-mile connectivity. Major infrastructure projects, such as the Central Africa Backbone and the Trans-Sahara Optical Fibre Backbone, have linked various African countries—including those that are landlocked—to high-speed fibre optic networks. Nearer to consumers, the smartphone and mobile broadband revolution has been instrumental in connecting users on the continent to the world wide web. The vast majority of Africans with access to the internet do so through mobile rather than fixed broadband. In 2019, there were 354 million active mobile-broadband subscriptions in Africa but just 5 million active fixed-broadband subscriptions.[499] Privatization and liberalization have transformed the telecommunications sector in many African countries and are partly responsible for the rise in mobile-broadband use. In the mobile operator space, markets that were once dominated by state-owned monopolies now have multiple players offering a level of competition and consumer choice.[500]

Figure 6.2 Individuals using the internet, 2005–2019



* Estimates.
Source: ITU.

Significant challenges remain, however, in bringing the rest of the continent online. Despite recent progress, in 2019 individuals with internet access make up less than 30 per cent of Africa's population, compared with the global average of 53.6 per cent (see figure 6.2). In addition to further infrastructure investment, two major stumbling blocks for higher internet use and penetration—affordability and reliability—must be addressed. In 2019, one gigabyte of data costs more than 7 per cent of the average monthly salary. In Democratic Republic of Congo it takes as much as 26 per cent of monthly income to pay for one gigabyte of data. Of the 50 countries in which data are most expensive, 31 are in Africa.[501,502] Further, African countries are among the most likely to cut off access to the internet. These blackouts vary in length and scope and, rather than blanket shutdowns, they are increasingly being used to block access to selective social media websites.[503] When the internet is available, speed is usually slow. No African nations are listed among the 50 countries with the highest mobile and fixed broadband download speeds. Morocco (53) and South Africa (54) are the best-performing African countries. Large economies such as Nigeria (113), Egypt (108), Kenya (97) and Ethiopia (71) do less well. Seven[504] of the bottom 20 countries in download speeds are in Africa.[505]

Mobile money is one area where Africa is a pioneer. The continent[506] boasted almost half the total global mobile money accounts, with 396 million registered users in 2018. They are served by 1.4 million agents. In countries such as Kenya and Zimbabwe, more than 60 per cent of all adults have mobile money accounts.[507] The value of mobile money transactions in Kenya was projected to exceed the country's GDP in mid-2018.[508]

Quantifying the digital economy in Africa

There have been various attempts to quantify aspects of the digital economy. Numerous international and regional organizations, academic institutions and researchers have adopted different methodologies to calculate the value of the digital economy. This makes it difficult to compare results from different studies, let alone arrive at standardized measures that are universally accepted. Lately, however, international efforts to coordinate measurements have been led by the International Telecommunication Union (ITU), the International Labour Organization (ILO) and UNCTAD.[509] With these cautions in mind, the following section reports estimates of the size of Africa's digital economy across multiple dimensions.

Contribution to GDP

The most obvious measure of the digital economy is its contribution to GDP. At the global level, estimates of the value added by the digital economy to GDP range from 4.5 per cent (narrow scope) to 15.5 per cent (broad scope).[510]

In an analysis of the 14 economies that accounted for 90 per cent of Africa's GDP, the McKinsey Global Institute found that the internet contributed 1.1 per cent to overall GDP in 2012.[511] In comparison, the internet's contribution to GDP was 1.9 per cent in emerging countries and 3.7 per cent in developed economies. In the 14 African countries studied, the internet's contribution to GDP varied widely. It was 3.3 per cent in top performer Senegal, a level comparable to that of developed countries, but only 0.5 per cent in Angola. In dollar terms, the value of the internet economy in 2012 was $17.7 billion for the 14 countries and ranged from $18 to $18.5 billion for the continent. But there is a massive upside potential for the internet's contribution to GDP. If it matches the impact that mobile telephony has had on Africa's economy, the internet could contribute $300 billion to Africa's GDP by 2025.[512]

GSMA offers a different estimate of the contribution of the mobile sector.[513] It found that in 2018 the mobile ecosystem[514] directly contributed $39 billion, or 2.4 per cent of GDP, to Africa's economy.[515] It argues, however, that mobile technologies also enable significant productivity gains in the broader economy. If indirect contributions and productivity gains are included—estimates that are inherently imprecise—mobile contributions to the economy rose to $144 billion or 8.6 per cent of GDP.

Digital trade

The Organisation for Economic Co-operation and Development (OECD) defines digital trade or e-commerce as "the sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders."[516] E-commerce orders are placed and received over the internet, but deliveries and payments do not necessarily happen online. Orders placed by phone, fax or e-mail are not considered e-commerce transactions. With the rising adoption of social media networks such as Facebook and Instagram, merchants and consumers are increasingly promoting, buying and selling products on these platforms. This specific category of trade is generally classified as social commerce. Digital trade can be between a business and a consumer (B2C), a business and another business (B2B), a business and a government (B2G) or between two consumers (C2C). In this chapter the terms digital trade, digital commerce, electronic commerce and e-commerce are used interchangeably.

The latest estimates from UNCTAD show that global e-commerce reached $25.6 trillion in 2018, of which $21 trillion was B2B and $4.4 trillion was B2C sales. This represented 30 per cent of world GDP. One in four of the world's population older than 15–approximately 1.45 billion people—made online purchases in 2018.[517,518]

In Africa the uptake of e-commerce starts from a low base. Both new and established businesses in Africa are taking advantage of the internet and digital technologies to sell goods and services directly to a large population that is going online for the first time. In 2017, there were only 21 million online shoppers on the continent. B2C e-commerce was worth $5.7 billion or 0.5 per cent of GDP, much lower than the global average of 4 per cent.[519] This was because of the weak digital infrastructure that undergirds e-commerce transactions. UNCTAD's B2C E-commerce Index is an annual ranking of countries' preparedness for online shopping. It is calculated as the average of four indicators: financial institution account ownership rate (banks or mobile money), percentage of the population using the internet, Postal Reliability Index (by the Universal Postal Union) and the number of secure internet servers per one million people.[520] According to the 2019 edition of the Index, Africa scored the lowest among all the world's regions.[521] The best-performing African country, Mauritius, ranked only 58, and 9 of the bottom 10 countries were in Africa.[522, 523]

Both the value of e-commerce and the number of online shoppers are growing fast, however. Statista estimates that in 2021 African consumers will spend $24.8 billion online on major product segments including fashion, electronics, furniture and appliances, toys, food and personal care. It forecasts B2C e-commerce revenue will rise at a compound annual growth rate of 13.3 per cent between 2021 and 2025, reaching $40.8 billion by 2025.[524] The McKinsey Global Institute projects an even higher number: in Africa's largest 14 economies, e-commerce could account for 10 per cent of total retail sales by 2025, generating $75 billion in online sales every year.[525]

Employment

The digital economy has the potential to boost employment. Globally it already makes up approximately 3 per cent of the total workforce.[526] But there are fears that automation enabled by the internet can also reduce jobs. Acemoglu and Restrepo suggest a conceptual framework for analysing these effects.[527] They argue that automation—and technological changes more generally—makes it possible for capital to replace labour in certain production tasks (displacement effect). At the same time, because automation raises productivity in the overall economy, it augments the demand for labour in non-automated tasks (productivity effect).

Additionally, technological advances typically create new tasks in which labour enjoys a comparative advantage relative to capital (reinstatement effect). Thus, the overall impact of automation on labour demand depends on the magnitude of the displacement effect, on the one hand, and the productivity and reinstatement effects, on the other. If the former exceeds the latter, job losses ensure. Otherwise automation leads to a net positive gain in employment.

Empirical studies suggest that employment gains generated by technology could more than offset any losses. A McKinsey Global Institute study found that globally the internet creates 3.1 new jobs for every job that it eliminates.[528] The ratio is higher in aspiring (McKinsey's terminology) economies (3.2 jobs) than developed countries (1.6 jobs). This is because the internet enables significant productivity gains for all sectors of the economy. In a survey of SMEs, the institute found that companies that use web technologies grow twice as fast as those that do not.[529] And internet-enabled businesses bring in more than twice as much in export revenues as a percentage of total sales and create twice as many jobs as their offline peers.[530]

For Africa in particular, a World Bank report argued that the trade-off between job losses caused by automation and employment gains from innovation is less pronounced than in the rest of the world due to two factors. First, digital tools can raise the productivity of low-skilled workers in all sectors and, second, manufacturing—the sector most susceptible to automation—remains small on the continent. As a result, Africa has the potential to create jobs across all skills in all sectors by further adopting digital technologies.[531]

PwC estimated that digitalization created more than 600,000 jobs in Africa in 2011.[532] GSMA estimated that the mobile ecosystem employed 3.5 million people in Africa in 2018.[533] Of these, 500,000 were formally employed by mobile operators and other mobile sector employers, 1.2 million were informally employed and another 1.8 million jobs were supported by the mobile ecosystem in other sectors of the economy.[534] A Boston Consulting Group report indicated that online marketplaces—defined as "digital platforms that essentially match independent third-party providers of goods and services with consumers"—could create 3 million new jobs by 2025 with little downside risks for incumbent businesses and workforce norms.[535] The report projected online marketplaces will directly employ 100,000 people in software development, operations and marketing. There will also be indirect employment opportunities for 1 million people in jobs, such as drivers, merchants, logistics personnel, housekeepers and so on. Another 1.8 million jobs will be "induced" by additional economic activities generated by online marketplaces.[536]

The mobile sector and online marketplaces are subsets of the overall digital economy.

The mobile sector and online marketplaces are subsets of the overall digital economy. In the broader economy, opportunities for employees with digital skills are likely to be much bigger. A modelling exercise by the International Finance Cooperation (IFC) found that there will be 230 million "digital jobs"—defined as jobs requiring digital skills in agriculture, industry and services in both the formal and informal sectors—in Africa by 2030.[537]

The authors cautioned, however, that the continent's education systems currently face resource shortages, do not adequately equip students with foundational skills and are grappling with a mismatch between the skills taught in schools and those demanded by employers. Unless there are fundamental shifts in education systems, especially to equip people with the digital skills necessary for the future of work, Africa risks failing to capture the opportunities presented by digitalization.

Experience in China shows that e-commerce platforms allow women to start businesses from home selling products online.

Not only can the digital economy contribute positively to employment in Africa, but it has the potential to help underserved groups such as women and youth. Experience in China shows that e-commerce platforms allow women to start businesses from home selling products online. In China this has resulted in one in two online enterprises being women-owned, a higher ratio than their offline counterparts.[538] And according to the African Development Bank, for young Africans age 15 to 35 who are not students, only one in six is wage employed.[539] The continent's youth are well positioned to benefit from employment opportunities offered by new business models such as e-commerce and the gig economy. But if left unregulated, these new employment norms may pose a different set of challenges, including low pay, unsatisfactory working conditions and uncertainty. It is thus essential that labour laws and regulations be updated to keep pace with the new reality to ensure employees are adequately protected from potential exploitation.

Fourth Industrial Revolution sectors

Africa is fast becoming a hotbed for innovations, with a small but growing number of companies using cutting-edge technologies to solve difficult problems in agriculture, healthcare, education, finance and industry. The African Development Bank identified 712 4IR start-ups backed by $210 million in venture funding in 2019.[540] A good example is the Nigerian start-up Ubenwa, which uses machine learning to analyse the cries of newborn infants and detect anomalies such as birth asphyxia or brain injury. It has the potential to help save lives through early detection and treatment.[541]

E-government

With more and more people accessing the internet, citizens are demanding that governments improve the efficiency of public administration by moving more public services online. But many countries in Africa are not fully prepared for e-government. According to the 2018 UN E-Government Development Index (EGDI)—a measure of governments' willingness and abilities to use ICT to deliver public services—only six African countries[542] were ranked in the high EGDI group, while 14[543] achieved very low EGDI scores.[544] But there has been some encouraging progress. For instance, the Irembo[545] portal is a key component of the Rwanda government's drive to improve public service delivery and combat corruption. Irembo allows citizens and businesses to electronically access public services. Citizens can apply online for national IDs, register for driving tests, pay traffic fines and transfer land titles. Rwandans can even book COVID–19 tests through the online portal.[546] The increasing use of technology is another important trend in moving government services online to better manage public resources through e-procurement (see chapter 4).

Business models of e-commerce firms operating in Africa

Africa has a young population that is rapidly urbanizing, connected to the internet for the first time and comfortable with the use of digital technologies. Spending power is on the rise. Consumer spending on the continent reached $1.5 trillion in 2015 and is projected to rise to $2.1 trillion by 2025 and $2.5 trillion by 2030.[547] African consumers are increasingly going online to buy a broader range of goods and services. Taking advantage of these favourable demographic trends and changing consumer behaviours, incumbent businesses and start-ups alike are competing for a chance to capture a share of booming online shopping markets.

Africa has a young population that is rapidly urbanizing, connected to the internet for the first time and comfortable with the use of digital technologies.

Africa is now a centre for innovation and experimentation in e-commerce. A 2017 analysis by Disrupt Africa identified 264 e-commerce start-ups active in 23 African markets.[548] These start-ups adopt a variety of business models (table 6.1): they enable trade in goods (MallforAfrica, an online marketplace) and services (Vezeeta, a digital healthcare booking platform). They operate either in their home markets only (Konga in Nigeria) or in multiple regional markets (Jumia, which has headquarters in Lagos but operates in 11 African countries). They serve mainly either B2C or B2B segments. A business model that is growing in importance is online boutiques that sell products made by Africa-based artisans and by SMEs to the diaspora and other global consumers. An example is soleRebels, a company selling footwear inspired by "barabasso"—traditional Ethiopian shoes handcrafted from recycled tires. But e-commerce start-ups are not spread evenly across the continent: the vast majority of entrepreneurship teams are based in West Africa (48.1 per cent), southern Africa (27.3 per cent), and east Africa (18.2 per cent).[549] This is because businesses are choosing to operate closer to consumers: more than half of online shoppers in Africa are located in just three countries— Kenya, Nigeria and South Africa. Nigeria is the largest e-commerce market in both revenue and number of shoppers.[550]

Table 6.1 E-commerce business models in Africa

	GOODS		SERVICES	
	B2C	B2B	B2C	B2B
Local	Konga, Takealot, Kilimall, Jiji, Copia	Twiga Foods	SWVL, SweepSouth, Gokada, Vezeeta	MaxAB, Sendy
Regional	Jumia, MallforAfrica	WasytoCap	GetSmarter, Mubawab	Kobo360
Global (often targeting the diaspora)	Aftownmall, soleRebels, Afropolitan, TONGORO			

Digital trade still faces many challenges on the continent, including inadequate access to the internet, a general lack of trust in e-commerce platforms, unreliable street addresses and postal systems, and low financial institution account ownership rates. As a result, a simple copy-and-paste transfer to Africa of existing business models in developed countries does not work. This explains why international e-commerce giants such as Amazon and Alibaba do not yet have local operations on the continent. While both ship select products to some countries in Africa, the costs of international shipping and the hassles of clearing customs limit the volume of orders. [551] The continent's major e-commerce players are currently homegrown (for example, Jumia and Konga in Nigeria, Takealot in South Africa and Kilimall in Kenya). The constraints they experience in tough local operating environments force them to develop skills and innovations that are different from those of their international peers.[552] For example, many African consumers are shopping online for the first time and are unfamiliar with the experience. To address this, Jumia developed a direct marketing activation program called JForce that allows registered agents to assist customers in placing orders through Jumia's website or through its apps.[553] Because these obstacles do not apply to the service sector, services such as Uber and Airbnb have significant operational footprints and market share in Africa.

In tandem with the growth of e-commerce, the digital payment ecosystem in Africa is also developing fast. Major e-commerce platforms offer a multiplicity of payment methods on their websites and apps (table 6.2). Despite the advance of mobile money, less than half the population over age 15 has an account at a financial institution or mobile money operator.[554] Cash on delivery (CoD) remains the only option for many online shoppers. But bank and electronic fund transfers (EFT) through payment gateways, credit and debit cards and mobile/digital wallets are also increasingly being used and accepted. PayPal is also available on MallforAfrica, a platform that lets African consumers purchase directly from international online retailers in the United States and Europe. In Nigeria, 25 per cent of e-commerce payments are through bank transfers, 24 per cent in CoD, 16 per cent by credit and debit cards, 10 per cent on mobile wallets and the rest through other payment methods.[555] So while the majority of e-commerce firms operating in Africa are local, a significant portion of payments processed on these platforms happen on foreign-owned card and payment schemes.

Table 6.2 Payment methods available on different e-commerce platforms

PLATFORM	PAYMENT METHODS AVAILABLE
Jumia	Cash on delivery (CoD) Credit and debit cards (VISA, Mastercard, Verve) Mobile money and wallets (JumiaPay, mCash)
Takealot	Cash on delivery (CoD) Credit and debit cards (VISA, Mastercard, American Express, Diners Club) Payment gateways (PayFast, Ozow) Loyalty programs (eBucks, Discovery Miles) Non-credit card credit products (Mobicred)
Kilimall	Credit and debit cards (VISA, Mastercard) Mobile money and wallets (M-Pesa, LipaPay, Airtel Money)
MallforAfrica	Bank transfers Credit and debit cards (Webcard, VISA, Mastercard, Verve) Mobile money and wallets (M-Pesa, Orange Money, Paga) PayPal

Source: Jumia, n.d.; Kilimall, n.d.; MallforAfrica, n.d.; Takealot, n.d.
Note: Webcard is a stored-value reloadable debit card offered by MallforAfrica.

National, regional and continental policies on the digital economy

This section reviews what governments on the continent have been doing in the areas of e-commerce and the broader digital economy. Not all African governments have set out their e-commerce visions, but recently several comprehensive strategies and policies have begun to emerge. This overview, while non-exhaustive, examines the structure and content of the strategies and polices and highlights the best practices adopted by different African countries to encourage e-commerce.

National e-commerce and digital economy strategies, policies and initiatives

E-commerce can contribute to the economy in various ways. It improves market efficiency through disintermediation by directly matching sellers and buyers, allows consumers to have better access to goods and services at lower prices and expands sales opportunities for merchants who can reach many more buyers online than is possible with traditional brick-and-mortar stores. Recognising this economic potential, governments around the world have formulated and implemented policies to spur the growth of e-commerce and the digital economy more broadly.

The need to address market failures is often given as the main rationale for developing national strategies for innovations. According to Lundvall et al., "To understand the construction of innovative systems it is, therefore, not sufficient to explore the endogenous institutional evolution of the private sector. The public sector plays a major role when it comes to supplement the self-organizing forces of the private sector in at least two respects: enhancement in the production and distribution of technology and the reduction in transaction costs."[556] This rationale —to accelerate the national adoption of digital technology and lower transaction costs—as well as ambitions to create national champions— seem to be the objectives of national strategies for e-commerce and the broader digital economy.

Egypt's National E-commerce Strategy

Egypt is the only African nation with a stand-alone National E-commerce Strategy, and one of the very few countries outside Asia with such a strategy.

Egypt is the only African nation with a stand-alone National E-commerce Strategy, and one of the very few countries outside Asia with such a strategy.[557] The strategy, launched in 2017, was jointly developed by Egypt's Ministry of Communications and Information Technology and UNCTAD.

The vision for Egypt is to "fully leverage the potential of e-commerce and the talents of her people to boost domestic trade, regional and international exports, to provide a channel for consumers and businesses to buy and sell, and to create jobs and innovation in the e-commerce ecosystem, producing e-commerce products, services and applications."[558]

To achieve this vision, an overarching goal is set for combined B2B and B2C e-commerce value to reach 2.35 per cent of GDP by 2020, driven by e-commerce adoption by key economic sectors.[559] This high-level goal is further divided into six strategic goals:

1. Empower businesses through e-commerce.
2. Leverage e-commerce to incentivise formalization of the informal sector.
3. Exploit strengths of the ICT sector for e-commerce.
4. Boost Egypt's logistics sector into a regional hub.
5. Stimulate the growth of payment sector.
6. Build Egypt's consumer market for e-commerce.

Each strategic goal is accompanied by a list of recommendations/actions that assigns ministerial or institutional responsibility for implementing each action. These recommendations/actions are expected to be achieved through a mix of public policy tools, including fiscal policy (soft credit, credit guarantees, tax deductions and exemptions), regulatory initiatives (e-procurement, customs duties exemptions) and capacity building (entrepreneurship training, creation of trade networks and industry associations). For monitoring purposes, the strategy includes a set of key performance indicators as well as a detailed action plan for Egypt.[560]

Kenya's Digital Economy Blueprint

Apart from Egypt, other African countries usually cover e-commerce issues in broader digital economy strategies or national development plans. A good example is Kenya's Digital Economy Blueprint. It was a product of an inter-ministerial working group led by the Ministry of Information Communications and Technology (MoICT) and published in 2019.

Similar to Egypt's approach in defining its national e-commerce strategy, Kenya builds its digital economy blueprint on a broad vision of "a digitally empowered citizenry, living in a digitally enabled society." This is to be achieved by a mission to create "a nation where every citizen, enterprise and organization has digital access and the capability to participate and thrive in the digital economy." The government justifies the existence of the blueprint by laying out different rationales (sociocultural, political and economic) for the digital economy in Kenya. It also offers clear objectives of what the blueprint is meant to accomplish, that is, to identify the foundation for a Kenya digital economy framework by defining the pillars and enablers of a digital economy, defining the imperatives necessary for Kenya to move to a digital economy and identifying areas where Kenya can intervene and seize opportunities.

To realize the vision, the blueprint defines five areas of focus for Kenya:

- *Digital government:* The presence and use of digital services and platforms to enable public service delivery.

- *Digital business:* Development of a robust marketplace for digital trade, financial services and digital content; e-commerce focus.

- *Infrastructure:* The availability of affordable, accessible, resilient and reliable infrastructure.

- *Innovation-driven entrepreneurship:* The presence of an ecosystem that supports homegrown firms to offer general world-class products and services that help to widen and deepen digital economic transformation.

- *Digital skills and values:* The development of a digitally skilled workforce that is grounded in sound ethical practices and sociocultural values.

Each strategic pillar consists of goals and objectives (what is to be accomplished) and a list of indicators (how to measure accomplishment, with most of the indicators as either numerical or yes/no metrics).

One of the three key areas of Strategic Pillar 2 (digital business) is digital trade, and the main goal is to have a digital economy where citizens and businesses can easily trade goods, services and labour. To support this aspiration, the blueprint calls for an identity for each person and a global addressing scheme for the country. To capture the transboundary potential of e-commerce, the blueprint also proposes further regional integration of African economies to create a single digital market.

Nigeria's National Digital Economy Strategy

The National Digital Economy Strategy was developed by Nigeria's newly renamed Federal Ministry of Communications and Digital Economy (previously Federal Ministry of Communications) and unveiled in November 2019. Its stated goal is to ensure that the population has access to and regularly uses digital technologies in their everyday lives. It envisions that, by the end of the next decade, every Nigerian is digitally literate, owns a digital device, has access to the internet, owns a bank account that can be operated online and can conduct many activities—including accessing public services—digitally.[561] The strategy lays out eight pillars:[562]

1. Developmental regulations.
2. Digital literacy and skills.
3. Solid infrastructure.
4. Service infrastructure.
5. Promotion of digital services.
6. Software infrastructure.
7. Digital society and emerging technologies.
8. Indigenous content development.

Pillars 5, 7 and 8 most directly contribute to the further development of Nigeria's burgeoning e-commerce sector since they call for increased digitization of the economy, for policies to support start-ups and innovators to develop and deploy their products in Nigeria, and for more young people to build local solutions for the local market. The rest of the pillars provide a supporting environment for e-commerce by seeking to improve internet connectivity throughout the country and by developing a more digitally literate customer base.

Digital Senegal 2016–2025

Digital Senegal 2016–2025 is a national digital economy development strategy with a vision of "Senegal in 2025: digital for all and for use in everything, with a dynamic and innovative private sector within an efficient ecosystem." The stated goals are to raise the contribution of digital technologies to GDP by 10 per cent and to create 35,000 direct jobs by 2025.[563] Though not exclusively about e-commerce, the strategy has an e-commerce component: the fourth pillar recognizes e-commerce and digital financial services as two of the priority economic sectors in which the use of digital technologies is to be supported.[564] Among the actions to be implemented under this pillar are: updating laws to spur e-commerce activities; developing a digital payment and financial services ecosystem with an emphasis on ensuring interoperability among platforms; and creating and promoting e-commerce businesses, especially those selling local products.[565]

The review of these four national strategies and policies identifies some common best practices.

The review of these four national strategies and policies identifies some common best practices. The first and most obvious is that, for all four documents, their formulation follows a vision-based approach to planning in which strategic goals (or strategic pillars) and detailed action plans are derived from a broad vision for an explicitly stated future.[566] This allows governments to articulate a clear and single stance on e-commerce and digital economy issues. Although each country had one lead ministry for the process—the ministry of trade in the case of Senegal and ministries of ICT in Egypt, Kenya and Nigeria—other relevant government ministries took part in developing the strategies and policies. Although level of detail varies, a second theme is that all four documents list the actions needed to achieve the visions and goals. While Egypt's strategy assigns each action to responsible ministries or organizations, Kenya leaves implementation of the overall digital economy blueprint to a secretariat. A third theme proposes well-defined governance structures for implementing each strategy and policy. In Egypt, a new Ministerial E-Commerce Committee—chaired by the Minister of Communications and Information Technology and with membership of other relevant ministers—is the lead governance body for the strategy.[567] Both Kenya and Senegal adopt a more consultative approach, where the bodies responsible for implementation are made up of members drawn from the government and from the private sector, academia and civil society.

There are two important areas of discussion missing from the reviewed strategies and policies. First, all four countries have ambitions to become regional and even global leaders in certain areas. Kenya wants to become a "regional and global Innovation Leader driving a strong sustainable economy and a better society."[568] And one of the strategic goals of Egypt's National E-Commerce Strategy is to turn the country into a regional logistics hub. Given how central these ambitions are to each country's vision, the issues of regional and international competition and cooperation are not sufficiently covered in their national strategy documents. Second, while all the strategies and policies propose major actions and projects, they do not elaborate on costs or sources of funding. And there are no comprehensive cost-benefit analyses. The exception is Senegal with an estimate of €2.5 billion for the 28 reforms and 69 projects called for in its strategy.[569]

Other national e-commerce initiatives

E-commerce transactions are only possible when several enabling factors are in place: access to the internet, trust in e-commerce platforms and logistics and order fulfilment. In addition to overarching national strategies and policies, various governments in Africa have also undertaken targeted interventions to support e-commerce in these areas.

Continental efforts to improve ICT in Africa can be traced back to the African Information Society Initiative launched by ECA in 1996. This led to the development of national ICT plans and strategies in many countries.[570] Going online, however, is still out of reach for many.

While wider internet access should remain a priority for Africa, improving the trust in e-commerce platforms is also crucial. According to UNCTAD, only 13 per cent of internet users in Africa made an online purchase in 2017, compared with 68 per cent in the European Union.[571] To create trust in e-commerce transactions, African governments have made efforts to strengthen their legislative frameworks. UNCTAD identifies four key pieces of e-commerce legislation: electronic transactions, consumer protection, privacy and data protection and cybercrime. Currently 54 African countries have some form of e-commerce legislation: 33 have laws on electronic transactions (setting legal equivalence between paper-based and electronic forms of exchange), 28 have privacy and data protection laws (governing the collection, processing, use and sharing of personal information), 28 have cybercrime laws (creating rules and enforcement agencies to shield consumers from online fraud and crime) and 20 have consumer protection laws (safeguarding consumers against unfair business practices). Nine countries have all four: Côte d'Ivoire, Ghana, Madagascar, Morocco, Mozambique, Senegal, South Africa, Tunisia and Zambia.[572]

Another prerequisite for trust in e-commerce platforms is the ability to unambiguously establish the identity of buyers and sellers. This remains problematic in Africa where half of all births are not registered. As a result, these unregistered people lack any form of identification and are not able to fully participate in social life (qualifying for public services or subsidies), political life (registering to vote), or economic life (meeting know-your-client requirements to open a bank account). As economic activities become digitized, participation in the digital economy increasingly hinges on not just having a legal identification but possessing of a "good digital ID." According to a set of criteria proposed by the McKinsey Global Institute, a good digital ID is "verified and authenticated to a high degree of assurance over digital channels, is unique, is established with individual consent, and protects user privacy and ensures control over personal data."[573] For e-commerce transactions, it is not enough for individuals to have just a legal identity, it is also imperative for them to be able to prove who they are online. Recognizing this, several countries in Africa—Algeria, Ghana, Liberia, Nigeria, Rwanda and Senegal—have launched digital ID initiatives. Rwanda's national ID system now incorporates biometric data and covers more than 95 per cent of the eligible population (ages 16 and older). Public institutions and companies are connected to the system and can authenticate the identity of individuals in real time.

Another prerequisite for trust in e-commerce platforms is the ability to unambiguously establish the identity of buyers and sellers.

Last but not least, last-mile delivery is a major challenge for e-commerce operators in Africa. Street address systems on the continent are often incomplete, inconsistent, or both. As a result, mail and packages are often lost or delayed. On the Universal Postal Union's Integrated Index for Postal Development (2IPD)—a score on a 0–100 scale of postal reliability, reach, relevance and resilience—Africa scored only 21 in 2019.[574] But not all countries do badly. As part of its Mail for Every House Initiative, Nigerian Post (NIPOST) sought to improve the country's address system by adopting a solution from UK-based start-up What3Word. Their technology divides earth into 3-meter squares (57 trillion in all) and assigns a three-world label (available in 26 languages) to each of them (for example, the label for the address of the Economic Commission for Africa in Addis Ababa is "cookbooks.showrooms.label").[575] For most people, this label is much easier to remember than a GPS coordinate. Because of this system, Nigeria ranks first in Africa on the 2IPD index, and average delivery time is relatively good at 3.6 days for letters, 4.4 days for parcels and 2.0 days for express mail.[576]

Regional initiatives, policies and regulations

Several of the continent's regional economic communities (RECs) have also introduced strategies, instruments and initiative to increase cross-border e-commerce transactions among their members.

Common Market for Eastern and Southern Africa Digital Free Trade Area

Building on the foundation of its 2000 Free Trade Area, the Common Market for Eastern and Southern Africa (COMESA) rolled out a Digital Free Trade Area (DFTA) in 2018. The DFTA includes three components:[577]

- E-regulation introduces two initiatives: a supportive regulatory environment for paperless trading (e-signature, contracts and so on) and online legislation and government services.
- E-logistics makes it easy to digitize trade documents (invoices, packing lists, certificates of origin) and improve cross-border logistics through automation and the use of digital technologies.
- E-trade enables smoother e-commerce through the provision of an e-payments gateway, regional clearing and settlement arrangements and an e-commerce platform for small traders.

The DFTA also makes it possible for exporters to apply for electronic certificate of origin (e-CoO) through a website, replacing paper versions. The use of e-CoO is expected to boost cross-border trade volume. It reduces goods clearing time by customs authorities, who now have less paperwork and can authenticate e-CoO digitally.[578]

e-SADC Strategic Framework

In collaboration with ECA, the Southern African Development Community (SADC) Secretariat developed the e-SADC Strategic Framework which was adopted by the Conference of SADC Ministers responsible for telecommunications, postal and ICT in May 2010. The main objectives of the framework are "promotion of ICT use for regional economic integration; enhancement of connectivity and access to ICT among and within SADC Member States; development of applications including e-government, e-commerce, e-education, e-health, e-agriculture, and addressing policy, legislation, regulation, human and financial issues."[579] The framework consists of three themes and seven strategic objectives (table 6.3).

Table 6.3 e-SADC strategic framework themes and strategic objectives

THEMES	STRATEGIC OBJECTIVES
• Delivery of quality ICT services • E-application and innovation • Governance of e-SADC strategy	• Create a conducive legal, policy and regulatory environment for the development of an ICT culture • Develop ICT infrastructure and security • Invest in human resource development • Develop e-applications, including e-government • IIncrease the use of ICT in business - Develop an ICT industry - Develop institutional mechanism

Source: ECA, 2010.

Detailed action plans for e-applications and business use of ICT are meant to spur e-commerce activities both within and among Member States. For example, require the development of common standards—including in banking and financial services—to facilitate regional transactions and to provide incentives for developing innovation e-applications relevant to regional needs. For business use of ICT, one of the actions recommended is the introduction of regional measures on certification and authentication to ensure trust in the use of e-services and e-commerce.[580]

Economic Community of West African States rules on electronic transactions, cybercrime and data protection

Although it does not have a comprehensive regional e-commerce strategy, Economic Community of West African States (ECOWAS) has been proactive in introducing legislation to support online transactions. For example, it is one of the most active RECs in cybercrime and cybersecurity. In 2011, it adopted a Directive on Fighting Cybercrime (directive 1/08/11) with the objective of updating the criminal laws of Member States to address cyber issues, such as violations of computer systems, data breaches and possession of child pornography.[581] ECOWAS has also enacted key legal instruments on personal data protection[582] and electronic transactions,[583] both in 2010, to harmonize members' legislation frameworks in these areas.

Regional payment system initiatives

Payments for goods and services in cross-border transactions can be a significant burden for importers and exporters, especially if they must deal with multiple currencies and rules. In Africa, there are a few regional initiatives to address this issue, including the COMESA Regional Payment and Settlement System (REPSS), the East African Payment System (EAPS) and the SADC Integrated Regional Electronic Settlement System (SIRESS). EAPS, for example, was launched in 2013—originally by Kenya, Tanzania and Uganda, with other countries set to join later.[584] All three settlement systems enable real-time cross-border payments in multiple currencies and are designed to bolster intra-regional trade by reducing transaction time and costs. In countries participating in SIRESS, for example, payment clearing time dropped from 2–3 days to just under 24 hours.[585]

Continental initiatives, policies and regulations

In response to increased cross-border e-commerce, and beyond private electronic payment platforms, digital payment systems have also emerged to reduce the cost and time associated with cross-border trade. The REC initiatives just described are among these efforts. Private examples include Flutterwave and Wari, which connect various types of payment systems (bank transfers, mobile money) to enable cross-border payments. Mobile money has also been a solution for those who do not have access to formal banking payment platforms, which is the case for many informal cross-border traders.

At the continental level, Afreximbank has been developing a Pan-African Payments and Settlements Platform (PAPSP) as a solution to the current status, where intra-African trade is transacted in foreign currencies, posing an additional cost for traders and consumers. The platform supports cross-border payments where both the sender and receiver transact in local currencies and on mobile devices, facilitating the clearing and settlement of trade transactions. The platform thus reduces the costs and procedures of bank relationships, while supporting customer and interbank transfers for trade and retail payments.

The PAPSP represents a move towards a uniformed payment system in Africa to facilitate intra-African trade and supports the formalization of informal cross-border trade. The platform could slash annual payment transaction costs by $5 billion on the estimated $50 billion in informal cross-border trade. The PAPSP was presented to the AU in early 2019 and was subsequently launched during the AU Extraordinary Summit in July 2019, backstopping the initiation of the operational phase of the AfCFTA.[586] The PASPS was initially piloted in six countries of the West African Monetary Zone (WAMZ), and is expected to scale up to the rest of the continent.

In recognition of the need for a continental solution to the challenges Africa faces in the digital space, in January 2019 the Executive Council of the AU mandated the African Union Commission, the ECA and other stakeholders develop a Comprehensive Digital Trade and Digital Economy Strategy, to be considered by the AU Heads of State Summit in February 2020. The Digital Transformation

Strategy (DTS) was subsequently developed by the AUC in partnership with the ECA and other institutions and adopted by the AU Executive Council in January 2020.[587] Its main aim is to enable Africa to fully benefit from the Fourth Industrial Revolution through a holistic approach, recognizing the various initiatives and developments that exist.

African Union Member States are now expected to initiate the implementation phase of the DTS. The strategy is expected to complement existing strategies and policies at regional and national levels, as well as trigger the development of sectoral components of the strategy on digital industry, digital trade, financial services, digital governance and digital education, health and agriculture.

Other continental instruments and initiatives, such as the AU Convention on Cyber Security and Personal Data Protection, will interact with the continental digital strategy, which is positioned to revolutionize digital production and trade. At the continental level, support for these instruments could come from already existing initiatives such as the Security Guidelines for Africa, the Guidelines on Privacy and Personal Data Protection (PPDP) and the Malabo Convention on Electronic Transactions, Cyber Security and Personal Data Protection.

The AU Convention on Cyber Security and Personal Data Protection can play an important role in improving consumer trust in e-commerce transactions, which is still low. The Convention reflects Member States' commitment to building an information society on the continent, aiming to protecting the fundamental rights and freedoms of citizens. It prescribes a set of security rules and principles that are "essential for establishing a credible digital space for electronic transactions, personal data protection and combating cybercrime."[588] It also seeks to harmonize legislation in these areas and guides the establishment of national data protection authorities. To protect consumers, the convention lays down six broad principles to govern processing personal data:

- Consent and legitimacy.
- Lawfulness and fairness.
- Purpose, relevance and storage.
- Accuracy.
- Transparency.
- Confidentiality and security.

The convention also assigns a set of rights to the owners of data that are being processed, including the right to information, right to access, right to object and right of rectification or erasure. Though adopted in 2014, the convention has yet to come into force, since it has not reached the threshold of 15 ratifications by national parliaments.

Recent discussions in academic and policy circles have focused on the General Data Protection Regulation (GDPR), the European Union's (EU) legislation governing the online collection, processing and storage of EU citizens' data. Some have argued that the GDPR is a global gold standard for data privacy,[589] with its requirements of data protection "by design and by default" and "unambiguous consent." There is evidence that the GDPR has had some influence on Africa, with several countries on the continent introducing or updating data protection laws that adopt some of the legal provisions introduced by the GDPR.[590] This highlights the unique situation Africa is in, potentially setting regulations ahead of forthcoming user trends by learning from other regions. It is also worth noting that there is overlap in the principles and rights prescribed by the AU convention and the GDPR. Going forward, both instruments can be useful guides for African governments as they seek to legislate national data protection laws and policies.

In the build-up to the AfCFTA commencement of trade and African governments' recognition of the importance of a digital dimension to AfCFTA, countries endorsed negotiating an e-commerce protocol as part of a Phase III of AfCFTA.

The DTS will enable African countries to participate in the 4IR and it will facilitate the implementation of the AfCFTA. Countries are now expected to implement the DTS using sectoral implementation strategies and plans in several areas covering digital trade and financial services, which include credit, savings, payments, remittances and insurance services. The internet, mobile phones, automated teller machines (ATMs) and point of sales (POS) terminals are the identified digital channels for financial transactions.

Facilitating digital trade and finance through supportive infrastructure and platforms will be central to operationalizing the AfCFTA, and the African Trade Observatory of the AU Commission will serve as the interface for national and regional trade portals. E-commerce marketplaces are also proposed by the AU Commission and the Universal Postal Union to enable cross-border trade. The Africa Medical Supplies Platform (AMSP), an online market for COVID-related essential medical supplies, is a good illustration of how digital trade can enable stakeholders to work together to solve a common challenge (box 6.1).

Box 6.1 The Africa Medical Supplies Platform: Leveraging digital technologies to enable regional cooperation in the COVID–19 response

The Africa Medical Supplies Platform (AMSP[1]) is a single online marketplace for COVID–19-related medical products in Africa. It was launched on 18 June 2020 by the Africa Centres for Disease Control and Prevention (Africa CDC) in partnership with the African Export-Import Bank (Afreximbank) and the ECA. The platform builds on ECA's AfCFTA-anchored Pharmaceutical Initiative, which addresses the difficulties African citizens face in accessing affordable, safe and efficacious medicines and supplies. Since its launch in November, the initiative operationalizes and reaps the early benefits of the AfCFTA through localized production, pooled procurement and harmonized regulatory and quality standards.

The AMSP was set up to respond to the unprecedented challenges posed by COVID–19, specifically inadequate access to pharmaceuticals and essential medical supplies across the continent, an issue that was starkly exposed by the pandemic. Leveraging information sharing and efficiency gains made possible by digital technologies, the AMSP is able to tackle this issue through innovative features such as logistics support, quota management, demand aggregation, payment facilitation and access to a bigger base of pre-vetted global manufacturers.

A key component of the AMSP is ensuring adequate quantity and quality of products. The platform onboards manufacturers with certifications from stringent global regulatory institutions such as the US Food and Drug Administration, the British National Health Service, Health Canada, the African Medicine Agency and the World Health Organization's Quality Assurance Programme. The platform also helps strengthen the capacities of local manufacturers (including agriculture companies) to scale up or repurpose production facilities to fill the demands for ventilators, personal protective equipment (PPE) and other essential medical supplies.

Early results have been encouraging. On the supply side, the platform has built up stocks of critical medical equipment and supplies above Africa CDC's initial quantity estimates and at below-target sourcing prices. And on the supply side, to date 32 African governments have joined and begun using the AMSP in the ongoing battle against COVID–19. In addition, 12 of 17 African, Caribbean and Pacific Group of States (ACP) countries are onboard, as are 30 African hospitals, foundations and NGOs.

1 https://amsp.africa.

Against this backdrop, cooperation will be required in various areas, including consumer protection, data, taxation and inter-operability of technology systems. For digital work and business, cooperation will ensure that the digital market is aligned with the vision of an integrated continental market. Cooperation will also ensure a level playing field where businesses and workers can compete fairly. Other areas that will require further regulatory development as the DTS unfolds include taxation, standards, cybersecurity, personal data protection, consumer and worker protection and protection of digital innovations and technology. These will need to be addressed through appropriate frameworks.[591] Some of these issues will be addressed as AfCFTA Phase II issues through the negotiations on the investment, competition and intellectual property rights protocols. In order to achieve consistent and integrated regulatory frameworks, the development of these regulations will need to be aligned with the cybersecurity, privacy and interoperability regulations and policies being developed in the context of DTS.

African countries can deepen and broaden financial markets by supporting the Digital Transformation Strategy and the establishment of the AfCFTA. Both initiatives promise to streamline important policies and regulations on digital payment systems and platforms and further open markets to e-commerce.

Linkages between e-commerce policies and investment

Countries where e-commerce is well developed tend to attract investment. Structural factors that support the growth of digital commerce—such as pervasive access to the internet, strong legislative frameworks that promote trust, and efficient payment and logistics systems—are also those that investors typically look for. According to UNCTAD, for example, several of the 10 top-ranking developing countries in their B2C E-Commerce Index attracted at least $1.7 billion in foreign direct investment (FDI) in their e-commerce sector in 2017.[592]

Literature and comprehensive data on the links between e-commerce and investment attractiveness in Africa are scarce. If such relationships exist, however, we should expect the list of countries with the most established e-commerce ecosystems and the list of top FDI destinations to overlap (table 6.4). This turns out to be at least partly true. Five countries feature on both lists—Ghana, Kenya, Nigeria, Morocco and South Africa.

Table 6.4 Top 10 countries in the UNCTAD B2C e-Commerce Index and top 10 FDI destinations

TOP 10 COUNTRIES IN UNCTAD B2C E-COMMERCE INDEX, 2018	TOP 10 FDI RECIPIENTS, 2018[A]
Mauritius	Egypt
Nigeria	South Africa
South Africa	Morocco
Tunisia	Nigeria
Morocco	Kenya
Ghana	Ethiopia
Kenya	Ghana
Uganda	Algeria
Botswana	Cote d'Ivore
Cameroon	Zimbabwe

[a] Calculated using a weighted average of number of projects, jobs created and FDI value.
Source: UNCTAD, 2018A; Madden, 2019.

Data on venture capital funding of African tech start-ups also suggest links between competitive e-commerce environments and the value of investment. Three different estimates of venture capital funding of African tech start-ups put the amount between $0.5 billion and $2 billion in 2019. All the studies agree that Egypt, Kenya, Nigeria and South Africa were the top recipients.[593] Three of these four countries—Kenya, Nigeria and South Africa—rank in the top 10 in Africa in UNCTAD's B2C E-Commerce Index.

There are, however, some important qualifications. First, FDI in Africa is unstable from year to year and is driven by a small number of big-ticket projects, typically of the resource-seeking kind. So, it makes sense not to rely too heavily on FDI data for analytical purposes. The list of top FDI destinations (see table 6.4) moderates these idiosyncratic factors by creating an index that accounts for not only the value of investment but also the total number of projects and jobs created. Second, it is possible that some confounding variables (size of economies, for example) explain the observed correlation. And third, anecdotal evidence of a link between advances in e-commerce and FDI does not establish a causal relationship—this remains an area ripe for further research.

It is not unreasonable, nevertheless, to hypothesize that the attractiveness of African markets for e-commerce is correlated with their appeal for foreign investment. This may hold true at both country and regional levels. And to the extent that the national and regional initiatives discussed in this section succeed in spurring e-commerce activities, they could also draw in more investments.

Policy recommendations

The relationship between the digital economy and investment is complex, multifaceted and bidirectional, calling for a series of targeted and coordinated policies and initiatives across national, regional and continental levels and across policy areas—industrial, infrastructure, consumer protection and others.

At the strategy level, an assessment needs to be undertaken to gauge what digitalization entails for companies and for competitive advantage and what industrial and investment priorities and policies need to be adjusted accordingly. Digital sector investment-related policies need to reflect the changes brought about by digitalization and at the same time foster a thriving digital sector. This requirement increases the complexity of the policy response and necessitates more coordination between different government departments.[594]

The AU's recently adopted Digital Transformation Strategy (DTS) envisions "continental ownership with Africa as a producer and not only a consumer in the global economy."[595] Meeting this ambitious goal requires local and regional champions: African digital businesses that serve the particular needs of African consumers through business models that reflect the socioeconomic realities of the continent. This is only possible with a vibrant start-up ecosystem focused on genuine innovation, and not just imitation of models that have worked elsewhere.

African countries must invest more heavily in research and development. A good start would be meeting the commitment to raise gross expenditure on research and development to 1 per cent of GDP. Intellectual property protection and enforcement also need to be strengthened to ensure entrepreneurs reap the full benefits of their efforts (see chapter 5). Further, governments should review existing policies—including in taxation—for any loopholes that might create more favourable operating conditions for foreign firms than their domestic peers.

More traditional industries also need additional support to take advantage of digitalization. As a recent study revealed, connectivity alone did not result in the better integration of small East African companies into global value chains.[596] Access to cloud computing infrastructure, the promotion of digital skills—not least among the growing youth population—and business support policies stemming from a situational analysis should also be considered.[597]

Individual policy areas and intervention should best be undertaken at different levels. Phase II protocols on intellectual property, competition and investment will have a significant bearing on the digital world's investment dynamic. While strong intellectual property frameworks can attract investors to enter a new market and innovate, these frameworks may provide incumbents undue market power and over time foreclose markets. In terms of investment protection, specificities of the digital economy can be reflected in deliberations on the assets covered by investment protection and on pre-establishment rules.[598] Policy priorities—such as deploying broadband, setting up e-commerce and competition rules, protecting data and consumers, and accessing finance—could be best addressed at the regional or continental level. In relation to taxation—and tax avoidance in particular—continental and global cooperation appears warranted to stem tax avoidance practices. In contrast, issues related to labour laws and regulation of specific sectors impacted by the digital economy may best be left to national policymakers, who may still benefit from an exchange of best practices.

Digital trade reveals the scale of the challenge facing the digital economy. Digital trade requires infrastructure, such as roads and ports, for both digital and physical connectivity, and skills development, as well as conducive legal, institutional and regulatory environments.[599] The cross-boundary nature of much e-commerce calls for a unified continental approach and rules. Any such regulation, be it at national, regional or continental level, would entail simplification and alignment of rules, which have been traditionally dealt with by country line ministries and regulators.

Access to high-speed internet is an increasingly important factor for both tech and traditional companies, and the development of the associated infrastructure needs to be fast-tracked. Regional approaches and initiatives, including through the Programme for Infrastructure Development in Africa, and involvement of the private sector can drive down the costs of deploying broadband and digital infrastructure. To minimize the rural–urban access gap, alternative methods of providing connectivity—such as balloon-powered mobile broadband (currently piloted by Google Loon in Kenya) and high-throughput satellites—should be considered. Closer involvement by investment promotion agencies in the design and execution of these plans could further enable FDI in internet infrastructure.

Access to high-speed internet is an increasingly important factor for both tech and traditional companies, and the development of the associated infrastructure needs to be fast-tracked.

Connectivity is a necessary but not sufficient enabler of a thriving digital economy. Trust in digital platforms is just as important in encouraging fuller participation by consumers in online activities such as shopping and accessing critical public services. To promote confidence in cyberspace, African countries need proper legislative and regulatory frameworks governing online transactions, particularly laws on e-transactions, data privacy, consumer protection and cybersecurity. Effort must be made to harmonize rules across the continent to prevent jurisdiction shopping by private firms. In the area of data privacy, for example, this can be done by drafting new laws or updating existing legislation to meet continental standards, such as the AU Convention on Cyber Security and Personal Data Protection, as well as considering international practices such as the GDPR.

Africa must move quickly to capture the benefits of e-commerce and digitalization. Business and employment norms were already being transformed by digitalization, but the COVID–19 pandemic has drastically accelerated the process. In several short months, economic activities have moved online at a rate that would have taken years under normal circumstances. This provides an added rationale for African governments to take advantage of this unique opportunity through two complementary measures: first, merging negotiations for the AfCFTA E-Commerce Protocol with those of Phase II Protocols and, second, giving priority to implementing the DTS.

References

Acemoglu, D., and P. Restrepo. 2019. "Automation and New Tasks: How Technology Displaces and Reinstates Labor." *Journal of Economic Perspectives* 33 (2): 3–30. https://doi.org/10.1257/jep.33.2.3.

African Development Bank. 2016. *Jobs for Youth in Africa*. Abidjan, Côte d'Ivoire: African Development Bank. https://www.afdb.org/fileadmin/uploads/afdb/Documents/Boards-Documents/Bank_Group_Strategy_for_Jobs_for_Youth_in_Africa_2016-2025_Rev_2.pdf

African Development Bank. 2019. *Fourth Industrial Revolution in Africa: Study Report Unlocking the Potential of the Fourth Industrial Revolution in Africa*. Abidjan, Côte d'Ivoire: African Development Bank.

African Payment Solutions. 2019 "African Ecommerce Payments: Survey of Nigerian Online Payment Methods for Ecommerce." 10 October. https://africanpaymentsolutions.com/2019/10/10/african-ecommerce-payments-survey-of-nigerian-online-payment-methods-for-ecommerce/.

Alliance for Affordable Internet. n.d. *2019 Affordability Report*. https://a4ai.org/affordability-report/report/2019/. Accessed 2 April 2020.

Amazon. n.d. "AmazonGlobal Export Countries and Regions." https://www.amazon.com/gp/help/customer/display.html?nodeId=201910800. Accessed 2 April 2020.

Artashyan, A. 2019. "African E-commerce Market Size Expected to Reach $22 Billion by 2022." *GIZ China*, 12 December. https://www.gizchina.com/2019/12/12/african-e-commerce-market-size-expected-to-reach-22-billion-by-2022/.

AU (African Union). 2014. "African Union Convention on Cyber Security and Personal Data Protection." Addis Ababa: AU.

AU (African Union). 2019. "Second Specialized Technical Committee on Trade, Industry and Minerals, Pan-African Payments Systems Items submitted by the Afreximbank (DTI/STC-TIM/SO/14(II))." 8–10 January, Addis Ababa, African Union.

AU (African Union). 2020a. "Executive Council, Thirty Sixth Ordinary Session, Executive Council Decision on the Reports of the Specialised Technical Committees (STCs) and Other Ministerial Meetings (EX.CL/Dec.1073–1096(XXXVI))." 6–7 February, Addis Ababa, African Union.

AU (African Union). 2020b. *Digital Transformation Strategy*. Addis Ababa: African Union. https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf.

Blimpo, M. P., and M. Cosgrove-Davies. 2019. *Electricity Access in Sub-Saharan Africa*. Washington, DC: World Bank. https://openknowledge.worldbank.org/bitstream/handle/10986/31333/9781464813610.pdf.

Bright, J. 2020. "Did African Startups Raise $496m, $1b or $2b in 2019?" *TechCrunch*, 5 March. https://techcrunch.com/2020/03/04/did-african-startups-raise-496m-1b-or-2b-in-2019/.

Bukht, R., and R. Heeks. 2017. "Defining, Conceptualising and Measuring the Digital Economy." Manchester Centre for Development Informatics Working Paper 68, University of Manchester Global Development Institute, Manchester, UK.

Buttarelli, G. n.d. "The EU GDPR as a Clarion Call for a New Global Digital Gold Standard." Guest Editorial, International Data Privacy Law, Oxford Academic. https://academic.oup.com/idpl/pages/featured. Accessed 15 July 2020.

Choi, J., M. A. Dutz and Z. Usman. 2020. *The Future of Work in Africa: Harnessing the Potential of Digital Technologies for All*. Washington, DC: World Bank. https://openknowledge.worldbank.org/bitstream/handle/10986/32124/9781464814440.pdf.

CrunchBase. n.d. "Africa E-commerce Companies." https://www.crunchbase.com/hub/africa-commerce-companies. Accessed 2 April 2020.

Deloitte. 2018. *Updates on COMESA Developments*. Tax Alert, August. https://www2.deloitte.com/content/dam/Deloitte/ke/Documents/tax/COMESA%20Developments.pdf.

Disrupt Africa. n.d. "Afri-shopping 2017." https://disrupt-africa.com/afri-shopping-2017/. Accessed 7 February 2021.

Dupoux, P., L. Ivers, A. Dannouni, Z. Sqalli and G. Ngambeket. 2019. "How Online Marketplaces Can Power Employment in Africa." Boston Consulting Group, 26 March. https://www.bcg.com/publications/2019/how-online-marketplaces-can-power-employment-africa.

ECA (United Nations Economic Commission for Africa). 2010. *e-SADC Strategic Framework*. Addis Ababa: ECA. https://repository.uneca.org/bitstream/handle/10855/21168/32387.pdf.

ECA (United Nations Economic Commission for Africa). 2014. *Private Equity and Its Potential Role in Economic Growth in Africa: Demystifying the Asset Class for Policy Makers*. Addis Ababa: ECA. https://repository.uneca.org/bitstream/handle/10855/22554/b11079526.pdf.

ECA (United Nations Economic Commission for Africa). 2019. *Assessing Regional Integration in Africa IX (ARIA IX): Next Steps for African Continental Free Trade Area*. Addis Ababa: ECA.

ECOWAS (Economic Community of West African States). 2011. "Directive C/DIR. 1/08/11 on Fighting Cybercrime within ECOWAS." Sixty-Sixth Ordinary Session of the Council of Ministers, Abuja, 17–19 August. http://www.tit.comm.ecowas.int/wp-content/uploads/2015/11/SIGNED_Cybercrime_En.pdf.

El-Darwiche, B., R. Friedrich, A. Koster and M. Singh. 2013. *Digitization for Economic Growth and Job Creation*. Strategy&. https://www.strategyand.pwc.com/m1/en/reports/digitization-for-economic-growth-and-job-creation.pdf.

Facebook. n.d. "Internet Disruptions." https://transparency.facebook.com/internet-disruptions. Accessed 2 April 2020.

Foster, C., M. Graham, L. Mann, T. Waema and N. Friederici. 2018. "Digital Control in Value Chains: Challenges of Connectivity for East African Firms." *Economic Geography* 94 (1): 68–86.

Gnanasambandam, C., A. Madgavkar, N. Kaka, J. Manyika, M. Chui, J. Bughin and M. Gomes. 2012. *Online and Upcoming: The Internet's Impact on India*. McKinsey Global Institute. https://www.mckinsey.com/~/media/mckinsey/dotcom/client_service/high%20tech/pdfs/online_and_upcoming_the_internets_impact_on_india.pdf.

Greenleaf, G., and B. Cottier. 2018. "Data Privacy Laws and Bills: Growth in Africa, GDPR Influence." *Privacy Laws & Business International Report*, 11–13. Sydney, Australia: University of New South Wales, Faculty of Law. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3212713.

GSMA. n.d. "The Mobile Economy." https://www.gsma.com/mobileeconomy/. Accessed 2 April 2020.

GSMA. 2019a. "618 Active Tech Hubs: The Backbone of Africa's Tech Ecosystem." *Mobile for Development* (blog), 10 July. https://www.gsma.com/mobilefordevelopment/blog/618-active-tech-hubs-the-backbone-of-africas-tech-ecosystem/.

GSMA. 2019b. *The Mobile Economy: Sub-Saharan Africa 2019*. https://www.gsma.com/mobileeconomy/wp-content/uploads/2020/03/GSMA_MobileEconomy2020_SSA_Eng.pdf.

Hope, A. 2018. "What Is COMESA's Digital Free Trade Area and Should SADC Have One Too?" *Tralac*, 15 February. https://www.tralac.org/publications/article/12728-what-is-comesa-s-digital-free-trade-area-and-should-sadc-have-one-too.html.

IFC (International Finance Corporation). 2019. *Digital Skills in Sub-Saharan Africa: Spotlight on Ghana*. Washington, DC: World Bank. https://www.ifc.org/wps/wcm/connect/ed6362b3-aa34-42ac-ae9f-c739904951b1/Digital+Skills_Final_WEB_5-7-19.pdf?MOD=AJPERES&CVID=mGkaj-s.

ITU (International Telecommunication Union). n.d.a. *"Digital Senegal 2025" Strategy*. https://www.itu.int/net4/wsis/archive/stocktaking/Project/Details?projectId=1488401022. Accessed 2 April 2020.

ITU (International Telecommunication Union). n.d.b. *Statistics*. https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx. Accessed 13 October 2020.

Irembo. n.d. "Popular Services." https://irembo.gov.rw/rolportal/en/home. Accessed 15 July 2020.

Jumia. n.d. "How to Shop." https://www.jumia.com.ng/how-to/. Accessed 2 April 2020.

Jumia. 2019. "JFORCE: How to Make Money Online." 22 February. https://www.jumia.co.ke/blog/jforce-how-to-make-money-online/

Kenya Ministry of Information Communications and Technology. 2019. *Digital Economy Blueprint*. Nairobi: Ministry of Information Communications and Technology. https://www.ict.go.ke/wp-content/uploads/2019/05/Kenya-Digital-Economy-2019.pdf.

Kilimall. n.d. "How Do I Pay on Kilimall Kenya? How to Pay with Mpesa, Visa & Mastercard? Do You Accept Card Payment?" https://kilimall.freshdesk.com/support/solutions/articles/35000109931-how-do-i-pay-on-kilimall-kenya. Accessed 2 April 2020.

Korovkin, V. 2019. "National Digital Economy Strategies: A Review of Africa." Issue Brief 303, Observer Research Foundation, New Delhi. https://www.orfonline.org/research/national-digital-economy-strategies-a-survey-of-africa-53468/.

LIRNEasia. 2019. *AfterAccess: ICT access and use in Asia and the Global South (Version 3.0)*. Colombo, Sri Lanka: LIRNEasia.

Lough, R. 2013. "East Africa's Top Economies Launch Cross-border Payment System." *Reuters*, 11 December. https://www.reuters.com/article/us-eastafrica-trade/east-africas-top-economies-launch-cross-border-payment-system-idUSBRE9BA0GF20131211.

Lundvall, B., B. Johnson, E. S. Andersen and B. Dalum. 2002. "National Systems of Production, Innovation and Competence Building." *Research Policy* 31: 213–231.

Luohan Academy. 2019. *Digital Technology and Inclusive Growth: Luohan Academy Report 2019*, *Executive Summary.* Hangzhou, China: Luohan Academy. https://gw.alipayobjects.com/os/antfincdn/DbLN6yXw6H/Luohan_Academy-Report_2019_Executive_Summary.pdf.

Madden, P. 2019. "Figure of the Week: Foreign Direct Investment in Africa." Brookings Institution, *Africa in Focus* (blog), 9 October. https://www.brookings.edu/blog/africa-in-focus/2019/10/09/figure-of-the-week-foreign-direct-investment-in-africa/.

Majaha, D. 2018. "SADC Moves towards Multi-currency Regional Payment Settlement System." *Tralac*, 16 August. https://www.tralac.org/news/article/13372-sadc-moves-towards-multi-currency-regional-payment-settlement-system.html.

MallforAfrica. n.d. "How to Load up Your WebCard." https://www.mallforafrica.com/load-webcard. Accessed 2 April 2020.

Manyika, J., A. Cabral, L. Moodley, S. Yeboah-Amankwah, S. Moraje, M. Chui, J. Anthonyrajah and A. Leke. 2013. *Lions Go Digital: The Internet's Transformative Potential in Africa*. McKinsey Global Institute. https://www.mckinsey.com/industries/technology-media-and-telecommunications/our-insights/lions-go-digital-the-internets-transformative-potential-in-africa.

Mastercard Foundation. 2019. *Digital Commerce and Youth Employment in Africa*. https://mastercardfdn.org/wp-content/uploads/2019/03/BFA_Digital-Commerce-White-Paper_FINAL_Feb-2019-aoda.pdf.

Moyer, E. 2017. "High-tech Snail-mail Service What3Words Goes Big in Africa." *CNET*, 2 August. https://www.cnet.com/news/nigeria-mail-service-addresses-what3words/.

Okonji, M. 2020. "Pantami Gives Insight into Nigeria's Digital Economy Policy Drive." *This Day*, 6 January. https://www.thisdaylive.com/index.php/2020/01/06/pantami-gives-insight-into-nigerias-digital-economy-policy-drive/.

Olabanji, D. 2020. "The Eight (8) Strategy Goals by Ministry of Communication and Digital Economy of Nigeria." *Techconvos*, 19 February. http://techconvos.com/the-eight-8-strategy-goals-by-ministry-of-communication-and-digital-economy-of-nigeria/.

Ookla. n.d. "Speedtest Global Index." https://www.speedtest.net/global-index. Accessed 2 April 2020.

OECD (Organisation for Economic Co-operation and Development). n.d. "Glossary of Statistical Terms: Electronic Commerce." https://stats.oecd.org/glossary/detail.asp?ID=4721. Accessed 2 April 2020.

OECD (Organisation for Economic Co-operation and Development). 2015. "Addressing the Tax Challenges of the Digital Economy, Action 1: 2015 Final Report." OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. https://doi.org/10.1787/9789264241046-en.

Pelissie du Rausas, M., J. Mayika, E. Hazan, J. Bughin, M. Chui and R. Said. 2011. *Internet Matters*. McKinsey Global Institute. https://www.mckinsey.com/~/media/McKinsey/Industries/Technology%20Media%20and%20Telecommunications/High%20Tech/Our%20Insights/Internet%20matters/MGI_internet_matters_full_report.pdf.

Pires, G., J. Stanton and I.-D. Salavrakos. 2010. "The Interaction of Foreign Direct Investment with Electronic Commerce in Less Developed Countries." *Forum for Social Economics* 39 (2): 127–143.

Rukundo, S. 2020. "Addressing the Challenges of Taxation of the Digital Economy: Lessons for African Countries." Working Paper 105, International Centre for Tax and Development, Brighton, UK. https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/14990/ICTD_WP105.pdf.

Sarr, A. 2018. "Talking E-commerce with Alioune Sarr, Senegal's Trade Minister." *Bridges Africa* 7 (2): 4–7. https://ictsd.iisd.org/bridges-news/bridges-africa/news/talking-e-commerce-with-alioune-sarr-senegal%E2%80%99s-trade-minister.

Senegal Ministry of Trade. 2016. *Stratégie Sénégal Numérique 2016–2025*. Dakar: Ministry of Trade. http://www.numerique.gouv.sn/sites/default/files/Numerique%202025_0.pdf.

Signe, L. 2018. *Africa's Consumer Market Potential: Trends, Drivers, Opportunities, and Strategies*. Washington, DC: Brookings Institution. https://www.brookings.edu/wp-content/uploads/2018/12/africas-consumer-market-potential.pdf.

Statista, n.d. "eCommerce: Africa." https://www.statista.com/outlook/dmo/ecommerce/africa. Accessed 2 March 2021.

Takealot. n.d. "What Are My Payment Options?" https://www.takealot.com/help/faq#what-are-my-payment-options. Accessed 2 April 2020.

Ubenwa. n.d. "Overview." https://www.ubenwa.ai/index.html#overview. Accessed 2 April 2020.

UN (United Nations). 2018. *United Nations E-Government Survey 2018*. New York: UN.

UNCTAD (United Nations Conference on Trade and Development). n.d. "Summary of Adoption of E-commerce Legislation Worldwide." Geneva: UNCTAD. https://unctad.org/en/Pages/DTL/STI_and_ICTs/ICT4D-Legislation/eCom-Global-Legislation.aspx. Accessed 2 April 2020.

UNCTAD (United Nations Conference on Trade and Development). 2017. *National E-commerce Strategy for Egypt*. Geneva: UNCTAD. https://unctad.org/en/PublicationsLibrary/dtlstict2017d3_en.pdf.

UNCTAD (United Nations Conference on Trade and Development). 2018a. *B2C E-Commerce Index 2018*. Geneva: UNCTAD. https://unctad.org/en/PublicationsLibrary/tn_unctad_ict4d12_en.pdf.

UNCTAD (United Nations Conference on Trade and Development). 2018b. “Nairobi Manifesto on the Digital Economy and Inclusive Development in Africa.” Geneva: UNCTAD. https://unctad.org/meetings/en/SessionalDocuments/Africa-eWeek2018_NairobiManifesto_en.pdf.

UNCTAD (United Nations Conference on Trade and Development). 2019a. *B2C E-Commerce Index 2019*. Geneva: UNCTAD. https://unctad.org/en/PublicationsLibrary/tn_unctad_ict4d14_en.pdf.

UNCTAD (United Nations Conference on Trade and Development). 2019b. *Digital Economy Report 2019: Value Creation and Capture: Implications for Developing Countries*. Geneva: UNCTAD. https://unctad.org/en/PublicationsLibrary/der2019_en.pdf.

UNCTAD (United Nations Conference on Trade and Development). 2020. “Global E-commerce Hits $25.6 Trillion: Latest UNCTAD Estimates.” Press Release, 27 April. https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2345&Sitemap_x0020_Taxonomy=UNCTAD%20Home;#1713.

UPU (Universal Postal Union). 2019. *Postal Development Report 2019*. https://www-qa.upu.int/UPU/media/upu/publications/postalDevelopmentReport2019En.pdf.

Vota, W. 2018. “Wow! Mobile Money Transactions Are Now Larger than Kenya’s GDP.” *ICT Works*, 16 May. https://www.ictworks.org/mobile-money-larger-kenya-gdp/.

Weigert, M. 2018. “How the Private Sector Is Shaping African E-commerce.” *Bridges Africa* 7 (2): 11–14. https://ictsd.iisd.org/bridges-news/bridges-africa/news/how-the-private-sector-is-shaping-african-e-commerce.

White, O., A. Madgavkar, J. Manyika, D. Mahajan, J. Bughin, M. McCarthy and O. Sperling. 2019. *Digital Identity: A Key to Inclusive Growth*. McKinsey Global Institute. https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/McKinsey%20Digital/Our%20Insights/Digital%20identification%20A%20key%20to%20inclusive%20growth/MGI-Digital-identification-Report.pdf.

End notes

481 ECA, 2014.
482 Taxation associated with cross-border investment is part of a broader discussion in chapter 7.
483 Rukundo, 2020.
484 Rukundo, 2020.
485 OECD, 2015.
486 UNCTAD, 2019b.
487 Bukht and Heeks, 2017.
488 UNCTAD, 2019b.
489 GSMA, 2019a.
490 Excluding North Africa.
491 Blimpo and Cosgrove-Davies, 2019.
492 Blimpo and Cosgrove-Davies, 2019.
493 Excluding North Africa.
494 Blimpo and Cosgrove-Davies, 2019.
495 Blimpo and Cosgrove-Davies, 2019.
496 GSMA, 2019b.
497 LIRNEasia, 2019.
498 ITU, n.d.b.
499 ITU, n.d.b.
500 Except for cases such as Ethiopia where Ethio Telecom, a state-owned firm, is the only operator even though the government is currently implementing a privatization plan.
501 Benin, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Democratic Republic of Congo, Ethiopia, Gambia, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mozambique, Niger, Rwanda, Senegal, Sierra Leone, South Africa, Tanzania, Togo, Uganda, Zambia, and Zimbabwe.
502 Alliance for Affordable Internet, n.d.
503 Facebook, n.d.
504 Algeria, Lybia, Rwanda, Somalia, Sudan, Tanzania and Zambia.
505 Ookla, n.d.
506 Excluding North Africa.
507 GSMA, 2019b.
508 Vota, 2018.
509 UNCTAD, 2019b.
510 UNCTAD, 2019b.
511 Manyika et al., 2013.
512 Manyika et al., 2013.
513 GSMA, 2019b.
514 The mobile ecosystem consists of mobile operators, infrastructure providers, retailers and distributors of mobile products and services, mobile device manufacturers, and mobile content, application and service providers (GSMA, n.d.).
515 Excluding North Africa.
516 OECD, n.d.
517 UNCTAD, 2020.
518 UNCTAD arrives at these estimates by aggregating national statistics on e-commerce, which often cover a broader scope of activities than Bukht and Heeks's definition of the digital economy.
519 UNCTAD, 2018a.
520 UNCTAD, 2019a.
521 UNCTAD, 2019a.
522 UNCTAD, 2019a.
523 Burundi, Chad, Comoros, Congo, Democratic Republic of Congo, Guinea, Liberia, Mauritania and Niger.
524 Statista, n.d.
525 Manyika et al., 2013.
526 Bukht and Heeks, 2017.
527 Acemoglu and Restrepo, 2019.
528 Gnanasambandam et al., 2012.
529 Pelissie du Rausas et al., 2011.
530 Pelissie du Rausas et al., 2011.
531 Choi, Dutz and Usman, 2020.
532 El-Darwiche et al., 2013.
533 Excluding North Africa.
534 GSMA, 2019b.
535 Dupoux et al., 2019.
536 Dupoux et al., 2019.
537 IFC, 2019.
538 Luohan Academy, 2019.
539 African Development Bank, 2016.
540 African Development Bank, 2019.
541 Ubenwa, n.d.
542 Ghana, Mauritius, Morocco, Seychelles, South Africa and Tunisia.
543 Central African Republic, Chad, Comoros, Djibouti, Equatorial Guinea, Eritrea, Guinea, Guinea-Bissau, Mali, Mauritania, Niger, Somalia, South Sudan and Sudan.
544 UN, 2018.
545 Irembo means "access" or "door" in Kinyarwanda.
546 Irembo, n.d.
547 Signe, 2018.
548 Disrupt Africa, n.d.
549 Artashyan, 2019.
550 UNCTAD, 2018b.
551 For example, Amazon currently exports to Algeria, Angola, Botswana, Cameroon, Egypt, Ghana, Kenya, Mauritius, Morocco, Namibia, Nigeria, Senegal, South Africa, Tanzania, Tunisia, Uganda, and Zimbabwe (Amazon, n.d.).
552 Weigert, 2018.
553 Jumia, 2019.
554 World Bank Global Findex Database.
555 African Payment Solutions, 2019.
556 Lundvall et. al. 2002.
557 Mastercard Foundation, 2019.
558 UNCTAD, 2017.
559 UNCTAD, 2017.

560 The key performance indicators and detailed Action Plan are unpublished and not publicly available.
561 Okonji, 2020.
562 Olabanji, 2020.
563 ITU, n.d.a.
564 Senegal Ministry of Trade, 2016.
565 Sarr, 2018.
566 Korovkin, 2019.
567 UNCTAD, 2017.
568 Kenya Ministry of Information Communications and Technology, 2019.
569 ITU, n.d.a.
570 ECA, 2019.
571 UNCTAD, 2018a.
572 UNCTAD, n.d.
573 White et. al., 2019.
574 UPU, 2019.
575 Moyer, 2017.
576 UNCTAD, 2018a.
577 Hope, 2018.
578 Deloitte, 2018.
579 ECA, 2010.
580 ECA, 2010.
581 ECOWAS, 2011.
582 Act A/SA.1/01/10 governs the collection, processing, transmission, storage and use of personal data.
583 Act A/SA.2/01/10 regulates electronic transactions, including online advertising and electronic contracts.
584 Lough, 2013.
585 Majaha, 2018.
586 AU, 2019.
587 AU, 2020a, para. 10–14.
588 AU, 2014.
589 Buttarelli, n.d.
590 Greenleaf and Cottier, 2018.
591 ECA, 2019.
592 UNCTAD, 2018a.
593 Bright, 2020.
594 UNCTAD, 2018b.
595 AU, 2020b.
596 Foster et al., 2018.
597 AU, 2020b.
598 UNCTAD, 2017.
599 Pires, Stanton and Salavrakos, 2010.

PART 3:

FLANKING POLICIES AND COVID–19'S IMPACT ON FOREIGN INVESTMENT IN AFRICA

Chapter 7 Complementary and flanking policies

Chapters 4–6 have examined competition, intellectual property and digitalization as linked to investment and the surrounding policy nexus. The report has also reviewed interlinkages with other relevant sectors: the trade, fiscal and private sectors. The policy nexus deserves special attention since it can complement positive interlinkages and prompt virtuous cycles with the other sectors to enhance and bolster development in Africa. This chapter takes a closer look at some complementary and flanking policy measures.

Identifying complementary measures reinforcing the policy nexus

What are complementary and flanking policy measures? They are policies and regulations that advance, enhance and support desired policy outcomes in other policy areas.

Beyond the sectors focused on here—investment, competition, intellectual property and digitalization—the theoretical and empirical literature also considers other interlinkages and their policy relevance for other sectors. That was duly highlighted in the report's conceptual framework (see chapter 2). It recognized that sectors such as trade, fiscal and private sector development can enhance, stifle or worsen the policy outcomes of interventions in the investment, competition, intellectual property and digitalization sectors (see figure 2.1). Policies for the complementary and flanking sectors can complement policies in the study's central sectors, maximize positive outcomes and minimize negative ones.

For example, suppose a government established an investment promotion policy measure, such as a national electronic investment guide (such as the iGuides mentioned in chapter 1) to showcase investment opportunities in the country. An accompanying trade policy measure might be supporting businesses in showcasing their investment opportunities in international trade fairs. A resulting trade policy outcome of such a measure would be more investment flowing into the companies in the trade sector promoted through both the electronic investment platform and the trade fairs.

Another example uses a fiscal policy measure to support manufacturing sector investment. Tax rebates for purchases by manufacturing firms might be formulated as an incentive—perhaps exemption from tariffs on importing industrial machinery above a certain value. That measure might appear to be neutral, not distinguishing between foreign or domestic investment. But in the medium to long run, it could result in greater investment by foreign firms seeking to settle themselves in the local market to capture the tax rebate through a locally established company purchasing machinery. That could harm the chances of domestic firms that are smaller in size and capacity and unable to take advantage of the incentive because of the cost of the machinery. Although investment through foreign firms might increase, domestic investment in the manufacturing sector could stagnate, harming domestic private sector development. A small adjustment of the policy measure—such as lowering or eliminating the threshold for the rebate—might, in contrast, allow domestic small and medium-sized enterprises in the private sector to purchase machinery and so add to their productivity and competitiveness, at their specific level of production.

A policy measure that could have a negative outcome is one limiting the ownership and the nationality of staff of foreign firms in the domestic market. Though well intended, such a policy might reduce the transmission of know-how and technology to the domestic market. Initially, the policy might have sought to promote joint ventures of local and foreign capital and to build stronger backward and forward linkages in the economy. But firms wanting to protect intangible assets, such as those in information technology or pharmaceuticals, might be discouraged from investing in the country, especially if intellectual property protection and enforcement were weak (see chapter 5). And firms that did invest might have intra-company practices that discouraged or stifled opportunities for the transfer of technology and know-how. That often happens in companies where the management and high-level expertise are entirely foreign, and no internal development programmes train local personnel beyond technical functions.

A policy measure that could have a negative outcome is one limiting the ownership and the nationality of staff of foreign firms in the domestic market.

With differing policy outcomes possible and the need to ensure that policy responses are attuned to development priorities—such as increased investment and competition and improved innovation and technology, including in the digital space—governments may need to assess their policies. They can do so by cataloguing existing policy measures and assessing their impact on various sectors of the economy to determine:

- Which sectoral policy measures have a positive impact on investment, competition, intellectual property and digitalization (such positive interlinkages should be sustained and enhanced).
- Which are neutral or “blind” to the existing sectors (these policies might be adjusted to bring on positive effects).
- Which adversely affect the existing sectors (these should be corrected or reversed the to remove negative impacts or usher in positive impacts).

Table 7.1 provides examples of policy measures to illustrate the possible relationships between the flanking or complementary policy measures and how they affect the sectors this report focuses on. The table also suggests possible policy actions to enhance, correct or eradicate policy outcomes.

Table 7.1 Complementary and flanking policy measures

POLICY SECTOR	POLICY MEASURE	POLICY OUTCOME	POLICY ACTION
Trade sector	Support the participation of firms through trade promotion activities, such as trade fairs	**Positive:** Firms in the trade sector seeking to attract investment can meet potential investors and present their investment cases	None required, unless an adjustment to the policy might enhance the positive outcome without leading to negative impacts in other policy sectors
Fiscal sector	Tax rebates or holidays for importing machinery for businesses, for purchases above a certain value threshold	**Neutral:** The measure does not affect all companies in the same way. Large companies (such as multinational enterprises) may be incentivized to locate their production in the host country (through foreign direct investment) because of the tax rebate. Small and medium-sized enterprises (SMEs) may be unable to take advantage of the policy because of the value threshold	Eliminate the value threshold on the machinery so that all firms, including SMEs, can import low-value machinery to advance their business
Private sector	Capital ownership requirements with caps on foreign participation (typically below 50 per cent of ownership)	**Negative:** Although intended to promote joint ventures and the blending of different sources of capital as well as technology transfer and know-how, the measure might deter foreign investment and the transfer of intangibles	Requirements on ownership should be removed, and direct policies promoting and facilitating the transfer of know-how and technology should be designed

Source: ECA, based on Tinbergen (1956) policy principles.

Such a catalogue could structure moving from a policy disconnect to a more coherent and better connected policy space.[600] Policy measures for various sectors could then be articulated to complement and flank policies on investment, competition, intellectual property and digitalization (see box 7.1, for instance, on the disconnect between land reforms and investment policy in Zimbabwe). To achieve this, governments may also need treat some of neutral or negative policy measures as needing tweaking or reversal.

Box 7.1 Policy disconnect resulting from Zimbabwe's land reform and resettlement programme

After Zimbabwe's independence in 1980, its land policy had two objectives: to reduce the imbalances of colonial land allocation and to maintain or increase agricultural production in line with overall economic policy.[1] Between 1980 and 1996, land was acquired by the government on a willing buyer–willing seller basis for redistribution, but the effort was largely unsuccessful due to underfunding and insufficient land being made available for sale. The Land Reform Act of 1992 set out conditions and procedures for land reforms, driven by the need for food security, through labour-intensive smallholder agriculture, respect for property rights and political stability.

In 2000, a more aggressive approach, the Fast-Track Land Reform Programme, was adopted. It resulted in 14 million hectares of commercial farming land being compulsorily acquired for resettlement. Of that, 977,000 hectares (197 farms) were covered under Bilateral Investment Promotion and Protection Agreements (BIPPAs), including those with Belgium, Denmark, Germany, Italy, Malaysia, the Netherlands and Switzerland.[2]

In principle, land reforms were necessary. The way they were implemented, however, violated the principles of rule of law and investment protection, disrupted agriculture and triggered a general economic meltdown. Agriculture is the backbone of Zimbabwe's economy and has strong backward and forward linkages with other sectors, particularly manufacturing. The effects of its dramatic decline are felt economywide and contribute to persistent low production and productivity, poor export performance, low attractiveness to foreign investors, high unemployment, increased poverty, food insecurity and inequality.

The disconnect between land reforms and investment policy

The implementation of land reforms has affected compliance with BIPPA provisions in multiple ways that might deter foreign investment:

- Violations of fair and equal treatment clauses enshrined in various legal instruments, including the constitution, various BIPPAs, the Zimbabwe Investment Development Agency Act, the National Investment Policy, and other relevant policies and regulations. These have exposed the country to lengthy and costly investor–state dispute settlement proceedings.

- The high cost of compliance with BIPPA obligations. Zimbabwe has yet to honour some high awards from arbitration by the International Centre for the Settlement of Investment Disputes (ICSID). It faces the dilemma of whether to divert funds from public coffers to compensate private investors, especially since they have a right under the BIPPAs to repatriate the money to their countries of origin in hard currency (which is scarce). The failure to comply with ICSID and tribunal awards makes the country even less attractive to foreign investors.

- Rule of law concerns, due to the lack of prompt and adequate compensation for expropriation.

- A conflict between human rights and investment protection. In exercising the country's right to regulate, affirmative actions by the government may have infringed investors' rights. For instance, in the attempts to redress past colonial injustices, challenges have been encountered in balancing among the protection of foreign investment, the rights of indigenous people to self-determination and the country's sovereignty over natural resources.

- Inadequate access to justice. The expropriation of land affected both local and foreign investors, and neither received fair compensation for their losses. The unavailability of relief from local remedies meant that foreign investors enjoyed more rights—granted under BIPPAs through access to arbitration at the ICSID—than local investors.3

Possible remedies to strengthen the complementarity of land and investment policies

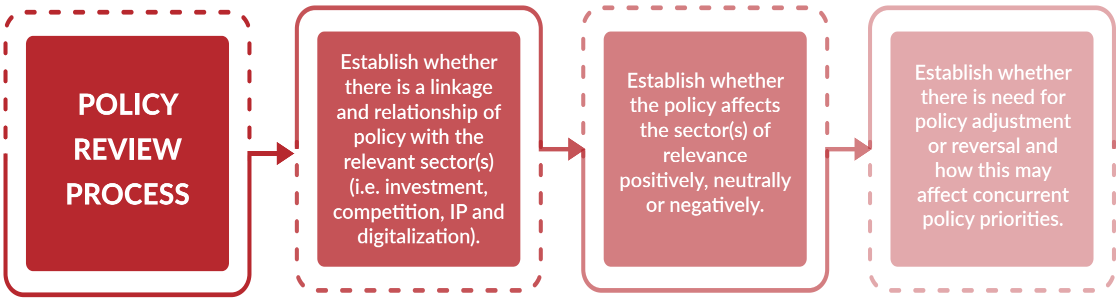
Recent initiatives to strengthen the investment regulatory and policy framework include the enactment of the Zimbabwe Investment and Development Agency Act *[Chapter 14:37]* (ZIDA Act) on 7 February 2020 and the launch of a new National Investment Policy in August 2019. The ZIDA Act consolidates investment laws into a single law to foster coherence and predictability in investment governance and revamp one-stop shop services to ease investment approvals. Provisions of the ZIDA Act reinforce and complement those of the BIPPAs. Further provisions relevant to investment facilitation, promotion and protection are contained in the Zimbabwe Arbitration Act [*Chapter 7:15]*, the national constitution, the Land Commission Act *[Chapter 20:29]*, the Land Commission (Gazetted Land) (Disposal in Lieu of Compensation) Regulations (SI 62 of 2020), the Land Acquisition Act, and the National Agriculture Policy Framework (2018–2030).

A comprehensive and gender-sensitive land policy aligned with the African Union Framework Agenda 2063 and the African Union's guidelines on land policy in Africa is currently being formulated.[5] It is intended to enhance access to land, land use planning and management, and productive and sustainable use of land. A holistic approach to land administration integrating land dispute resolution, environmental sustainability and management of wildlife, forestry and water is envisaged.

1. Mupawose and Chengu, n.d.
2. Towindo, 2020.
3. Hondora, 2012.
5. Chikwati and Chasokela, 2019.

Policy tweaking will of course not be easy. It will require adequate consultation across the identified sectors, data for evidence-based analysis of impact and outcomes and a systematic approach to ensure consistency in identifying policy interventions, policy outcomes and policy adjustments. A three-step approach could result, in which a policy review initially establishes whether policies affect the relevant policy sector, then assesses what type of impact the policy has and then discovers whether there is a need for policy corrective action (figure 7.1).

Figure 7.1 Policy review process



The next three sections discuss policy interfaces, with a view to elucidate requirements for better policy design and formulation. The following discussions are not exhaustive but point to some features to be considered in the context of policy reviews and dialogues when engaging policy stakeholders in the fiscal, trade and private sectors.

The trade policy nexus

In this report's conceptual framework (see chapter 2), the trade–investment policy nexus is perhaps the strongest, given the theoretical and empirical evidence of their linkages. The most salient feature of this nexus is the difference between complementarities and substitutions, which are greatly determined by policy interventions or measures. A trade policy targeted at enhancing a mutually reinforcing relationship between trade and investment in one sector could have exactly the opposite effect in another sector. So, trade policy must be synchronized and targeted at sectors rather than the whole economy.[601]

In the competition–trade policy relationship, competition provides safeguards that enable trade policy. Trade policy without competition policy can be empty because no rules or principles would control harmful market conduct by firms or distortionary regulations. Competition policy can assist in securing gains from trade liberalization and market opening. But simply reducing barriers to trade and removing barriers to entry for domestic and foreign investment can create an environment in which firms, especially multinational corporations, can acquire significant market power and influence pricing and volumes of supply in a way that obstructs the objectives of market liberalization.

A growing consensus backs competition policy as a vital component for the proper functioning of international markets.[602] Competition and trade policy are interlinked components, and no other pair of policies is so connected.

Competition policy decisions reliably address market failures that can result from trade policy, such as cartels, anti-competitive mergers, unilateral conduct and abuse of dominant position. By their nature, competition policy decisions require separating economic and non-economic goals in trade policy, which at times is used to pursue public interest. So, trade policies could promote anti-dumping laws to prevent damage to local markets from low-priced imports, while competition policies prohibit predatory pricing that damages competitors. These relationships constitute key consideration in developing economic reform policies, particularly in the context of regional integration efforts such as the AfCFTA.

So, meaningful trade policy must be supported by a complementary competition policy that addresses the following, among other things:

- Since the Competition Protocol will, of necessity, try to harmonize AfCFTA states' competition rules or policies, trade policies need to be implemented so they can coexist with the harmonized competition policies. Should competition policy apply the same standards for home markets and export markets? That question raises a problem when producer and consumer interests differ from one AfCFTA state to another. Harmonizing trade policy is thus an intricate process that could distort market outcomes, for example by strengthening export cartels, if poorly executed. Global economic welfare is higher when countries harmonize to the less distortionary policy and when policy favours harmonization towards a stricter competition policy.[603] In short, the harmonization of competition rules requires strict enforcement across all AfCFTA states, not strict enforcement in some and lax enforcement in others.

- Legal instruments must deliberately support the link between the trade policy objective and the supportive competition policy. The legal instruments must preserve complementarity between trade policy and competition policy, eliminating any potential conflict.

- Competition policy needs proper structuring to address and avert economic crises that could result from trade policies, such as the creation of market dominance, which could obstruct market liberalization objectives.

- Market integration trade policies can hinder the competitiveness and growth of specific domestic industries at different stages of growth that are overexposed to international competition. Competition policy must balance the needs of different market players at different levels of maturity to competitively coexist in a single market.

- Competition policy is critical in levelling the playing field, though some trade policies could easily neglect that.

- Competition policy is industry-neutral—it is applied in the same way across all industries. But trade policy tends to be industry-related and gets more diverse beyond the border. So, a robust competition policy or regime is increasingly needed as markets get larger, to redress market imperfections.

- Competition policy should especially inform trade policy in a market where several countries' economies are integrated so that competition rules will be the same at home and beyond the countries' borders. This will benefit community members more, since trade policy is not used to shield domestic markets at the expense of the greater economic community.

Intellectual property policy and trade policy also have an intrinsic relationship, as is evidenced through the market. Trade policy must be particularly observant of intellectual property rights (IPRs) and enforcement across borders if trade in knowledge-intensive goods and services is to take place. Without such protection, trade in sectors such as information technology, pharmaceuticals and the creative industries, as well as intra-industry trade, is likely to be severely stifled and underperform. The multilateral trading system is fully cognizant of this dual role of IPRs in facilitating trade while protecting the fruits of innovation, upholding and enforcing the international conventions that govern the vast realm of intellectual property (see chapter 5).

A free trade area (FTA) can support consistency in enacting, applying and enforcing IPRs through its trade policy. Efforts to ensure that application and enforcement will require cooperation and coordination across the FTA's countries. In the African context, increased public investment in IPR law enforcement agencies may be required, focusing on civil and administrative procedures and remedies, border measures and criminal procedures to promote regional (AfCFTA) and international cooperation. The AfCFTA could thus become a good destination for foreign direct investment in greenfield projects and research and development (R&D) spending from abroad while bolstering trade in goods and services with greater knowledge content. And strengthening public institutions can reduce predation, corruption and excessive bureaucracy in local governments, support the efficient use of existing IPR enforcement measures and so attract additional greenfield foreign direct investment by multinational enterprises (MNEs) and R&D spending from abroad.

A free trade area (FTA) can support consistency in enacting, applying and enforcing IPRs through its trade policy.

Trade policy and the digital realm are also closely linked, particularly in the context of e-commerce (see chapter 6). The prospective protocol on e-commerce, which will govern electronic trade in the African continental space under the AfCFTA agreement, presents a unique opportunity to design trade policy tailored to Africa's digitalization needs and objectives. That protocol must set trade policy for electronic transactions across borders. It must also capture the financial transactions that take place on electronic platforms, accompanying the cross-border movement of a good (or service) from seller to buyer, and capture the digital components embedded in the trade. And it must establish a relationship with investment in the digital economy and address principles of competition and intellectual property that will govern the digital space.

These linkages provide a rationale to frontload the negotiation of an E-commerce Protocol so its policy connects with the other Phase II issues—investment, competition and intellectual property. To do that will require a political decision on behalf of the AfCFTA states to establish a technical working group, like those for the other disciplines, so an E-commerce Protocol can be developed in tandem with the other Phase II issues.

The fiscal policy nexus

Fiscal policy is critical to all sectors of an economy. It dictates what government budgetary resources and allocations can be secured for and what taxes and other impositions can be derived from each economic activity.

The effectiveness and efficiency of fiscal policy can be enhanced considerably through digitalization. Digitalization can enhance fiscal policy through two channels that also benefit investment, competition and intellectual property in the form of technology and innovation. First, expanding the tax base to cover fast-growing digital services can improve domestic revenue mobilization. And second, better use of digital technologies in tax administration can raise revenues and reduce costs, thereby improving tax administration efficiency (box 7.2). Digital technology can thus help African countries increase fiscal revenue by an estimated 3–4 per cent, the same amount as they could gain by bringing into taxation sectors that are considered hard to tax, such as agriculture, the digital economy and the informal sector.

Box 7.2 The digitalization-fiscal policy nexus: Examples from Kenya and Rwanda

Kenya's digital services tax

In 2019, Kenya introduced a digital services tax (DST) on transactions that take place on a digital marketplace, defined as "a platform that enables direct interaction between buyers and sellers of goods and services through electronic means." The Finance Bill, 2020, setting out the new tax regime was announced by the Kenyan parliament in May 2020. The tax came into effect at the beginning of 2021, with the first returns and payment due on 20 February 2021.

The DST is a 1.5 per cent levy on the gross transaction value of a range of digital services, including, to name a few: downloadable digital content (e-books, movies, music and so on), electronic ticketing and booking, online training, search engine services and purchases made on digital marketplaces. The gross transaction value for a service provider is the payment received for the digital service, and for a marketplace it is the commission received for the use of the platform. The DST applies to both residents and non-residents on the portions of their revenues generated in Kenya.

It is too early to estimate the impact of the DST on Kenya's overall tax revenues. It appears to be an effort to enlarge fiscal space by taxing companies that generate significant revenues in Kenya without being physically present. Without global coordination to address the challenges posed by the digital economy on the international tax system (see chapter 6), governments around the world have increasingly resorted to similar unilateral efforts. France, for example, enacted a digital services tax in 2019, and the European Commission has proposed rules to tax digital business activities.

The digitalization of tax administration in Rwanda

In 2000, the Rwandan government launched Vision 2020, a national economic roadmap. The document envisions digital tools as key to domestic revenue mobilization. Since then, the Rwanda Revenue Authority (RRA) has introduced various measures to digitalize tax collection. These include deploying software to facilitate tax return processing (2004), launching online filing and payment (2011), allowing filing and payment through a mobile application (2013), developing the e-government platform Irembo (2014, see chapter 6) and introducing a live chat feature on the RRA website to assist taxpayers (2019).

In part due to this digital transformation, Rwanda has achieved remarkable improvements in tax administration efficiency. On the revenue side, the tax-to-GDP ratio rose 4.5 percentage points between 2004 and 2016 (to 16.6 percent). The number of registered taxpayers increased from 144,000 in 2011 (when the RRA made it possible to file and pay taxes online) to 242,000 in 2018. And collection costs fell from 3.5 per cent to 2.7 per cent of total revenue between 2010 and 2018 through RRA's intensive use of digital technology.

Source: Better Than Cash Alliance, 2020; Deloitte, 2020; KPMG, 2021; Parliament of Kenya, 2020.

Using digital technologies to mobilize and manage revenue (and to manage, downstream, public investment expenditure) can strengthen government capacity to implement and monitor effective tax and spending policies. Technology advancements, such as big data analytics, financial technology (fintech) and blockchain technology, can increase revenue and improve tax administration by lowering compliance and tax collection costs. For example, through big data analytics, revenue authorities can cost-effectively identify new sources of revenue and deepen the participation of current and potential taxpayers. Tax avoidance can be reduced if taxpayers use technologies as simple as mobile banking to file their taxes. Similarly, digital technology can promote greater fiscal discipline in public expenditure by better monitoring, enhancing spending transparency in real time and ensuring that such spending aligns with budgets requirements. All this raises accountability, efficiency and effectiveness in managing public assets.

Digital applications are being leveraged to promote innovation, entrepreneurship and the empowerment of women and youth. Mobile and digital solutions are helping to fill credit gaps and create productive jobs for youth. Despite that progress, increased public and private investment in information and communications technology (ICT) and related capabilities is needed to overcome challenges faced by trade and the private sector. Adapting and harmonizing technology law is also needed, including for intellectual property and data privacy, to keep up with rapid technological and social changes and so maximize the benefits of digitalization.

Fiscal policy must therefore support complementary policies that advance digitalization.

Fiscal policy must therefore support complementary policies that advance digitalization. Fiscal resources must be dedicated to investing in digital infrastructure and overcoming the digital divide in Africa through various policy measures (see chapter 6).

Fiscal policy and investment also have notable complementarities. Fiscal policy—if geared to investment rather than consumption-based spending—can achieve multiple development objectives. It can, for example, propel investment towards critical economic sectors, such as the knowledge economy, and thereby enhance the interlinkages with intellectual property policy. Fiscal policy can support blending in non-fiscal investment sources, if adequately designed. It can also reduce procyclical responses and regulate speculation by investors in boom and bust cycles that exacerbate a country's vulnerability, instead contributing to the resilience and predictability of long-term investment.

And, as discussed earlier, fiscal policy can use tax holidays and rebates to attract investment to targeted sectors, such as the knowledge sector. Fiscal policy for the information technology sector is particularly important. Tax laws should be adapted, together with IPR and data laws, to address emerging challenges, such as the pricing of sales within a company ("transfer pricing") in cyberspace. The efficient allocation of taxable profits to MNEs, small and medium-sized enterprises (SMEs) and transient workers in the borderless digital market becomes critical.

And the collection of fiscal revenue must be steered to boost the share of general expenditure on research and development (GERD) devoted to developing digital skills. Such skills relate to blockchain, big data, robotics, the internet of things (IoT), artificial intelligence (AI) and applications to such vital sectors/areas as trade, transport, health care, finance, government, energy, education and drug discovery and development.

Private sector development policy nexus

The third dimension under review in this chapter is private sector development. Advancing the private sector to support industrialization, which drives structural transformation, is a critical and fundamental policy objective in Africa. But industrialization requires large capital expenditure on productive assets. Domestic capital is insufficient, making inflows of foreign capital, among other sources, virtually indispensable.

Most intra-industry trade takes the form of cross-border intra-company exchanges, so foreign investment is often necessary to participate. But regional integration through the movement of African capital could create regional value chains that could move countries faster into production involving more processing and blending with global flows of goods and services. Regional production could offer a better cost structure for processing raw materials than global trade, allowing African countries to trade at the higher parts of value chains.

But moving up the production ladder is not easy. Transportation costs have fallen and flatlined, and digital space has boomed, with the world's largest companies often hailing from the tech sector. Moving up the value chain requires embedding local intangible content (chapter 5) —the activity where the most value addition and most opportunities for harnessing greater revenue lie. To harness the myriad opportunities presented by the booming digital economy, African countries must support their tech entrepreneurs in developing scalable products (see chapter 6). And important spillover effects flowing from foreign companies can help domestic suppliers and competitors, including SMEs, increase their competitiveness (see chapters 2 and 5).

To promote investment in sectors that might support industrialization, and ultimately structural transformation, African countries should develop and implement industrialization plans identifying and tapping their static comparative advantages (often based on cost-competitiveness). This strategy would increase the employment and purchasing power of domestic consumers, allowing further investment and greater specialization of domestic companies. It would also develop SMEs—the backbone of the private sector in Africa, as in many parts of the world. The industrialization plans should facilitate a movement towards production embedding more added value, benefiting from an educated, burgeoning young population and context-specific R&D carried out in cooperation with the private sector.

The AfCFTA will usher in an opportunity for continental free circulation of goods and services with embedded R&D content.

The AfCFTA will usher in an opportunity for continental free circulation of goods and services with embedded R&D content. The protocol on intellectual property could bolster efforts to mobilize African states to use the AfCFTA to implement the African Union Commission's Science, Technology and Innovation Strategy (STISA) 2024. That undertaking could support raising GERD to at least 1 per cent of GDP, as agreed by the African Union Executive Council in 2006,[604] so countries can make progress in innovation and technology and gradually escape the middle-income trap, a situation where an economy cannot attain a higher income level because of its inability to compete in high-value-add production. Increased local capabilities to absorb and learn from FDI and international R&D; enhanced creativity, innovation and competitiveness in global value-chains and increased contribution to value added and inclusive growth are parts of this promise. They are not too distant if a coordinated approach can be achieved through the effective implementation of STISA.

Industrialization is typically urban, so urban planning should encompass the development of production centres.[605] A successful industrial drive also requires agricultural modernization to create an economic environment conducive to forward and backward linkages. Rural development, typically via SMEs, is thus essential to industrialization.

Policies to support private sector development emphasizing investment include improvements in the domestic business environment. Such measures can range from improving bureaucratic efficiency and cutting red tape to reducing corruption and improving infrastructure (see below).[606] An appropriate mix of investment facilitation and protection (chapter 3), trade barrier reduction, and capital markets development can support industrial policy and so enhance private sector development.[607]

The AfCFTA, beyond integrating trade, envisages developing it on a foundation of industrialization and an infrastructure. To pursue that, hard and soft national and regional infrastructure development will be key to investment, trade and industrialization. Although involving the private sector in infrastructure could be beneficial and could unlock many previously inaccessible opportunities, African countries must make up-front investments in building the capacities needed to deal with complex public-private partnership contracts.

Ownership can matter.[608] Countries that have industrialized, such as Japan, Germany, South Korea, the United Kingdom, the United States and, to some extent, China have done so on the back of big national conglomerates. Some argue that other regions have failed to converge with their more advanced peers partly due to the global distribution of production, with intra-company relations decided outside their regions, creating a structural ceiling to the productive development achievable by relying on foreign capital. That supports fostering complementarity with domestic businesses, so local SMEs might become the next global players, if adequately supported (chapter 5). For example, private sector development policies could try to lower the costs of obtaining IP protection to encourage local youth and smaller entrepreneurs, who generally lack the required resources. This policy could incentivize them to bring exciting innovative ideas into the marketplace and develop new ones. So, the need for domestic firm development should be carefully balanced and complemented with the need for FDI (see figure 7.1).

This policy could incentivize them to bring exciting innovative ideas into the marketplace and develop new ones.

African industrialization must avoid being merely temporary, with assets losing their value due to climate change (becoming “stranded”). Greening the brown must be a foundation for Africa, particularly the private sector, as well as for several interrelated Sustainable Development Goals (SDGs): achieving industrialization (SDG 9), accessing affordable and clean energy, (SDG 7) and sustainable production and consumption (SDG 12). Smart regulation and the use of incentives to support the private sector in this task would ensure responsible stewardship, underpinning long-term competitiveness and so aligning socioeconomic development driven by industrialization with the environmental dimension of sustainable development.

References

AUC (African Union Commission). 2006. "Executive Council Decisions EX.CL/Dec.236 - 277 (VIII)." Addis Ababa: AUC. https://au.int/sites/default/files/decisions/9639-ex_cl_dec_236_-_277_viii_e.pdf.

Better Than Cash Alliance. 2020. "Tax Digitalization in Rwanda: Success Factors and Pathways Forward." https://btca-production-site.s3.amazonaws.com/documents/507/english_attachments/Tax_Digitalization_in_Rwanda_Success_Factors_and_Pathways_Forward.pdf?1606765795Chikwati, E., and E. Chasokela. 2019. "National Land Policy Formulation Process Launched." *The Herald*, 25 February. https://www.herald.co.zw/national-land-policy-formulation-process-launched/.

Deloitte. 2020. "The Income Tax (Digital Services Tax) Regulations 2020." https://www2.deloitte.com/content/dam/Deloitte/ke/Documents/tax/Kenya%20Tax%20Alert%20-%20The%20Income%20Tax%20(Digital%20Service%20Tax)%20Regulations%202020.pdf

Derenne, J., M. Merola and J. Rivas. 2013. *Competition Law in Times of Economic Crisis: In Need of Adjustment?* GCLC Annual Conference Series 4, Global Competition Law Centre.

ECA (United Nations Economic Commission for Africa). 2017. *Urbanization and Industrialization for Africa's Transformation*. Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa). 2018. *African Governance Report V: Natural Resource Governance and Domestic Revenue Mobilization for Structural Transformation*. Addis Ababa: ECA.

ECA (United Nations Economic Commission for Africa). 2020. *Drivers for Boosting Intra-African Investment Flows towards Africa's Transformation*. Addis Ababa: ECA. https://www.uneca.org/drivers-boosting-intra-african-investment-flows-towards-africas-transformation.

Hondora, T. 2012. "Off the Beaten Track into the Savannah: The Mike Campbell (Pvt) Ltd v. The Republic of Zimbabwe Ruling Imperils SADC Investment Law." http://dx.doi.org/10.2139/ssrn.2117318.

KPMG. 2021. "Digital Services Tax." https://home.kpmg/content/dam/kpmg/ke/pdf/tax/Tax_Alert_on_Digital_Services_Tax_updated_2021.pdf

Levinsohn, J. 1994. "Competition Policy and International Trade." Working Paper 4972, National Bureau of Economic Research, Cambridge, MA.

Mupawose, R. M., and E. T. Chengu. n.d. "Determination of Land Policy in Zimbabwe." United Nations University. http://archive.unu.edu/unupress/unupbooks/80604e/80604E06.htm. Accessed 13 October 2020.

Parliament of Kenya. (2020). "Kenya Gazette Supplement No. 66 (National Assembly Bills No. 10)." http://www.parliament.go.ke/sites/default/files/2020-05/Finance%20Bill%2C%202020_compressed.pdf

Tinbergen, J. 1956. *Economic Policy: Principles and Design*. North-Holland.

Towindo, L. 2020. "Government Moves to Clean Anomalies on Farms." *The Sunday Mail*, 8 March. https://www.sundaymail.co.zw/some-farmers-to-get-land-back-as-govt-moves-to-clean-anomalies-on-farms.

UNCTAD (United Nations Conference on Trade and Development). 2015. *Economic Development in Africa Report: Unlocking the Potential of Africa's Services Trade for Growth and Development*. Geneva: UNCTAD. https://unctad.org/en/PublicationsLibrary/aldcafrica2015_en.pdf.

End notes

600 UNCTAD, 2015.
601 ECA, 2020.
602 Derenne, Merola and Rivas, 2013.
603 Levinsohn, 1994.
604 AUC, 2006
605 ECA, 2017.
606 ECA, 2018.
607 ECA, 2020.

Chapter 8 COVID–19 and investment in Africa

Since it emerged in December 2019, COVID–19 has taken lives and damaged health across the world. To date,[609] 117 million people have been infected and 2.6 million have died from the disease.[610] In Africa,[611] there have been close to 4 million cases and 106,000 deaths.[612] Egypt, Ethiopia, Morocco, South Africa and Tunisia are the most severely affected African countries. By March 2021, vaccination programmes started in several countries on the continent, but the quantity of vaccines available and the speed of deployment have been uneven.[613] With successive surges of infection, COVID–19 could remain a major risk to health and economies in Africa for some time.

More than a health emergency

The health consequences are tragic for the continent, and COVID–19's impact goes further. The pandemic is an "economic disaster, a security disaster and a humanitarian disaster—and they're all interrelated," according to John Nkengasong, the head of the Africa Centres for Disease Control and Prevention.[614]

The economic cost has been severe and, without drastic actions by policymakers, could continue to be so. The Economic Commission for Africa projected that GDP growth would drop from 3.2 per cent in 2019 to between 1.8 and −2.6 per cent in 2020.[615] The International Monetary Fund (IMF) revised its 2020 GDP growth forecast for Africa (excluding North Africa) to −3 per cent, the region's worst performance since the IMF started keeping a record.[616] Those are preliminary estimates, which are frequently reassessed with significant downside risk due to the uncertain depth and duration of the pandemic.

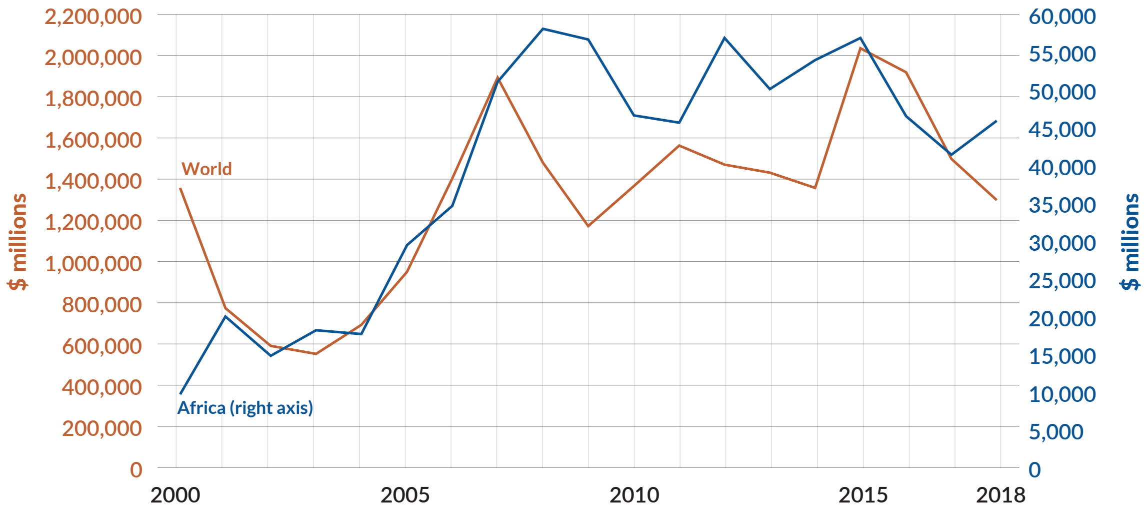
The pandemic led to a fall in foreign direct investment (FDI) in Africa in 2020 and will likely continue to put downward pressure on investment in 2021. The reduction in foreign investment inflows, a key source of financing for the continent, could harm Africa's development. FDI could play an important role in alleviating the immediate economic impact of the pandemic and supporting economic recovery through technology transfers, job creation and linking Africa to global value chains (GVCs).

Foreign direct investment flows before COVID–19

Global FDI was already slowing before the coronavirus outbreak. In 2018, worldwide FDI inflows were $1.3 trillion (figure 8.1), lower than for any other year since the aftermath of the 2008 global financial crisis.[617] In Africa, investment inflows peaked in 2008, dropped steeply for three consecutive years following the global financial crisis, and recovered to $57 billion, nearly their pre-crisis level, by 2015. They fell to $41 billion in 2017 before rising to $46 billion in 2018.[618] The

2017 drop likely results from both global factors—decreasing returns on FDI, a shift towards asset-light investments enabled by digitalization, an erosion of investor confidence, and US tax policy changes to encourage capital repatriation[619]—and specific political, macroeconomic and regulatory uncertainties on the continent. (See chapter 1 for FDI trends in Africa).

Figure 8.1 FDI inflows, 2000–2018



Source: UNCTADstat.

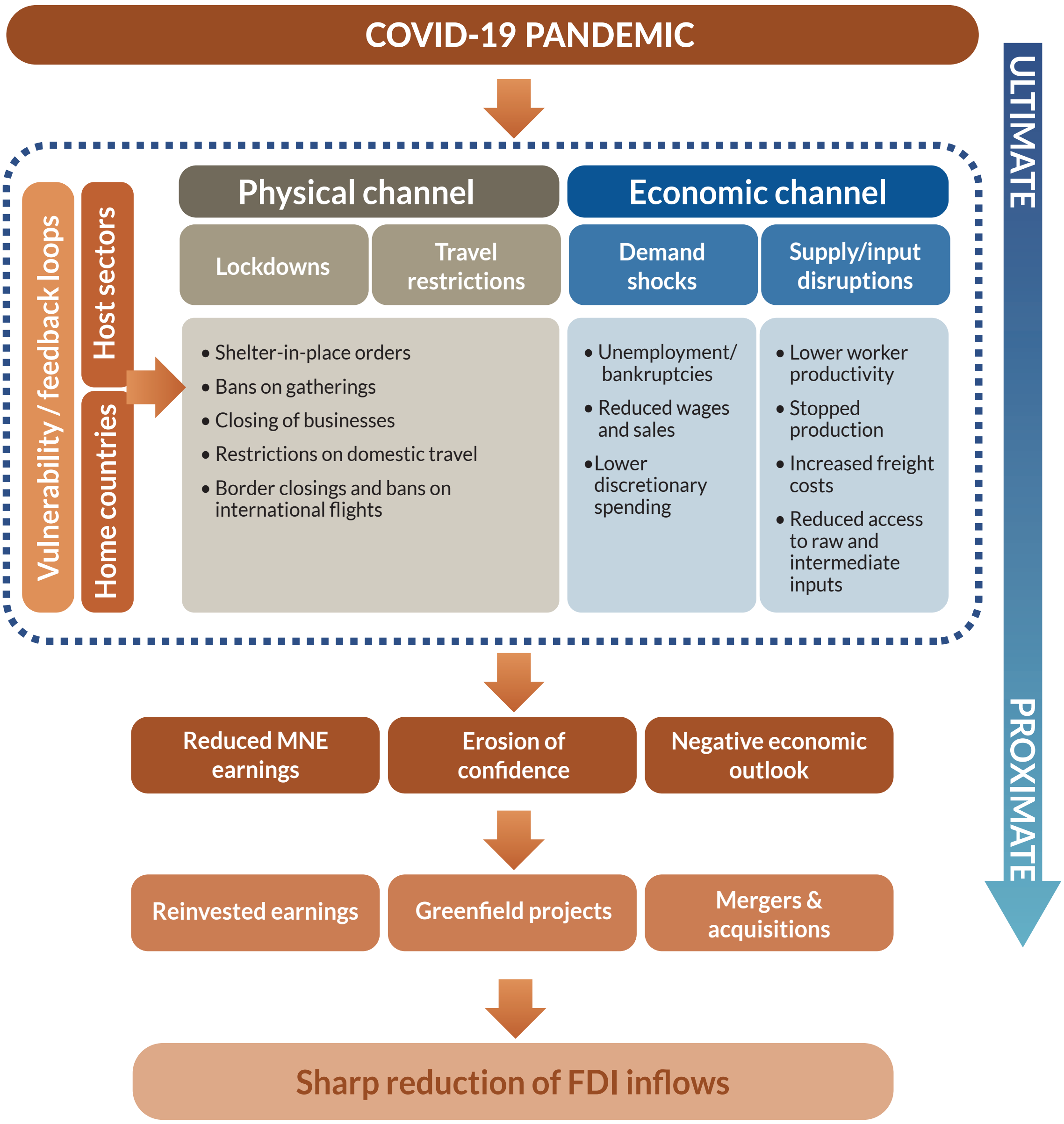
COVID–19's impact on foreign direct investment in Africa

Channels of transmission

The pandemic is the primary cause of the decline in FDI in Africa. By 13 May 2020, every country on the continent had confirmed cases.[620] Since then, Africa has experienced multiple outbreaks of infections. To protect the lives and health of their citizens, countries have imposed varying levels of lockdowns and travel restrictions. Businesses have closed and re-opened, and workers are asked to work from home. Economic activities have contracted. On the demand side, consumers and firms with actual or expected reduced earnings cut down discretionary spending. And on the supply side, the pandemic has disrupted production and global supply chains, affecting firms' access to raw materials and intermediate inputs.

The impact on FDI is amplified by specific vulnerabilities in Africa (figure 8.2). Some key host sectors (particularly oil and gas, manufacturing and travel and tourism) have been hit the hardest by plunging demand and prices. Major investor countries and regions—China, Europe and the United States—are among the economies most affected by COVID–19. These factors have eroded investor confidence, prompted a generally negative economic outlook and severely reduced the earnings of multinational enterprises (MNEs). Investors are unable or unwilling to make new investments, decreasing all the key components of FDI: reinvested earnings, greenfield projects, and mergers and acquisitions (M&A). Altogether, FDI inflows plummeted in 2020 and could continue to fall in 2021 (figure 8.2).

Figure 8.2 Channels of COVID–19 effects on foreign direct investment



Source: ECA

Lockdowns and travel restrictions

African countries have introduced measures to restrict movement within their own borders, including school and business closures, cancellations of public events, bans on large gatherings and closing or reducing public transport capacities. By 4 May 2020, Africa had 42 localized or national lockdowns, 38 of them for more than three weeks.[621] Although some countries have begun easing lockdowns and movement restrictions, the World Health Organization has urged United Nations Member States to put in place effective surveillance systems to detect any spikes in new infections and to adapt their opening-up measures accordingly.[622]

Land and air borders were closed, and air links between the continent and international destinations significantly reduced. For example, before the pandemic, an average of eight flights connected destinations in China and Africa every day, up from one a day in 2000.[623] In 2019, Ethiopian Airlines operated daily flights from its Addis Ababa hub to Beijing, Guangzhou, Hong Kong and Shanghai and three flights a week to Chengdu.[624] In contrast, at the end of May 2020, it only offered one flight a week to Shanghai, though the number of its daily flights to China has since increased.

Domestic and international mobility restrictions affect FDI in two ways. First, shuttering factories, workplaces and construction sites delays investment projects. Second, disrupted international flights suspend or cancel trips to Africa by expatriate workers—a workforce that FDI projects often rely on, especially in technical and managerial positions—interrupting the implementation of such projects.

Demand shocks and supply/input disruptions

The COVID–19 pandemic has resulted in severe, simultaneous demand and supply shocks. Consumers and businesses spend less, due to actual or anticipated income loss. And workers and firms produce less, since health risks force them to adopt alternative working arrangements and to close manufacturing plants.[625]

Survey results offer worrisome pictures of the pandemic's impact on businesses' current performance and future outlook. In a global pulse survey in March 2020, 80 per cent of MNEs with investments in developing countries said their operations were affected by the coronavirus in the past three months. The same proportion of respondents reported lower revenues and profits (by 40 per cent on average), while three quarters reported that supply chain reliability had deteriorated.[626] Forward-looking sentiments are just as grim: 85 per cent of the MNEs surveyed expected business conditions to worsen in the following three months.

In Africa, an April 2020 survey found that, on average, African firms were operating at less than half capacity, with micro, small, and medium-sized enterprises being the most affected.[627] A plunge in demand was the biggest challenge they faced. Supply-side issues—business closures, logistical problems, disruptions in access to raw materials and lower worker productivity due to work-from-home arrangements—were also a hindrance.

Demand and supply shocks reduce MNE earnings, thus limiting their ability to make new investments and even forcing some of them to divest. The shocks also lower returns on FDI, making it less attractive. In the longer term, uncertain business outlooks and heightened risks lead investors to adjust their portfolios towards safer assets and adopt a wait-and-see approach.

Other transmission channels

In addition to the physical and economic disruptions to foreign investment in Africa just described, the pandemic will act through various secondary means. First, COVID–19 has wreaked havoc on financial markets. In the immediate aftermath of the pandemic, investors withdrew record amounts of portfolio investment from developing countries, leading to deep currency depreciations and widening sovereign bond spreads.[628] The exchange rate and sovereign bond problems pose additional risks for longer-term investors, since fluctuating currencies and the potential for capital control measures could reduce returns on FDI and make repatriating capital more difficult.

Delays in privatization plans are likely to defer an important source of FDI flows. A number of African governments were in the process of privatizing key sectors of the economy before the pandemic struck. For example, Ethiopia had planned to finalize the sale of a stake in state-owned Ethio Telecom to private investors and to award two additional telecom licences by March 2020, but winning bids had not yet been announced by March 2021.[629] COVID–19 has redirected public resources and priorities elsewhere and obliged governments to more carefully review merger and acquisitions transactions in strategic sectors.

The coronavirus may also accelerate pre-pandemic trends towards reshoring and value chain shortening caused by a downturn in global manufacturing and rising trade tensions. The pandemic has exposed weaknesses in global value chains as global transport links are severed and multiple countries ban the export of essential medical equipment and supplies. After the pandemic, some businesses may reassess their business models and reduce the distance between production and their home markets. MNEs may shift further to automated production and turn from using China as the sole or dominant supplier.[630] These changes could profoundly affect the African investment landscape but are ambiguous. While robotization—particularly of the lower rungs of production—would threaten labour-intensive models of industrialization, MNEs' increased appetite for alternative chains of production to China could unlock new opportunities for African economies.

Vulnerabilities and feedback loops

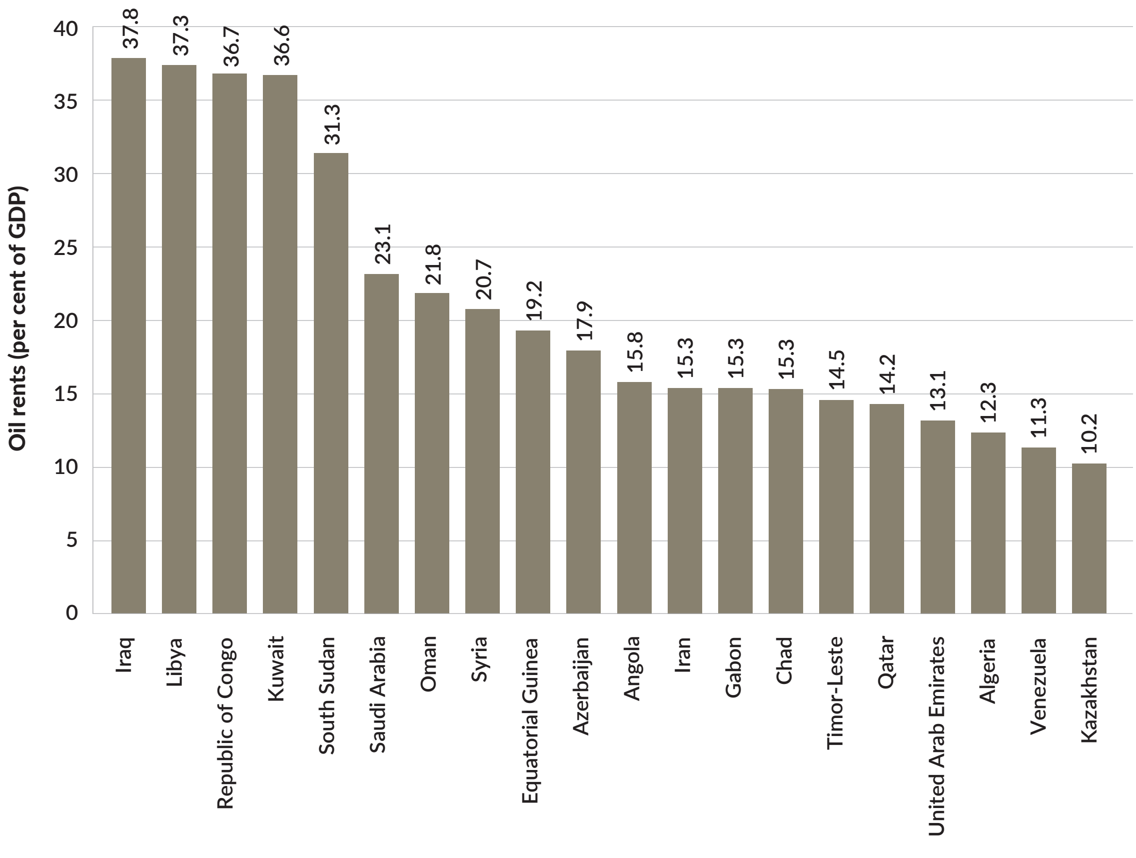
Oil and tourism as vulnerable sectors

Nearly all economies have experienced lower FDI as COVID–19 works its way through the physical and economic transmission channels. But just as the coronavirus affects patients with pre-existing conditions more severely, the final magnitude of the pandemic's impact on FDI depends on pre-pandemic vulnerabilities in different countries and regions.

Africa's dependence on the oil and tourism sectors creates a feedback loop that amplifies the pandemic's impact on FDI in Africa. Oil exporters (and commodity exporters more generally) and economies that rely on tourism receipts are expected to be among those hit worst by COVID–19, as world oil prices have crashed to historic lows and international travel has come to a standstill not seen in decades.[631]

Of the world's 20 countries most dependent on oil revenues, 8 are in Africa (figure 8.3). Since the onset of the pandemic, oil prices have slumped to the lowest levels in decades, driven by both slowing global demand and the failure of major oil producers to agree on production cuts.[632] And with commodity prices falling sharply, 13 African countries are projected to suffer an erosion in terms of trade in 2020, with 6 experiencing a fall of more than 10 per cent.[633] The IMF projected the GDP of African oil-exporting countries would contract by –2.8 per cent in 2020, compared with 1.8 per cent growth in 2019.[634]

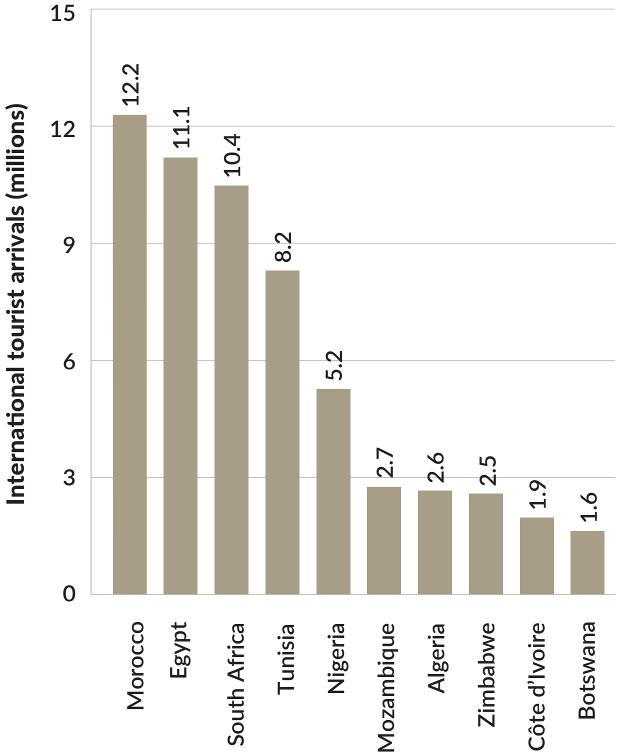
Figure 8.3 Oil rents as a percentage of GDP, top 20 countries, 2017



Source: World Bank, World Development Indicators.
Note: The South Sudan figure is for 2016, Syria figure is for 2007 and the Venezuela figure is for 2014.

COVID–19 has substantially harmed Africa's top destinations for tourist arrivals and the countries most dependent on tourism. The continent's largest tourist stops (figure 8.4) are countries in North and Southern Africa with high numbers of confirmed COVID–19 cases and deaths. Six African economies depend heavily on receipts from tourism, with the sector accounting for more than 5 per cent of GDP and 30 per cent of exports.[635] Those countries will be severely affected by the pandemic: after their GDP growth was 3.9 per cent on average in 2019, it was projected at −5.1 per cent for 2020.[636]

Figure 8.4 International tourist arrivals, top 10 African countries, 2018



Source: World Bank, World Development Indicators.

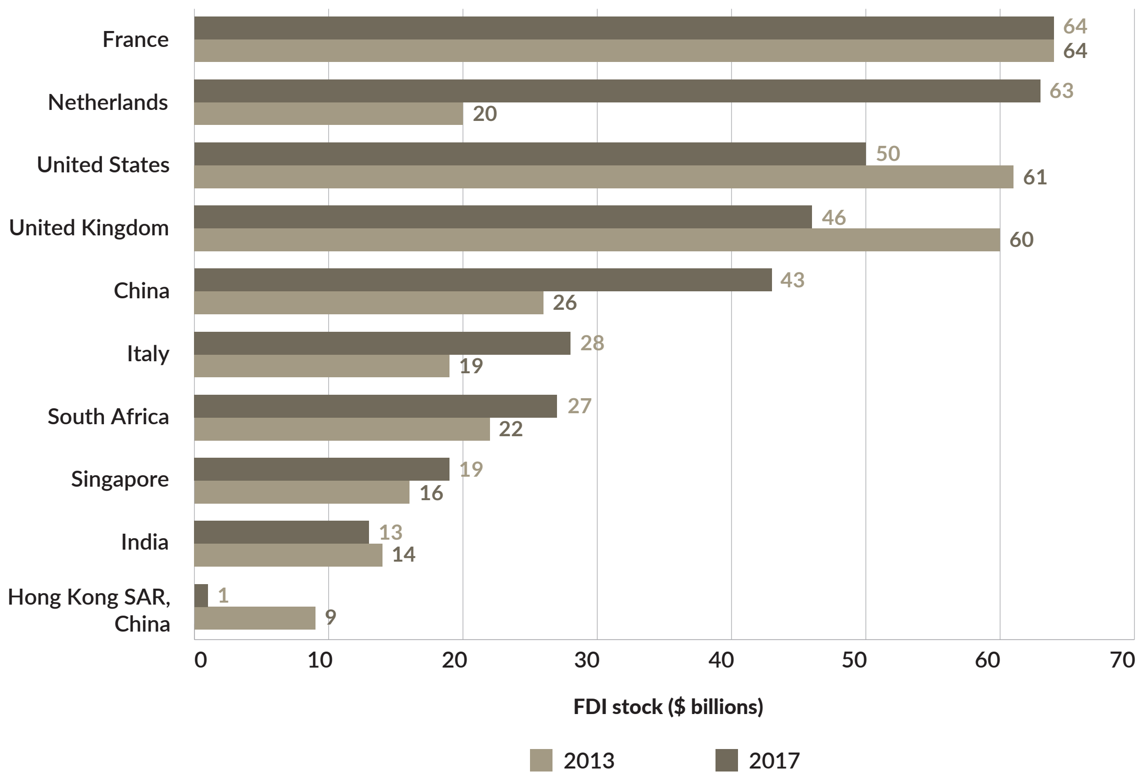
Note: Nigeria figure is for 2016, Botswana figure is for 2017.

Before the pandemic, except in some diversified countries, FDI in Africa was still largely resource-seeking. The year 2018 saw big-ticket foreign investments in oil and gas exploration and production and petroleum refining in major host countries such as Republic of Congo, Egypt and Ethiopia.[637] And given Africa's increasing popularity as a tourist destination, investments in travel and tourism were on the rise, reaching $28.2 billion in 2017.[638] COVID–19 is dampening investment inflows into those sectors.

COVID–19's economic impact on major home countries/regions

The pandemic's negative effect on foreign investment is also magnified by the continent's close trade and investment links with countries that have been devastated by COVID–19. The largest investors in Africa (figure 8.5) are among the world's largest epicentres of the pandemic (table 8.1).

Figure 8.5 Top home economies for foreign direct investment in Africa



Source: UNCTAD, 2019.

Table 8.1 Top 30 countries for COVID–19 cases

COUNTRY	NUMBER OF CONFIRMED CASES	COUNTRY	NUMBER OF CONFIRMED CASES
United States	28,999,542	South Africa	1,521,068
India	11,229,398	Ukraine	1,455,421
Brazil	11,019,344	Indonesia	1,386,556
Russia	4,284,408	Peru	1,371,176
United Kingdom	4,231,166	Czech Republic	1,325,291
France	3,964,078	Netherlands	1,135,258
Spain	3,149,012	Canada	892,199
Italy	3,067,486	Chile	855,785
Turkey	2,780,417	Romania	828,283
Germany	2,510,021	Portugal	810,094
Colombia	2,276,656	Israel	803,260
Argentina	2,149,636	Belgium	787,891
Mexico	2,128,600	Iraq	726,548
Poland	1,801,083	Sweden	684,961
Iran	1,689,692	Philippines	597,763

Source: Johns Hopkins, n.d.
Note: Updated 8 March 2021.

Economic conditions in the pandemic epicentres have deteriorated. China was the first country to report cases in December 2019. The extreme government measures to curb the spread of the disease proved largely effective, but the resultant disruptions to China's economic activities slowed its growth in 2020. France, Italy and the United Kingdom all posted negative growth in 2020, and the US unemployment rate reached its highest level since the Great Depression in 2020, though it has since recovered. COVID–19 has not spared the developing world: infections have been high in many developing countries, South Africa and India among them. Both economies contracted in 2020.

As the economic costs of the pandemic begin to hurt the investor countries, their MNEs saw significant slumps in sales and profits. Some have gone bankrupt. Their capacity to reinvest earnings in African affiliates and appetite for new investment projects are reduced, restricting future FDI inflows to the continent.

Magnitude of impact

The direction of COVID–19's immediate effect on FDI is clear: investment inflows into Africa have fallen sharply and could continue to fall in the immediate term. Longer-term prospects depend on the scale and effectiveness of policy responses. As an exogenous health-induced shock, COVID–19's epidemiological trajectory will largely determine its eventual economic costs. Since the pandemic is still unfolding in Africa, any attempt at this point to quantify its impact on investment flows is necessarily inaccurate and is constantly being revised (usually downward).

In March 2020, the United Nations Conference on Trade and Development (UNCTAD) estimated that FDI could plummet by 30–40 per cent in 2020–2021, reaching the lowest level in two decades.[639] The world's top 5,000 MNEs revised their earnings estimates for 2020 downward by 30 per cent on average. They also expected business operations to be affected beyond 2020. Since those MNEs account for a significant portion of foreign investment, their lower profits will directly cut into reinvested earnings in their affiliates, an important component of global FDI. Mergers and acquisitions are also slowing sharply—they were expected to drop 70 per cent in the first quarter of 2020. And site closures and production interruptions are causing investors to postpone or cancel both greenfield projects and expansion investments.

Forecasts by the Organisation for Economic Co-operation and Development (OECD) in May 2020 were broadly similar.[640] FDI was expected to drop 30 per cent worldwide in 2020 due to declines in reinvested earnings and adjustments in equity capital flows, including divestments. The decline in FDI accelerates the downward trend already in place before the pandemic. In the best case, foreign investment will recover to pre-coronavirus levels by the end of 2021. But in two other, less optimistic scenarios, the slump will last longer, and eventual recovery will depend on the effectiveness of public health measures to contain the pandemic and prevent its recurrence. The OECD also projected inflows to drop more in developing countries than in developed countries due to the concentration of FDI in primary and manufacturing sectors severely affected by the pandemic.

In a January 2021 update, UNCTAD reported that global FDI flows fell 42 per cent from $1.5 trillion in 2019 to $859 billion in 2020—a level 30 per cent lower than the trough reached in 2009 after the global financial crisis.[641] In Africa, foreign investment fell 18 per cent from $46 billion in 2019 to $38 billion in 2020,[642] a level not seen for at least a decade—a dip deeper than that in developing economies (12 per cent)[643] but less severe than either the fall in developed countries (61 per cent)[644] or UNCTAD's original projections (25—40 per cent).[645]

Forecasts by the Organisation for Economic Co-operation and Development (OECD) in May 2020 were broadly similar.

Policy implications

COVID–19 has plunged the world into the deepest health and economic crisis in living memory. The seriousness of the challenges posed by the pandemic demands a whole-of-government response. Although fiscal and monetary policies have been at the forefront of the economic response, investment policies also have a key role. Keeping businesses and supply chains running can help save lives now, and maintaining smooth FDI flows can support a strong recovery.

Short term: Protect lives and livelihoods

In the short run, the main objectives of investment policies should be to provide investors with relevant information and operational support, prevent hostile foreign takeovers of companies in strategic industries, encourage investment in key COVID–19-related industries and incentivize the production of essential healthcare goods and services.

As FDI flows dry up in the short term, investment promotion agencies (IPAs) should shift their priorities from marketing to attract new investments to retaining already launched investment projects and providing services for them. An obvious service is providing investors with relevant and up-to-date information on lockdown measures, workplace health regulations and available government supports. Sadly, African IPAs are falling short: fewer than half had COVID–19 information on their websites as of early April 2020.[646] IPAs should also provide maximum administrative assistance to investors, including helping them obtain any financial support they are entitled to under economic stimulus plans. Where resources are scarce, governments can ease investors' operational pain by prioritizing their access to raw materials and essential utilities such as electricity and water. And as alternative working arrangements become the norm for many businesses, internet access is critical. Extending business visas and work permits for foreign workers can also help investors keep vital staff on the grounds.

Countries in Africa should also use investment policies to safeguard domestic companies and industries from opportunistic takeovers. Under current market conditions, marked by simultaneous and to some extent mutually reinforcing demand and supply shocks, the share prices of public companies and the valuations of private ones are plunging, making them vulnerable to acquisition by hostile foreign investors at bargain-basement prices. Policy should focus on protecting firms in healthcare, pharmaceuticals and medical supplies by designating them as strategic sectors subject to lower M&A notification thresholds and more stringent reviews. Increased merger activity could result in more concentrated markets with less competition. Regulators must be vigilant in guarding against anti-competitive business practices and the abuse of dominant positions,

Countries in Africa should also use investment policies to safeguard domestic companies and industries from opportunistic takeovers.

since weak companies that have not been bailed out will likely exit the market, while stronger peers will increase their market share. Where strategic companies are in financial distress, governments should consider taking ownership stakes directly, as opposed to privatization, which is more efficiency-driven and not based on protecting vulnerable consumers. Governments and IPAs need to clearly communicate to investors that these extraordinary measures are required by the circumstances of the pandemic and will be transparent, temporary and non-discriminatory.

IPAs can contribute to this effort by using their contacts to reach out to investors and guiding them through bureaucratic red tape to obtain any necessary permits or authorizations quickly.

Countries must do all they can to drive up investment in producing essential medical supplies by helping existing manufacturers expand capacity and incentivizing other manufacturers to convert production lines to this purpose. Such activities require major spending on fixed assets at a time when appetites for risk are low. Governments should help reduce risks for businesses either directly (for example, by subsidizing capital spending or making advanced purchase agreements) or indirectly (for example, by loosening tax rules to allow faster depreciation of fixed asset investments). IPAs can contribute to this effort by using their contacts to reach out to investors and guiding them through bureaucratic red tape to obtain any necessary permits or authorizations quickly.

Pooled procurement and production can be used to fill any supply shortfalls from domestic production. Africa has proved it can enhance continental capacity to detect and respond to disease threats by deepening regional cooperation through the Africa Centres for Disease Control. It must now do the same for access to medicines. Governments must fast-track approvals for pharmaceutical products, expedite regulatory and quality standards harmonization and accelerate the launch of the African Medicine Agency (AMA). With these measures, Africa can leverage its considerable economies of scale and collective bargaining power to buy essential drugs and medical supplies more affordably. In the longer term, it will also be able to position itself as an attractive investment destination for large pharmaceutical companies.

Medium term: End lockdowns safely

Investment policies can help societies end painful lockdowns safely in two ways: by preparing government services for a future that is more digital and by unlocking access to universally accessible vaccines.

As soon and as much as possible, IPAs and other government agencies should move public services online. The process began before COVID–19. For example, through the electronic investment guides (iGuides; see box 1.1 in chapter 1)—online portals jointly developed by governments, UNCTAD and ECA—investors can access updated information on investment opportunities, regulatory requirements and business costs in various African countries. At the regional level, the Common Market for Eastern and Southern Africa Digital Free Trade Area allows exporters to apply electronically for certificates of origin. Now that the pandemic has closed government offices and service points, a renewed push must be given to further digitizing public services. IPAs can start by conducting an investment life cycle analysis and map out end-to-end all the bureaucratic processes investors must go through: discovering information on investment laws, regulations and incentives; registering businesses; applying for licences and permits; paying taxes; filing regulatory reports; obtaining export documentation and so on. Governments can then prioritize for online migration services that are cumbersome for investors to access offline but fairly easy to offer online. IPAs should also take full advantage of digital technologies (video conferencing, virtual reality solutions and so on) for important investment promotion and facilitation activities, such as investor meetings and site visits.

Africa has shown ingenuity in responding to the pandemic. A team of engineering students in Tunisia used 3D-printing technology to produce medical face masks and a ventilator prototype, and scientists in Senegal developed COVID–19 diagnostic kits that cost $1 and can give results in 10 minutes.[647] As the world turns its attention and resources towards developing vaccines for the virus, Africa must be an integral part of vaccine research, trials, manufacturing and distribution. To give vaccine research a boost, African governments must deliver on their commitment to raise spending on research and development to 1 per cent of GDP.[648] They should also help researchers unlock additional funding through international mechanisms such as the $2 billion being mobilized by the Coalition for Epidemic Preparedness Innovations.[649] After the successful development and testing of several vaccines, producing enough doses and distributing them quickly pose an immense logistical challenge. Countries must continue to strengthen national distribution systems. And building redundancy into vaccine supply chains by encouraging manufacturing close to where it is needed on the continent is crucial due to disruptions in global transportation and logistics. IPAs across Africa should collaborate closely to attract investment into vaccine production and supply, potentially using policy tools such as pooled procurement, capital expenditure subsidies and advanced purchase agreements, as discussed above.

Long term: Build back better

Once COVID–19 subsides, global competition for FDI will be intense. But on the plus side, investors will be looking to repair and build redundancy in severely damaged global value chains. Countries in Africa should incorporate the pandemic's lessons into investment policy formulation and reforms to prepare better for future crises.

Some mitigation measures taken by governments during the pandemic could conflict with provisions of International Investment Agreements (IIAs) and investor–state contracts meant to protect investors (see chapter 3). For example, restricting exports or compelling firms to repurpose production lines to make essential medical supplies might violate “fair and equal treatment” or “expropriation” clauses, exposing states to lengthy and costly investor–state dispute settlement proceedings. After the pandemic, governments in Africa should kickstart reforms of existing IIAs to ensure sufficient policy space to respond to global crises, including by enhancing governments’ right to regulate in the public interest. The United Nations Conference on Trade and Development publication *Investment policy monitor: Special issue—investment policy responses to the COVID–19 pandemic* highlights IIA provisions that are prime candidates for reform.[650] These considerations should also inform the negotiations of the Investment Protocol in Phase II of the African Continental Free Trade Area (AfCFTA).

These considerations should also inform the negotiations of the Investment Protocol in Phase II of the African Continental Free Trade Area (AfCFTA).

A crisis should not be allowed to go to waste, it is often said. Africa can take advantage of its experience with COVID–19 to better prepare for a world increasingly at risk of pandemics, natural disasters, economic crises and environmental catastrophes. Investment policies can play a critical role in protecting supply chains and strengthening the continent’s readiness to respond to future crises. The disruptions in global value chains and the protectionist tendencies witnessed during COVID–19 highlight the urgent need for Africa to develop regional value chains and reduce its external economic dependence. Governments should work closely together to identify strategic industries (pharmaceuticals, basic foods and others) where increased production on the continent should be encouraged. Pooled demand can also be leveraged to buy components or finished products from multiple sources, allowing Africa to build redundancy into essential supply chains. IPAs must reshape their strategies and operations in line with this broader economic imperative.

Continent-wide collective actions become even more important in a post-pandemic world of increased competition and uncertainty. The AfCFTA must be at the forefront of Africa’s economic recovery: as the worst of COVID–19 passes, AU Member States must refocus on Phase I implementation and Phase II negotiations. The Investment Protocol, in particular, will boost FDI inflows by harmonizing rules and creating a level playing field for investors. Further, COVID–19 has catalysed changes in consumer behaviour and the future of work, quickly moving employment and economic activities online. This transition presents Africa with a unique opportunity to capture the benefits of e-commerce and digitalization. In this light, the 13th Extraordinary Session of the African Union Heads of State and Government on 5 December 2020 decided to merge the negotiations of the AfCFTA E-commerce Protocol with those of the Phase II protocols on investment, competition and intellectual property. Africa, by leveraging its 1.2 billion–strong continental market, will be well positioned as an attractive FDI host.

References

Africa CDC (Africa Centres for Disease Control and Prevention). n.d. "Coronavirus Disease 2019 (COVID–19)." https://africacdc.org/covid-19/. Accessed 8 March 2021.

African Development Bank. 2018. *African Tourism Monitor 2018: The High 5s—Tourism as a Pathway to Industrialization, Integration, Quality of Life, Agriculture, and Powering Up Africa*. Abidjan, Côte d'Ivoire: African Development Bank. https://www.afdb.org/en/documents/africa-tourism-monitor-2018.

AUC (African Union Commission). 2006. "Executive Council Decisions EX.CL/Dec.236 - 277 (VIII)." Addis Ababa: AUC. https://au.int/sites/default/files/decisions/9639-ex_cl_dec_236_-_277_viii_e.pdf.

AUC (African Union Commission). 2020. "Impact of the Coronavirus (COVID–19) on the African Economy." Addis Ababa: AUC.

CEPI (Coalition for Epidemic Preparedness Innovations). 2020. "$2 Billion Required to Develop a Vaccine against the COVID–19 Virus." Press Release, 14 March. https://cepi.net/news_cepi/2-billion-required-to-develop-a-vaccine-against-the-COVID–19-virus-2/.

Economist. 2020. "COVID–19's Blow to World Trade Is a Heavy One." 14 May. https://www.economist.com/briefing/2020/05/14/COVID–19s-blow-to-world-trade-is-a-heavy-one

ECA (United Nations Economic Commission for Africa). 2020a. *COVID–19 in Africa: Protecting Lives and Economies*. Addis Ababa: ECA. https://www.uneca.org/publications/COVID–19-africa-protecting-lives-and-economies.

ECA (United Nations Economic Commission for Africa). 2020b. *COVID–19: Lockdown Exit Strategies for Africa*. Addis Ababa: ECA. https://www.uneca.org/publications/COVID–19-lockdown-exit-strategies-africa.

Giles, C., and P. Mwai. 2020. "Coronavirus: Infections Rising amid Economic Downturn in Africa." *BBC*, 13 July. https://www.bbc.com/news/world-africa-52395976.

Gopinath, G. 2020. "Limiting the Economic Fallout of the Coronavirus with Large Targeted Policies." International Monetary Fund blog, 9 March. https://blogs.imf.org/2020/03/09/limiting-the-economic-fallout-of-the-coronavirus-with-large-targeted-policies/.

Haque, N. 2020. "Senegal Trials Begin for $1 COVID–19 Test Kit." *Al Jazeera*, 28 April. https://www.aljazeera.com/news/2020/04/senegal-trials-1-COVID–19-test-kit-200428132313740.html.

Holmey, O. 2020. "Coronavirus: 'We've Gone from Looming Threat to Looming Disaster.'" *The African Report*, 23 March. https://www.theafricareport.com/24924/coronavirus-weve-gone-from-looming-threat-to-looming-disaster/.

IMF (International Monetary Fund). 2020a. *Regional Economic Outlook, Sub-Saharan Africa: COVID–19: An Unprecedented Threat to Development*. Washington, DC: IMF. https://www.elibrary.imf.org/doc/IMF086/28915-9781513536835/28915-9781513536835/Other_formats/Source_PDF/28915-9781513538495.pdf.

IMF (International Monetary Fund). 2020b. *Regional Economic Outlook, Sub-Saharan Africa: A Difficult Road to Recovery*. Washington, DC: IMF. https://www.imf.org/en/Publications/REO/SSA/Issues/2020/10/22/regional-economic-outlook-sub-saharan-africa.

Jawad, R., and M. Smith-Walters. 2020. "Coronavirus: The Students That Are Printing PPE Masks in Tunisia." *BBC*, 14 April. https://www.bbc.com/news/av/world-africa-52236678/coronavirus-the-students-that-are-printing-ppe-masks-in-tunisia.

Johns Hopkins. n.d. *COVID–19 Dashboard*. Baltimore, MD: Johns Hopkins University. https://coronavirus.jhu.edu/map.html. Accessed 8 March 2021.

OECD (Organisation for Economic Co-operation and Development). 2020. "Foreign Direct Investment Flows in the Time of COVID–19." Paris: OECD Publishing. https://www.oecd.org/coronavirus/policy-responses/foreign-direct-investment-flows-in-the-time-of-covid-19-a2fa20c4/.

Mwai, P. 2021. "COVID–19 Africa: Who is Getting the Vaccine?" *BBC*, 6 March. https://www.bbc.co.uk/news/56100076.

Shaban, A. 2020. "Africa COVID–19 Stats." *Africa News*. https://www.africanews.com/2020/06/07/coronavirus-in-africa-breakdown-of-infected-virus-free-countries/. Accessed 8 June 2020.

Statista. 2020. "Projected Coronavirus (COVID–19) Impact Index by Industry and Dimension." https://www.statista.com/statistics/1106302/coronavirus-impact-index-by-industry-2020/. Accessed 3 February 2021.

UNCTAD (United Nations Conference on Trade and Development). 2019. *World Investment Report 2019: Special Economic Zones*. Geneva: UNCTAD. https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf.

UNCTAD (United Nations Conference on Trade and Development). 2020a. "The COVID–19 Shock to Developing Countries." UNCTAD Trade and Development Update March 2020, Geneva. https://unctad.org/en/PublicationsLibrary/gds_tdr2019_covid2_en.pdf.

UNCTAD (United Nations Conference on Trade and Development). 2020b. "Investment Trends Monitor, March 2020: Impact of the COVID–19 Pandemic on Global FDI and GVCs." Global Investment Trends Monitor 35, UNCTAD, Geneva. https://unctad.org/en/PublicationsLibrary/diaeiainf2020d3_en.pdf.

UNCTAD (United Nations Conference on Trade and Development). 2020c. "Investment Policy Monitor, May 2020: Investment Policy Responses to the COVID–19 Pandemic." Investment Policy Monitor Special Issue 4, UNCTAD, Geneva. https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d3_en.pdf.

UNCTAD (United Nations Conference on Trade and Development). 2020d. *World Investment Report 2020: International Production beyond the Pandemic*. Geneva: UNCTAD. https://unctad.org/en/PublicationsLibrary/wir2020_en.pdf.

UNCTAD (United Nations Conference on Trade and Development). 2020e. "Investment Trends Monitor, January 2021: Global FDI Flows Down 42% in 2020." Global Investment Trends Monitor 38, UNCTAD, Geneva. https://unctad.org/system/files/official-document/diaeiainf2021d1_en.pdf.

WHO (World Health Organization). 2020. "WHO Urges Caution as Countries in Africa Ease Lockdowns." Press Release, 28 May. https://www.afro.who.int/news/who-urges-caution-countries-africa-ease-lockdowns.

Wilson, T. 2019. "Addis Ababa Searches for Adviser on Sale of Ethio Telecom Stake." *Financial Times*, 10 October. https://www.ft.com/content/7b1c6780-e537-11e9-9743-db5a370481bc.

World Bank. 2020a. "The Impact of COVID–19 on Foreign Investors: Early Evidence from a Global Pulse Survey." Washington, DC: World Bank. http://documents1.worldbank.org/curated/en/861571589873927189/pdf/The-Impact-of-COVID–19-on-Foreign-Investors-Early-Evidence-from-a-Global-Pulse-Survey.pdf.

World Bank. 2020b. *2019/2020 Global Investment Competitiveness Report: Rebuilding Investor Confidence in Times of Uncertainty*. Washington, DC: World Bank. https://openknowledge.worldbank.org/bitstream/handle/10986/33808/9781464815362.pdf.

Xinhua. 2019. "Ethiopian Airlines Plans to Add Three More Chinese Flight Destinations." 2 February. http://www.xinhuanet.com/english/2019-04/02/c_137944095.htm.

Zhou, Y. 2019. "Air Traffic between China and Africa Has Jumped 630% in the Last Decade." *Quartz*, 28 July. https://qz.com/africa/1675287/china-to-africa-flights-jumped-630-in-the-past-nine-years/.

End notes

608 See, for example, revamped dependency theory, i.e. the notion that less developed countries may not be well served by integration into the global economic system.
609 Updated as of 8 March 2021.
610 Johns Hopkins, n.d.
611 Updated as of 8 March 2021.
612 Africa CDC, n.d.
613 Mwai, 2021.
614 Holmey, 2020.
615 ECA, 2020a.
616 IMF, 2020b.
617 UNCTADstat.
618 UNCTADstat.
619 World Bank, 2020b.
620 Shaban, 2020.
621 ECA, 2020b.
622 Giles and Mwai, 2020; WHO, 2020.
623 Zhou, 2019.
624 Xinhua, 2019.
625 Gopinath, 2020.
626 World Bank, 2020a.
627 ECA, 2020b.
628 UNCTAD, 2020a.
629 Wilson, 2019.
630 Economist, 2020.
631 AUC, 2020; IMF, 2020a; Statista, 2020.
632 IMF, 2020a.
633 Angola, Cameroon, Chad, Equatorial Guinea, Gabon, and Nigeria. Data are not available for South Sudan; otherwise it may also have joined this group.
634 IMF, 2020a.
635 Cabo Verde, Comoros, Gambia, Mauritius, São Tomé and Príncipe and Seychelles (IMF, 2020a).
636 IMF, 2020a.
637 UNTAD, 2019.
638 African Development Bank, 2018.
639 UNCTAD, 2020b.
640 OECD, 2020.
641 UNCTAD, 2020e.
642 UNCTAD, 2020e.
643 UNCTAD, 2020e.
644 UNCTAD, 2020e.
645 UNCTAD, 2020d.
646 UNCTAD, 2020c.
647 Jawad and Smith-Walters, 2020; Haque, 2020.
648 AUC, 2006.
649 CEPI, 2020.
650 UNCTAD, 2020c.

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