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AfCFTA Protocol on Investment: policy brief on investment protection

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Contents

Acronyms and abbreviations

AfCFTA	African Continental Free Trade Agreement
AJT	Administrative and Judicial Treatment
BIT	Bilateral Investment Treaties
COMESA	Common Market for Eastern and Southern Africa
ECOWAS	Economic Community of the Western African States
EAC	East African Community
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FIP	Protocol on Finance and Investment
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreements
ISDS	Investor-State Dispute Settlement
OECD	Organization for Economic Co-operation and Development
OIC	Organization of Islamic Cooperation
PoI	Protocol on Investment
RECs	Regional Economic Communities
SADC	Southern African Development Community
SADC FIP	Southern African Development Community (SADC)
UNCITRAL	United Nations Commission on International Trade Law

Executive summary

In Africa, investment protection has been regulated by several instruments at the national, bilateral, and regional levels. Besides the several BITs on the continent, there are also various investment protection frameworks across Africa's Regional Economic Communities (RECs) aimed at creating favorable conditions for both regional and foreign investors. These investment protection frameworks include the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area, the Economic Community of the Western African States (ECOWAS) Supplementary Act for Common Investment Rules for the Community and the Common Investment Code (2019), the Southern African Development Community Protocol on Finance and Investment (SADC FIP), the East African Community (EAC) Model Investment Code, and the Organization of Islamic Cooperation (OIC) Investment Agreement.

These frameworks aimed to safeguard investments and protect the rights of investors. In spite of these frameworks, investors on the continent, both African and foreign, are still exposed to risks such as expropriation, breach of contract, currency inconvertibility and transfer restrictions, adverse regulatory changes, terrorism and politically motivated acts of violence and non-compliance with sovereign financial obligations among others. Also, the number of Investor-state dispute settlement (ISDS) brought against African countries has increased over the years. This has been attributed to provisions in previous and some existing investment frameworks that uphold investors interest, yet limit States ability to implement policies to support local development or environmental standards.

The African Continental Free Trade Area (AfCFTA) Protocol on Investment (PoI) addresses these challenges by harmonizing investment frameworks on the continent. It ensures protection for investors through the following provisions: non-discriminatory measures of National Treatment, Most Favoured Nation Treatment, Administrative and Judicial Treatment, Physical Protection and Security, Expropriation, and Free Transfer of Funds. It also strikes a balance between investor protection and African countries' right to regulate and specifies conditions under which exceptions to these rights apply. It further imposes obligations on investors and introduces reforms in ISDS by promoting alternative dispute

resolution mechanisms to reduce the risk of excessive litigation, which has impacted African countries over the years.

In order to strengthen investment protection on the continent, this policy brief recommends that State Parties take swift measures to align their national laws with the standards of the PoI, invest in awareness creation on the protection provisions of the PoI locally, clearly delineate the exact circumstances of exceptions under the PoI to investors, clarify exceptions to investment protection, and consider providing investment protections beyond the minimum standards provided by the PoI. There is also the need for Africa to set up permanent African dispute settlement mechanism for fair and efficient resolution, and to also provide capacity building for African arbitrators. In addition, private sector associations must collaborate to educate and advocate for investor interests across the continent.

1 Introduction

In line with Article 7 of the AfCFTA Agreement, the PoI, negotiated under Phase II, was adopted by the 37th Assembly of Heads of State and Government of the African Union, in February 2024. The PoI is a binding legal instrument designed to, inter alia, promote, facilitate, and protect intra-African investments with a view to fostering sustainable development of the continent while preserving the regulatory autonomy of the States. The PoI is further expected to establish a continental legal framework for investment building on the regimes in the State Parties and RECs.

The PoI consists of a Preamble and eight (8) Parts comprising general provisions; investment promotion and facilitation; investment protection standards; sustainable development-related matters; investor obligations; institutional arrangements; management and settlement of disputes and final provisions. This plan will, therefore, provide a comprehensive roadmap for its effective execution and enforcement. Negotiations on the Annex on the Rules and Procedures on Dispute Prevention, Management and Resolution under the PoI are still ongoing.

With the adoption of the PoI, countries have begun the process of implementation, the AfCFTA Secretariat has begun the work of awareness creation on the AfCFTA Agreement and the PoI to provide clarity and understanding of the core principles, objectives and rationale of the provisions contained therein. This engagement is an ongoing process that will see the Secretariat undertake various awareness creation initiatives, including generating publications and making presentations at national, regional and international forums, investment and policy advocacy forums and conferences, and undertaking capacity building engagements among others.

This policy brief therefore aims to provide an analysis of key investment protection provisions of the AfCFTA PoI to be used as one of the awareness creation tools by the AfCFTA Secretariat.

2 What is investment protection?

Investment protection is primarily concerned with safeguarding the rights of investors and their investments made in accordance with the laws of a host country. Investment protection standards provide guarantees to investors and their investments as well as the right by the host governments to regulate for legitimate public policy objectives. It plays an important role in creating a healthy regulatory climate for investment and it assures investors that any dispute with the government will be resolved fairly and swiftly, particularly in countries where investors have concerns about the reliability and independence of domestic courts.[1]

Investment protection typically includes provisions to provide National Treatment and Most Favoured Nation treatment to foreign investors. National Treatment ensures that foreign investors are treated no less favorably than domestic investors once their investment is established, while Most Favoured Nation treatment guarantees that investors receive treatment no less favoruable than that accorded to investors from any third country.[2]

Many investment agreements also include minimum standards of treatment which offer some level of protection for foreign investors and their investments. These standards are designed as a rule of international law and are not determined by the laws of the host state. They protect investors from arbitrary, unpredictable, non-transparent actions.[3] Investment protection also includes provisions against expropriation, which can be direct or indirect. These provisions ensure that investors are compensated if their investments are nationalized or otherwise taken by the state without adequate compensation.[4]

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[1] OECD. (2020). *OECD investment policy reviews: Indonesia 2020*. OECD Publishing. https://www.oecd-ilibrary.org/docserver/2e464f9e-en.pdf?expires=1729308118&id=id&accname=guest&checksum=4AE9BC5C3094EEBD9DB2806EC68F4EE2

[2] Crawford, J., & Kotschwar, B. (2018). *Investment provisions in preferential trade agreements: Evolution and current trends* (Staff Working Paper ERSD-2018-14). World Trade Organization. https://www.wto.org/english/res_e/reser_e/ersd201814_e.pdf

[3] Ibid

[4] Ibid

Furthermore, investment protection facilitates the free transfer of funds related to investments. This typically involves the ability of investors to transfer profits, dividends, and other financial returns from their investments back to their home country without undue restrictions.[5]

Dispute settlement mechanisms are also an important aspect of investment protection. These mechanisms allow investors to seek redress through international arbitration if they believe their rights under the investment agreement have been violated. Provisions on dispute settlement mechanisms are prevalent in many investment agreements, providing a formal avenue for resolving disputes between investors and host states.[6]

3 Overview of investment protection in international investment agreements

Investment protection has been one of the key cornerstones of investment treaties globally. Traditionally, the fundamental goal of investment treaties has been to provide investors with unambiguous protections for their interests, including avenues of recourse if they are expropriated or otherwise harmed by the host country.[7] While investment protection clauses safeguard the rights of investors, shielding them from political risks, investment protection in investment treaties has also been used to restrict the policy autonomy of national governments in developing nations, undermining their ability to support domestic industries and stimulate economic growth.[8]

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[5] Ibid

[6] The World Bank Group. (2020). *Policy options to mitigate political risk and attract FDI*. https://documents1.worldbank.org/curated/en/837421597291950540/pdf/Policy-Options-to-Mitigate-Political-Risk-and-Attract-FDI.pdf

[7] Crawford, J., & Kotschwar, B. (2018). *Investment provisions in preferential trade agreements: Evolution and current trends* (Staff Working Paper ERSD-2018-14). World Trade Organization. https://www.wto.org/english/res_e/reser_e/ersd201814_e.pdf

[8] Office of the High Commissioner for Human Rights (OHCHR). (2022). *Reforming international investment agreements: Options for states to advance human rights and sustainable development*.

Most of these treaties include clauses that facilitate dispute resolution between investors and States, often through the International Centre for Settlement of Investment Disputes (ICSID) or other alternative dispute resolution mechanisms.[9] This allows foreign investors to seek compensation from host governments through international arbitration. This system has, however, been criticized for prioritizing investor rights[10] over governments' efforts to implement policies that support local development or environmental standards.[11] States, international organizations, and civil society have expressed concerns about the current system of arbitration. They point to issues like the lack of transparency and consistency in decisions, the independence of arbitrators, and the often-high cost and lengthy duration of arbitration processes. [12]

Current global trends indicate that newly concluded protection-focused International Investment Agreements (IIAs)- at the bilateral, regional, and plurilateral levels- are focused on safeguarding States' right to regulate, imposing regulations on investors as well as reforming or even removing ISDS mechanisms.[13] Significant reforms undertaken to address the concerns around IIAs have specifically targeted provisions impeding States right to regulate, expansive and inconsistent interpretations of treaty provisions, and inadequacies in investor-State disputes.[14] The concerns being addressed include the lack of transparency, high costs, potential for frivolous claims, and questions about the qualifications and independence of arbitrators.

https://www.ohchr.org/sites/default/files/documents/issues/development/resources/2022-08-04/Reforming-International-Investment-Agreements.pdf

[9] International Centre for Settlement of Investment Disputes. (n.d.). Investment Treaties Retrieved October 18, 2024, from https://icsid.worldbank.org/node/20271

[10] Office of the High Commissioner for Human Rights (OHCHR). (2022). *Reforming international investment agreements: Options for states to advance human rights and sustainable development*. https://www.ohchr.org/sites/default/files/documents/issues/development/resources/2022-08-04/Reforming-International-Investment-Agreements.pdf

[11] Ibid

[12] Hallak, I. (2022, February). *EU international investment policy: Looking ahead* (EPRS Briefing PE 729.276). European Parliamentary Research Service. https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729276/EPRS_BRI(2022)729276_EN.pdf

[13] United Nations Conference on Trade and Development. (2024). *World investment report 2024: Investment facilitation and digital government*. https://unctad.org/system/files/official-document/wir2024_en.pdf

[14] The World Bank Group. (2020). *Policy options to mitigate political risk and attract FDI*. https://documents1.worldbank.org/curated/en/837421597291950540/pdf/Policy-Options-to-Mitigate-Political-Risk-and-Attract-FDI.pdf

There are currently ongoing discussions on reforming ISDS mechanisms.[15] Both States and institutions, such as the ICSID, the Organization for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), and the United Nations Commission on International Trade Law (UNCITRAL), are focusing on developing a range of reform options that can be applied both bilaterally and multilaterally.[16]

There are ongoing talks at the UNCITRAL Working Group III, to reform the existing ISDS system. Two main approaches have resulted from these discussions. The first approach focuses on making incremental changes to the existing ISDS framework by introducing new elements to improve how it functions without replacing the current arbitration-based system. These include introducing a code of conduct for arbitrators to ensure decisions are transparent and consistent and establishing an advisory body to support smaller economies and small and medium-sized enterprises. The second approach, proposed by the European Union, advocates for replacing the existing ISDS system with a multilateral investment court characterized by a main tribunal to handle initial cases and an appellate tribunal for reviewing decisions. Both would be run by appointed, full-time adjudicators.[17]

In Africa, investment protection is regulated by several instruments at the national, bilateral, and regional levels. Besides the several BITs on the continent, there are also various investment protection frameworks across Africa's RECs aimed at creating favorable conditions for both regional and foreign investors. These investment protection frameworks include the COMESA Common Investment Area, the ECOWAS Supplementary Act for Common Investment Rules for the Community and the Common Investment Code (2019), the SADC Protocol on Finance and Investment, the EAC Model Investment Code, and the OIC Investment Agreement.[18]

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[15] United Nations Conference on Trade and Development (UNCTAD). (2023). *Trends in the investment treaty regime and a reform toolbox for the energy transition: IIA issue note*. https://unctad.org/system/files/official-document/diaepcbinf2023d4_en.pdf

[16] Roberts, A. (2017, December 12). *UNCITRAL and ISDS reform: Pluralism and the plurilateral investment court*. EJIL: Talk!. Retrieved from https://www.ejiltalk.org/uncitral-and-isds-reform-pluralism-and-the-plurilateral-investment-court/

[17] Hallak, I. (2020). *Multilateral investment court: Overview of the reform proposals and prospects*. European Parliamentary Research Service. Retrieved from https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf

[18] White & Case. (2022, December 12). *Investment treaty protection: How to safeguard foreign investments in Africa*. Retrieved from https://www.whitecase.com/insight-our-thinking/africa-focus-winter-2022-investment-treaty-protection

These frameworks aim to safeguard investments through provisions that typically include protection against uncompensated expropriation, Most-Favoured Nation Treatment, National treatment, and guarantees on the free movement of capital. These frameworks encourage fair treatment, transparency, and cooperation among member states and include mechanisms for dispute resolution that range from national courts to international arbitration.[19]

In some existing investment frameworks, such as the SADC FIP, one major issue has to do with the lack of clarity regarding the scope of protections, particularly whether safeguards against uncompensated expropriation extend to foreign investments from non-member countries. This leads to uncertainty for potential investors. While Most-Favoured Nation treatment is generally guaranteed, National Treatment which is often a key component of BITs is not consistently provided in the SADC FIP. This is potentially disadvantageous to foreign investors. Furthermore, regarding free movement of capital, the SADC FIP is phrased cautiously, urging state parties to *"encourage the free movement of capital."* This wording permits Member States to impose regulations that create barriers to the free transfer of funds.

Within the SADC, the actual BITs signed by SADC member states frequently deviate from the SADC Model BIT. This results in inconsistencies in investment protections. The COMESA Investment Agreement has yet to be ratified. This has hindered its implementation, preventing a unified approach to investment promotion and protection within the region. Investors therefore have to comply with varying national laws and this poses a challenge for them. Also, the East African Model Investment Code and similar documents lack legally binding authority. This limits their effectiveness in safeguarding investments.[20]

In spite of efforts by African countries to protect the interests of investors, the number of ISDS cases brought against African countries has increased over the years. Over the past three decades (1993 to 2023), African states had faced a total of 171 known investment treaty arbitration claims, with only 12 of these being intra-African. So far, 29 African countries have been sued by investors at international arbitration tribunals. Egypt, Libya, Algeria, and Tanzania have faced the highest number of cases. African countries have lost most ISDS cases, with the interests of investors upheld in about 90% of all cases that have been decided. This trend has resulted in significant costs for

[19] *United Nations Economic Commission for Africa. (2021). Investment landscaping study: Implications for regional integration [PDF].* https://archive.uneca.org/sites/default/files/PublicationFiles/eng_investment_landscaping_study.pdf

[20] Ibid

African countries. As of 2023, the total claims against African countries since 1993 stands at $63.6 billion.[21]

The rising number of ISDS cases has compelled African States and institutions to re-evaluate their standards of protection and ISDS mechanisms. Many African countries are updating their investment protection laws to assert stronger control over investment disputes (often prioritizing domestic courts over international arbitration) and imposing obligations on investors to comply with local regulations. [22] Key changes include limiting the use of international arbitration by promoting local dispute resolution, introducing reforms to enhance grievance management and preventive measures, explicitly preserving states' rights to regulate in the public interest, redefining traditional protections like Fair and Equitable Treatment (FET) to prevent broad interpretations favoring investors.[23]

These reforms are also expressed in regional investment frameworks such as the ECOWAS Community Rules on Investment and the SADC Model Bilateral Investment Treaty among others.[24] The continent-wide investment framework, the Pan-African Investment Code, which harmonizes investment policies across the continent also follows this trend. These notwithstanding, other regional agreements, like those from the Arab League and the OIC, mainly focus on protecting investors' rights and ensuring that their investments are safe from risks like expropriation.[25]

By addressing the fragmentation of investment protection regulations, the AfCFTA PoI is designed to be the single standard for investments and investment protection in Africa. It establishes a clear framework

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[21] UNCTAD, Investment Dispute Settlement Navigator: full data release as of 31/12/2023 (excel format), available at https://investmentpolicy.unctad.org/investment-dispute-settlement.

[22] Naud, T., Sanderson, B., & Lapunzina Veronelli, A. (2019, April 11). *Recent trends in investment arbitration in Africa*. DLA Piper. https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2019/article/recent-trends-in-investment-arbitration-in-africa

[23] Pasipanodya, T., & García Olmedo, J. (2021, November 24). *21st century investment protection: Africa's innovations in investment law reform*. IBA Legalbrief Africa. Foley Hoag; University of Luxembourg. Retrieved from https://www.ibanet.org/africas-innovations-in-investment-law-reform

[24] White & Case. (2022, December 12). *Investment treaty protection: How to safeguard foreign investments in Africa*. Retrieved from https://www.whitecase.com/insight-our-thinking/africa-focus-winter-2022-investment-treaty-protection

[25] United Nations Economic Commission for Africa. (2021). *Towards a common investment area in the African Continental Free Trade Area: Levelling the playing field for intra-African investment*. https://repository.uneca.org/bitstream/handle/10855/46741/b11999081.pdf?sequence=5&isAllowed=y

for regulating investments on the continent and draws inspiration from several sources, including best practices outlined in the Pan-African Investment Code, various investment instruments within the continent, the UNCTAD Investment Policy Framework for Sustainable Development, and other relevant tools that support a new generation of investment policies aimed at inclusive growth and sustainable development.[26]

[26] International Trade Administration. (2023, May 5). *AfCFTA investment landscape*. U.S. Department of Commerce. https://www.trade.gov/market-intelligence/afcfta-investment-landscape

4 Current investment risks and challenges in Africa

Currently, there are different investment and legal frameworks in place in various African countries which make investment on the continent more complex because there is no single investment approach that works for all African countries. Investors on the continent, both African and foreign, are thus exposed to risks such as expropriation, breach of contract, currency inconvertibility and transfer restrictions, adverse regulatory changes, 'perception risks', fragmented investment regulations, terrorism and politically motivated acts of violence by non-state groups, wars, civil unrest, and non-compliance with sovereign financial obligations.

Another concern regarding expropriation and compensation is that local and foreign investors often struggle to receive adequate compensation. This may also be due to a breach of contract, in which governments violate agreements they have with investors, such as by failing to pay arbitral decisions that are intended to compensate them. It may also include cancellations of investment projects during the establishment and post-establishment phases. Such situations call into question the fairness of the investment protection mechanisms in place on the continent.[27]

Despite efforts by African governments to reform and open up their economies, regulatory barriers still exist. This includes burdensome bureaucracies, and weak enforcement of investment laws and policies. These barriers deter foreign investment and complicate the investment process. Political instability, changes in government, and organized internal or external conflicts and acts of violence by non-state actors like terrorism, in parts of the continent hinders the ability of states to uphold their obligations to protect investors and their investments. This instability leads to uncertainty for investors and significantly impacts intra-African investment flows.

Poor and inadequate infrastructure is a significant challenge affecting Foreign Direct Investment (FDI) in Africa. Poor transportation and

[27] United Nations Economic Commission for Africa. (2021). Towards a common investment area in the African Continental Free Trade Area: Levelling the playing field for intra-African investment. United Nations.

logistics, including inadequate road, rail, and port infrastructure, increase transportation costs and limit market access for investors.[28]

Restrictive business regulations, including high capital requirements, lack of legal protections, and heavy tax burdens, deter intra-African and foreign investments. These constraints increase the cost of doing business for intra-African Investors.

There is also a lack of comprehensive data on intra-African FDI, particularly within key sectors, which makes it challenging for African investors to make informed decisions and strategize effectively. This data gap hinders the ability of investors to identify investment opportunities and assess market trends. This is also due to the differences in capacity among national and regional investment promotion agencies.[29]

In addition, Africa suffers from the 'perception of risk,' which is often exaggerated and greater than the actual risk. This leads to inflated insurance premiums and diminished attractiveness of Africa vis-à-vis other more competitive investment destinations. This issue stems from questionable practices by major credit rating agencies, including delays in commenting on credit-positive events, limited understanding of Africa's specificities, and issuing unsolicited ratings. Furthermore, these ratings, though intended for portfolio and speculative types of investment, in absence of quality and timely information on investment opportunity, they are often used as a substitute for and do a disservice when informing FDI decisions. Meanwhile, uncertainty, real or perceived, can act as a tax on investment. To counterbalance this, an enabling investment policy environment is paramount.

Furthermore, another challenge on the continent is the fragmented investment regulations. A common complaint from investors, often reported, relates to a concern regarding a lack of uniform treatment of investors. Implementation of the PoI is intended to overcome this perception through a more standardized approach. It also seeks to create more of a level playing field between African states, to enhance the scale effect of more integrated intra-African markets.

Other challenges investors face on the continent include costly and difficult financial services, lack of government transparency, and corruption.[30]

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[28] U.S. Department of State. (2021). *2021 investment climate statements: Ghana*. https://www.state.gov/reports/2021-investment-climate-statements/ghana__trashed/

[29] ECMR (2020), Intra-African Foreign Direct Investment (FDI) and Employment: A Case Study, Working Paper Series N° 335, African Development Bank, Abidjan, Côte d'Ivoire.

[30] Economic Commission for Africa. (2020). *Drivers for boosting intra-African investment flows towards Africa's transformation*. Retrieved from https://archive.uneca.org/sites/default/files/PublicationFiles/drivers_for_boostin

5 Investment protection measures and provisions in the AfCFTA Protocol on Investment

The AfCFTA PoI provides a comprehensive framework for the promotion and protection of investments by establishing clear rules and regulations to govern investment activities across the African continent.

Generally, the PoI seeks to create an attractive investment environment in AfCFTA State Parties. It provides basic investor protections like National Treatment, Most Favored Nation treatment, the ability to transfer capital, and guarantees against expropriation.[31]

g_intra-african_investment_flows_towards_africas_transformation_eng_2020_web_version.pdf

[31] African Continental Free Trade Area. (n.d.). *Investment protocol*. U.S. Department of Commerce. Retrieved October 21, 2024, from https://www.trade.gov/market-intelligence/african-continental-free-trade-area-investment-protocol

The PoI also upholds accountability, good governance and responsible business conduct in a fair, transparent and predictable investment environment. The PoI creates a unified regulatory framework that fosters a more transparent and predictable investment environment. Investors both within and outside Africa who have interests across multiple African countries will no longer need to navigate varying investment standards and fragmented regulations from one country to another.[32]

It also offers reliable dispute resolution mechanisms for investor-state disputes either through negotiations, consultations, or other means of alternative dispute resolution; or through dispute resolution mechanisms that would be later on provided. Furthermore, the PoI aims to strike a balance between protecting foreign investments and allowing governments to pursue national economic goals. Through these measures, the protection measures under the PoI aims to build investor confidence and attract and retain long-term sustainable investments.[33]

The Preamble of the PoI contains provisions that explicitly emphasize investment protection. It expresses the determination of Member States to *"establish a balanced, coherent, clear, transparent, predictable and mutually-advantageous continental framework of principles and rules for investment promotion, facilitation and protection……create a framework for investment cooperation and facilitation and for the prevention of investment disputes…promote accountability, good governance and responsible business conduct in a fair, transparent and predictable investment environment."* These elements are essential for building trust and investor confidence which are necessary for attracting and retaining investments. They are also essential in promoting sustainable economic development and also upholding the interests Member States and investors.

The PoI has five main objectives:

1 Encouraging intra-African investment flows and opportunities and promoting, facilitating, retaining, protecting and expanding investments that foster sustainable development of State Parties;

2 Establishing a balanced, predictable and transparent continental legal and institutional framework for investment, taking into account the interests of State Parties, investors and local communities;

3 Providing a sound legal framework for the prevention, management and settlement of investment disputes;

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[32] International Trade Administration. (2023, May 5). *AfCFTA investment landscape*. U.S. Department of Commerce. https://www.trade.gov/market-intelligence/afcfta-investment-landscape

[33] African Union. *Protocol to the agreement establishing the African Continental Free Trade Area on investment.*

4 Encouraging the acquisition and transfer of appropriate and relevant technology in Africa;

5 Promoting, enhancing and consolidating coordinated positions and cooperation on matters related to investment promotion, facilitation and protection within the continent.

Article 9, although do not explicitly emphasize investment protection, encourages practices that indirectly contribute to protecting and supporting investments. It mandates that State Parties designate national focal points to provide support to investors by providing them with relevant information on the legal, policy and institutional frameworks governing investments. These include information on regulatory and administrative procedures, the establishment of companies, fees, taxes and charges, financial and fiscal incentives, technical standards, construction permits, and capital transfers. This provision reduces uncertainties, creates transparency which in turn minimizes the risk of unexpected regulatory hurdles or unfair practices. Article 9 also requires that investors are provided with information on the procedures for appealing or reviewing decisions on applications for authorization and indicative timeframes for processing applications. Investors are thus assured of clear pathways to resolve disputes or address grievances.

Part three of the PoI is dedicated to investment protection standards. In all, six main protection standards are covered: non-discriminatory measures of National Treatment, and Most-Favoured Nation treatment, Administrative and Judicial Treatment (AJT), physical protection and security, expropriation, and free transfer of funds.

Article 12 on the PoI covers National Treatment. Unlike in traditional investment treaties, although it allows for the protection of foreign investors, it also gives states the power to regulate investments, in certain instances, to ensure environmental protection and public health. Specifically, article 12 (1) states that "*Each State Party shall accord to investors of another State Party and their investments treatment no less favourable than it accords, in like circumstances, to its own investors with respect to the management, conduct, operation, use, expansion and sale or other disposition of their investments.*" This provision ensures that the foreign investors receive the same rights, privileges, and obligations as local investors under similar circumstances especially in regard to various aspects of business operations, including management, operation, expansion, and even the sale or transfer of investments. It ensures that foreign investors are not discriminated against or disadvantaged simply because they are foreign.[34]

However, Article 12(2) states that "*in assessing 'in like circumstances,' an overall examination is required on a case-by-case basis of all the circumstances of an investment, including, among*

[34] Ibid

others: its effects on third persons and the local community; its effects on the local, regional, or national environment, the health of the populations, or on the global commons; the sector in which the investor is active; the aim of the measure in question; the regulatory process generally applied in relation to a measure in question; and any other factor directly relating to the investment or investor in relation to the measure in question." This provision gives states the right to balance investment protection with their regulatory authority thereby enabling them to enforce measures that safeguard public interests while still considering the fair treatment of foreign investors. Investors, therefore, are not granted exclusive protection, even to the detriment of the welfare of host nations, as in traditional investment agreements.[35]

Similar to National Treatment, Article 14 on Most Favoured Nation requires each State Party to treat investors and their investments equally, regardless of their state of origin. This provision is also subject to a fair assessment of all relevant factors, such as environmental impact and regulations of host nations, among others.[36]

Furthermore, Articles 13 and 14 specify permissible conditions under which State parties can treat investors differently from domestic and foreign investors. These include measures implemented to protect or promote legitimate public policy objectives, preferential treatment given to national investments and investors to meet domestic development goals or support disadvantaged groups or regions, and discriminatory measures adopted by a State Party to fulfill obligations under other regional or international agreements. The exceptions also include any existing or future international agreement or domestic legislation relating wholly or mainly to taxation in the case of Most Favoured Nation. State Parties can make exceptions to the National Treatment standard for foreign investments in sectors or regions deemed strategically important, as per their laws.[37]

Article 17 (1) under AJT states that *"Each State Party shall ensure that, in administrative and judicial matters, investors and investments of another State Party are not subject to treatment which constitutes a fundamental denial of justice in criminal, civil and administrative adjudicative proceedings, an evident denial of due process, a manifest arbitrariness, a discrimination based on gender, race or religious beliefs, or an abusive treatment in administrative and judicial proceedings."*

Article 17 (2) further clarifies that the obligations of State Parties should not be equated with the broader concept of FET. Rather, they reflect the minimum standard of treatment recognized under customary international law, without extending beyond the specific

[35] Ibid
[36] Ibid
[37] Ibid

protections outlined for investors in Article 17(1). It reads *"For greater certainty, paragraph 1 of this Article shall not be interpreted as equivalent to fair and equitable treatment…this Article includes the minimum standard of treatment under customary international law and does not allow for an interpretation and application of such a standard that would go beyond the elements contained in paragraph 1 of this Article."*

AJT is a deviation from the problematic FET, which is a broad and overarching standard whose interpretation was expansive and included *investor's reasonable and legitimate expectations*. The PoI provides a more predictable treatment that clarifies and limits the substantive legal protections. The drafting followed current good practices in investment treaty-making to ensure that the investors can receive a fair legal remedy and are not subjected to denial of justice as it considers fundamental aspects of protection for investors and investments including due process in criminal, civil and administrative proceedings. The new drafting is innovative and follows international best practices meant to prevent arbitral tribunals or arbitrators from broadly interpreting treaty standards. This is a move away from the use of FET, as this has become fairly unpredictable and based on case law where countries, including those in the continent, have lost cases based on the wide expansive interpretation of FET.

Regarding Article 18 on Physical Protection and Security, the PoI requires State Parties to provide equal protection and security to investors and their investments as they do to their own or other State Parties' investors. This provision extends to restitution or compensation in the event that investors incur losses as a result of circumstances such as war or insurrection. This provision not only emphasizes the commitment to protecting investor rights, but it also imposes a duty on host countries to maintain a secure investment environment based on customary international law.[38]

According to Article 19, expropriation or nationalization of investments is only permitted under certain conditions: for a public purpose, in compliance with due process, without discrimination, and with compensation. This lowers the risks of arbitrary or unjust seizure of investments, giving investors more security. The PoI states that *"State Parties shall not, directly or indirectly, expropriate or nationalize investments in their territory except for a public purpose or in the public interest; in accordance with due process pursuant to the procedure established by the laws of the State Party; in a non-discriminatory manner. This notwithstanding, State Parties may take measures in accordance with domestic laws, to address the circumstances of persons or categories of persons who have been the subject of legal provisions enabling racial discrimination when provided for in the constitution of a State Party; and with compensation in accordance with Article 21 and paid within a reasonable period of*

[38] Ibid

time. The assessment of the reasonable period of time shall be made on a case-by-case basis in accordance with the domestic laws and regulations of the State Party and on a non-discriminatory basis" (Article 19 (1)).[39]

By requiring that expropriation follow legal procedures, the provision ensures that investors' rights are respected and that any measures taken by the state are valid and transparent. This safeguards investors against potential abuses of power by Host States. The provision also defines both direct and indirect expropriation, and specifies what constitutes unlawful seizure. Furthermore, it requires a case-by-case examination of indirect expropriation, taking into account the duration, context, and intent of State interventions. This further enhances transparency, fairness, and predictability, and ensures a secure investment environment for African investors.[40]

Article 20, however, specifies the exceptions to expropriation under the PoI. These include the issuing of compulsory licenses for intellectual property rights, as well as the revocation, limitation, or creation of intellectual property rights in compliance with international obligations and relevant protocols under the AfCFTA Agreement. It also includes non-discriminatory regulatory measures designed to safeguard legitimate public policy objectives such as public health, safety, environmental protection, and labour rights, as long as they conform with international obligations.

Article 21 outlines the guidelines for compensation in cases of expropriation. It states that *"Compensation for expropriation shall be fair and adequate, and shall be assessed on a case-by-case basis in relation to the fair market value of the expropriated investment….. shall be done in a reasonable period of time, and in accordance with the national constitution, laws, and regulations... the standard of fair and adequate compensation shall not exclude the applicability of a standard of just and equitable compensation"* Article 21(1). This provision, while it ensures that States can pursue expropriation for public interests, also protects investors from arbitrary or discriminatory expropriation, providing assurance that if their investment is taken, they will receive fair and reasonable compensation.

Article 21(2) further explains that *"The assessment of compensation shall be based on an equitable balance between the public interest and interest of those affected, having regard for all relevant circumstances and taking account of the current and past use of the investment, the history of its acquisition, the fair market value of the investment, the purpose of the expropriation, the extent of previous profit made by the investor through the investment, the previous behaviour of the investor, and the duration of the investment."* This article protects investors from arbitrary or discriminatory expropriation

[39] Ibid
[40] Ibid

and ensures that if their investment is expropriated, they will be compensated fairly and reasonably. It assures investors of a fair and transparent process and clarifies how compensation will be computed. This safeguards their investments from undervaluation.[41]

Furthermore, Article 21(4) allows payments of compensation to investors, in cases of expropriation, to be made in a freely convertible currency, which can be easily traded internationally. It includes simple interest at the Host State's commercial rate from the expropriation date until the payment date, deterring delays and compensating for time value of money. It also ensures that once compensation is given, it can be freely transferred across borders. This addresses concerns about potential capital controls as well as boosts investor confidence.[42]

Article 22 guarantees the free transfer of funds for investments across borders. It requires State Parties to facilitate transfers of capital, profits, royalties, and other investment-related funds into and outside of their territory without unnecessary delay, provided that applicable taxes and tariffs are paid. The article also outlines which funds are allowed for transfer, such as initial capital, dividends, technical service payments, loan repayments, and employee earnings. Furthermore, it ensures that investors can transfer funds in either the host country's currency or a freely convertible currency, based on market exchange rates. It reduces the risk of currency restrictions and devaluation, which can affect the value of an investor's earnings. This reduces the uncertainties surrounding capital repatriation and ensures transparency and reliability in cross-border financial operations. It reduces the risk of losses arising from an investor’s inability to convert local currency into foreign exchange for transfer outside of the host country.[43]

Article 23 establishes the conditions under which a State Party may impose restrictions on the free transfer of funds. It allows a State Party to impose non-discriminatory restrictions on transfers of funds related to investments made in their territory, and adopt non-discriminatory measures in exceptional circumstances. These include for the purposes of fulfilling tax obligations, addressing bankruptcy or insolvency, ensuring compliance with financial regulations, and addressing criminal activities, including anti-money laundering efforts. These restrictions may be used to uphold judicial orders, manage employee severance entitlements, and support social security or savings schemes.[44]

In addition, a State Party may adopt or maintain non-discriminatory measures in the event of a threat to serious balance-of-payments deficits or external financial difficulties, or in exceptional circumstances where capital movements cause or threaten to cause serious

[41] Ibid
[42] Ibid
[43] Ibid
[44] Ibid

economic or financial difficulties in the State Party concerned. Article 23(4) however cautions state parties to apply these measures in a manner that does not cause unnecessary damage to the economic and financial interests of other State Parties. These measures must also be proportionate and temporary, and be phased out progressively.[45]

Another remarkable feature of the PoI is that the dispute resolution mechanism proposed within it differs from the traditional ISDS mechanisms. Whiles it upholds the interests of investors, it introduces innovations that enable Host States to take legal actions against investors where necessary.

Unlike traditional ISDS mechanisms which allowed investors to directly sue host states through international arbitration for actions that allegedly harm their investments, the PoI emphasizes State-State dispute settlement (Article 44). This makes states the primary actors in resolving conflicts. Aggrieved investors are to channel their grievances to their Home States who will in turn submit a claim on their behalf through the exercise of diplomatic protection and in accordance with customary international law. It proposes measures for dispute prevention and grievance management by allowing investors to report their grievances to the designated competent authorities of State Parties. It also encourages these competent authorities to take steps to prevent conflict from arising: listen to investor complaints, address potential disagreements early to avoid escalation, and provide support to resolve challenges of investors (Article 45).

The PoI recommends that disputes between investors and Host States should first be resolved amicably *"through consultations, negotiations, conciliation, mediation or other amicable dispute resolution mechanisms available in the Host State"* (Article 46 (1)) and where this fails, "*they may seek to resolve such dispute in accordance with the dispute resolution mechanisms to be provided"* in an Annex to the PoI. Article 47 further grants Host States the authority to take legal actions against investors both within their territories and in the Home State of investors.

These provisions are proactive, innovative and forward-looking as they prioritize dispute prevention and grievance management, and seek to reduce the cost, time and tension involved in disputes. Also, the PoI differs from the traditional ISDS which has been criticized for being pro investor bias, its tendency to undermine the regulatory sovereignty of Host States, and its lack of transparency, consistency, and fairness.

It can be seen that the PoI 's investment protection provisions signal a shift away from old generation IIAs and toward new-generation IIAs. It strikes a balance between investor protection and the state's ability to regulate. While it specifies investors' rights, it also specifies conditions

[45] Ibid

under which exceptions to these rights apply. In addition, unlike traditional IIAs, it imposes obligations on investors in terms of responsible business conduct, adherence to international standards on human rights, labour rights, and environmental protection. It also introduces reforms in ISDS by promoting alternative dispute resolution mechanisms to reduce the risk of excessive litigation, which has impacted African countries over the years.[46]

[46] Ibid

6 Recommendations on the policy and institutional reforms for strengthening investment protection

Given the importance of investment protection in creating a stable and attractive environment, the following policy and institutional reforms are proposed to further strengthen investment protection on the continent:

1 Judging by the varying degree of investment protection laws and policies by various governments on the continent, there is a need for States whose existing investment protection laws do not meet these minimum standards set by the PoI to do so with reasonable speed in order not to be left behind in the pursuit of intra-African investors. State Parties must recognize that an effective investment protection mechanism is the bedrock to attract FDI.

2 State Parties must invest in awareness creation and sensitization on the investment protection provisions of the PoI at all levels of their national, regional, municipal, and agency levels to properly align these institutions that interface with or provide services to investors to avoid situations in which these protections are varied by these agencies when the need arises.

3 The AfCFTA Secretariat needs to establish an African Investment Dispute Settlement Mechanism for resolving investment disputes among Africans. This may be a permanent tribunal located on the continent to ensure that investors have access to fair, transparent, and efficient dispute resolution. It will also reduce dispute related costs for African governments.

4 It is essential for the Secretariat to build the capacities of investor arbitrators on the continent to ensure they are well-versed in both international investment laws and continental, regional and national legal frameworks. This will also ensure a better understanding of

Africa's unique legal, cultural, and economic contexts within which disputes arise, leading to more fair and informed decisions.

5 Given the general nature of the exceptions to investment protection provisions under the PoI, State Parties must seek as far practicable to outline the exact circumstances of these exceptions to the understanding of investors. This will also bring about a certain level of predictability in the interpretation of these exceptions and also to avoid the varying degrees of interpretations that have bedeviled many IIAs.

6 State Parties eager to increase intra-African investments can consider providing investment protections beyond the minimum standards provided by the PoI. This will demonstrate a stronger commitment to investor protection, boost investor confidence and drive significant investments on the continent.

7 Private sector associations representing African investors are also encouraged to collaborate with sister organizations on the continent to provide education on the implementation of the PoI to investors and also to serve as advocacy platforms for both home and host State Parties to reach out and engage their members on the PoI and obtain feedback.

8 There is the need for regular capacity building programmes for State institutions, regulators and national investment-related agencies. This will ensure that the various national institutions responsible for investment protection better understand the PoI including the various investment protection mechanisms outlined in it, and are well positioned to enforce it effectively.

9 It is essential that State Parties facing challenges in investment protection are provided with targeted support to enable them develop and implement the necessary institutional and policy reforms needed to attract and retain investments. This support should include technical assistance in reviewing existing legal and regulatory frameworks, and updating them where necessary. It could also include specialized training programmes, and the establishment of knowledge-sharing platforms where state parties can share best practices on how to implement the PoI effectively.

7 Potential benefits of the Protocol on Investment to investors and state parties

The AfCFTA PoI offers several potential benefits to both investors and State Parties. These benefits include:

For investors:

1 The PoI incorporates high standards of investor protection, including provisions on National Treatment, Most Favored Nation, guarantees against expropriation, physical protection, and the free transfer of funds. This can enhance investor confidence and encourage more FDI on the continent.

2 By promoting the harmonization of investment laws and regulations across Member States, the PoI aims to create a more predictable and stable investment environment. This reduces the complexity and costs associated with navigating different legal frameworks, making it easier for investors to operate across borders.

3 The PoI provides investors with access to a broader continental market, allowing them to extend their activities among 54 state parties.

4 The PoI includes provisions that promote responsible and sustainable investment practices. This will ensure that investors contribute positively to social and environmental goals in their investment destinations.

5 The PoI promotes amicable dispute settlement mechanisms. This enables investors to resolve conflicts with Host States through consultations and negotiations without necessarily engaging in prolonged legal disputes. This approach can save investors both time and resources.

For State Parties:

1 The PoI gives State Parties the authority to implement policies that promote local development, environmental standards, health, and human rights, among others. By encouraging investments that align with national development goals, the PoI can help boost local economic development. This can create opportunities for local businesses and contribute to job creation within state parties.

2 The inclusion of exceptions to some of the provisions of the PoI allows host states to refuse protections to investors whose activities conflict with national interests or public objectives. This reinforces the sovereign rights of states.

3 The PoI provides a clear, predictable, and transparent framework for investments. This can in turn stimulate intra-African investments within the continent, leading to increased capital flows and economic activity.

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Endnotes