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COMESA

TOWARDS CONSOLIDATION OF THE REGIONAL INVESTMENT AGREEMENTS IN AFRICA

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To understand the investment regime landscape in the African continent, it is crucial to note that for the economic integration process, it was agreed that Africa should integrate through the regions and sub-regions. Thus, the continent experienced a proliferation of regional economic communities (RECs) between 1980s and 1990s.

Several African countries became members of more than one REC (except Algeria, Cape Verde and Mozambique that belong each to one REC). Despite the large number of regional integration initiatives (17 in total) their impact on generating or attracting FDI has been limited; the reason being the fact that regional integration agenda was most focused on Trade and trade facilitation program than on Investment promotion. However, investment promotion was indirectly addressed through the market seeking investors, established through the elimination of Tariff and Non Tariff barriers to trade.

Furthemore, various legal international investment agreements have been developed at bilateral and regional levels, although the scope of these instruments varies significantly. As per 2014, Africa accounts for a significant share of bilateral investment and double taxation avoidance treaties around the world.

According to the Economic Commission for Africa(ECA) Report, 21, October 2015, out of 2,750 bilateral investment treaties and 2,894 double taxation treaties, 783 and 459 respectively were concluded by African countries; of those, 145 and 60 respectively are intra-African treaties.

Regarding the Investor-state based dispute settlement, between 1972 and 2014, Africa has been recorded as participating in 111 cases among which 43 are still pending. Egypt is respondent in the largest number of cases (25) and ranks third globally under ICSID Dispute Settlement (ISCID being a venue of 107 of the 111 cases), followed by the Democratic Republic of Congo(8), Algeria (6).

The emerging consensus in the continent is that African countries should consider the regional approaches to assist in development of a legal investment framework, on interpretation of related provisions and on negotiation with third country parties. This will help to reduce disputes that disadvantage countries and would strengthen efficiency their bargaining power.

Among the RECs, four of them that have taken regional approach regarding investment regime are targeted in this current paper. These include: Common Market for Eastern and Southern Africa (COMESA), Eastern

Africa Community (EAC), Economic Community of Central Africa (ECCAS), Economic Community of West African States (ECOWAS) and Southern African Development Community (SADC).

The adopted and or signed regional investment legal frameworks by those RECs are as follows:

1. COMESA Common Investment Area (CCIA): 2007
2. EAC model Investment Code: 2006
3. SADC Protocol On Finance and Investment : 2010
4. ECOWAS Supplementary Act A/SA.3/12/08 on Common Investment Rules For the Community: 2008

New development in the economic integration in Africa: Tripartite and Continental Free Trade Area

<u>Facts on the overlapping membership</u>: Eight COMESA countries are member of SADC participating in the trade and investment arrangements; four EAC States (out of 5) are members of COMESA; One State (Tanzania) is member of EAC and SADC. This membership overlapping is also observed in other RECs. Thus, there is need for consolidation of trade and investment rules through Tripartite Free Trade Area and further Continental Free Trade Area.

Tripartite Free Trade Area (TFTA)

COMESA, EAC and SADC are the three participating RECs in the Tripartite Free Trade Area. The area has more than 527 million people and a Gross domestic product (GDP) of approximately 624 Billion US Dollars with 26 participating countries (vey soon 27 with South Sudan), representing up 57% of the population of the African continent, just over 58% in terms of contribution to GDP. The Agreement on Tripartite FTA was signed in Sharm el Sheikh, Egypt on 10 March 2015.

The First phase of negotiations (which is supposed to be completed in June 2016) was focused on three main following pillars:

-*Market integration (*through trade facilitation to improve the flow of goods along transport corridors by lowering transit times and the cost of trading);
-*Infrastructure development* of surface (road, rail, border posts, and seaports) and air transport, ICT and energy;
-*Industrial development*.

The second phase of tripartite negotiations will commence after June 2016 and will be focused on:

-*Cross – border investment* (which will be the Investment Chap under the TFTA) ;
-*Trade in services;*
-*Intellectual Property Rights;*
-*Competition and consumer protection policy.*

Continental Free Trade Area (CTFA)

The negotiations of the CFTA have already commenced and the related agreement is proposed to be signed in 2017.

In addition, the Continent is negotiation a Pan African Investment Code which will be a complementary continental investment regime to CTFA. The negotiations of the framework are going on, and are taking advantage of the ongoing negotiations or signed agreements (TPP, TTIP, CETA…). These CFTA negotiations will consider a pan-African solution to dispute settlement with the establishment an African Court of Justice to curb the negative impact of the current international arbitration system and restore the balance between investment protection and the legitimate right of as state to act in accordance with its development needs and objectives.