

STATEMENT

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1. Background on IIAs and Investments in Africa

- Africa has surged in the last decade as an investment destination largely due to positive growth performance, a rising consumer market and middle class, high rates of return on investment, as well as its natural resources wealth. These pull factors for investment have been boosted by an increasing demand for natural resources, especially from emerging economies. According to the ECA publication “Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration” the continent’s share of global foreign direct investment (FDI) reached a record high of 5.7% and the total value of FDI projects in Africa increased by 12.9% in 2013. At the regional level North Africa had the highest FDI share (27%) followed by West Africa (25%) and Southern Africa (23%).
- Nonetheless, the changing prospects of the global economy and associated challenges of implementing the post-2015 Sustainable Development Goals (SDGs), have deepened the debate on implications of international investment agreements (IIAs) (including bilateral investment treaties (BITs) for sustainable development. The debate is particularly relevant in the context of Africa’s efforts to sustain its growth performance and structurally transform its economy as many of the existing IIAs may constrain the continent’s development ambitions. The debate ensuing from this conference is therefore very timely, as policymakers, negotiators, civil society and other stakeholders need to engage and be informed about the policy and governance options for foreign direct investment and IIAs which support sustainable development.
- As we speak most African countries are parties to one or more IIAs. Despite this being the case, many are not fully satisfied with existing IIAs, regime particularly with the imbalance between the rights and obligations of investors and States, and the systemic complexity of the IIAs regime as a whole. For instance, the current system of investor-State dispute settlement has given rise to a distinct set of challenges for many African countries which are unsurmountable and need to be addressed through adequate reforms of the IIAs regime. This notion is supported by many African countries which are in the process of effectively address the complexities of the IIAs regime and thereby ensure that it is aligned and attuned to their development objectives.
- The world has seen a flurry of investment and taxation treaties especially since the 1990s. Over 2,750 BITs and 2,894 DTTs are known to exist globally. Africa accounts for more than 854 BITs (157 intra-African and 696

with the rest of the world) and more than 400 DTTs (ECA report on BITs). The rationale behind the signing of IIAs such as BITs has often been to boost FDI. It is often argued that BITs give investors' confidence, ensuring that investment is legally protected under international law in case of political turmoil or any other arising disagreement between the investor and the State. Given the absence of conclusive empirical evidence on the relationship between BITs and FDI flows, developing countries, including those in Africa, should seriously reconsider the merits of signing new agreements for the sole purpose of attracting FDI and review existing agreements in light of their development priorities.

2. Why Reform the IIAs Regime?

- We are all aware that the IIAs regime is going through a period of reflection, review and revision. It is now widely acknowledged that IIAs contain provisions that are vague and open to interpretation which raises the likelihood for disagreements between the host country and investors. These disagreements often taken a toll on developing countries, especially when legal disputes result in hefty compensation awards in favor of the investors. African countries have experienced an important number of such disputes, and often do not meet the requirements for legal or economic capacity to deal with them.
- Investors are increasingly bringing claims against host countries, which some argue is against the intent and spirit of BITs and multilateral treaties that underpin the Investor– State Dispute Settlement (ISDS) system. Lack of qualified legal expertise in this field has greatly contributed to the loss of cases by African countries. For instance, the ruling of a case between Al-Kharafi and Libya in 2013 went in favour for the investor and Libya was ordered to pay US\$ 935 million in damages to Al-Kharafi, a Kuwaiti conglomerate, for obstructing a planned tourism development project.
- African countries have been relatively silent in the discussions on the ISDS system and its reform. This has led to widespread belief that the issue is dormant in the continent, compared with Latin America and Asia and the Pacific. However, more recently, we have seen some African leaders pushing for reforms of the IIAs regime, both at the national and regional levels. Notable initiatives include the a decision by South Africa to review and phase out existing BITs, but also the creation of regional investment regulation at the level of the RECs such as COMESA, SADC, ECA and ECOWAS.
- As we reform the IIAs system, consideration should be given to a number of issues including the venues for dispute settlement. There is need to consider the use of local remedies such as domestic or regional courts as an alternative to international arbitration. According to the ECA BITs report, very few investment arbitration cases were addressed using local remedies, even though some of these agreements do include them as venues for dispute settlement. For instance, between 1972 and 2014, out of 112 investor–state disputes reviewed involving Africa, a total of 110 cases were taken to the International Centre for Settlement of Investment Disputes (ICSID) and the UN Commission on International Trade Law (UNCITRAL), whilst only 2 cases were brought to regional courts.

3. Reform Initiatives at National, Regional and Continental Levels

- African countries are making important strides towards accomplishing their regional integration agenda, and many Regional Economic Communities (RECs) are working towards setting up free trade areas, customs unions, or even a common market, all steps in realizing an Africa Economic Community. Promoting investment among RECs through investment protocols is a key feature. But what are the prospects for further regional integration in investment in Africa? The response depends on how RECs design regional investment instruments, so that they may maximize the benefits of their regional integration initiatives.
- Various RECs have developed regional investment instruments, including the Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area, the Supplementary Act adopting Community Rules on Investment and the Modalities for their Implementation with the Economic Community of West African States (ECOWAS), and the Southern African Development Community (SADC) Protocol on Finance and Investment. The East African Community (EAC) and SADC have also developed model laws on investment, namely the EAC Model Investment Code and the SADC Model Bilateral Investment Treaty Template (SADC Model BIT).
- At continental level, the African Union is also in the process of developing a Pan–African Investment Agreement Code. The primary objective is to create a conducive environment to attract greater investments into Africa and facilitate intra-African cross-border investments which are critical to the success of economic integration in the continent and vital to promote private sector participation.
- African Member States believe that continental and regional investment codes will assist in harmonizing and simplifying investments rules and regulations across their markets, making it clearer and easier for investors. It is believed that this will create a conducive and more competitive environment in Africa, especially as the continent establishes the Continental Free Trade Area, and moves one step closer to the realisation of an African Common Market. Lastly, continental and/or regional investment codes could also help raise low intra-African trade which currently only represents 10–13% of Africa’s global trade, and is much lower than in other regional trading blocs such as the EU or Asia. An important prerequisite for this to happen is that such instruments adequately promote regional investment projects across borders and support the development of regional value chains.
- To supplement the initiatives at continental and regional levels, the ECA undertook the *Review of Investment Policies and Bilateral Investment Treaties Landscape in Africa: Implications for Regional Integration*. This review was conducted as part of efforts by ECA to support African member States in making the most of investment in the continent to accelerate regional integration. The study is helping Member States and RECs to, among others,
 - ✓ Take stock of their investment agreements landscape, and understand the prevalence, scope, application, and contribution of IIAs to investment in Africa;
 - ✓ Examine the extent to which regional integration is being addressed in these agreements and identify how they may be instrumental in attracting greater foreign direct investment (FDI) to African regions (RECs) by improving the investment climate and harmonizing of policies in Africa;

- ✓ Identify key challenges leading to limited investment flows in Africa and how these agreements are addressing these challenges;
- ✓ Determine the degree of implementation of these agreements and what may be done to improve and raise awareness on how they may be relevant to supporting the private sector; and
- ✓ Provide policy guidelines on how member states and RECs could contribute to improving the current IIAs governance and associated investment disputes to better support Africa's transformation and development.

4. Conclusion

- ECA strongly supports the efforts to reform the IIAs regime. However, this should be done through an inclusive process which engages all key stakeholders (governments, private sector, RECs, and civil society among others).
- African governments are worried about their responsibility and potential liability vis-à-vis investors in the context of existing investment agreements. This concern is justified given the numerous investment arbitration cases and merits special attention from a development perspective, as most BITs were negotiated without consideration of the economic and technical challenges many African countries face as a result of investment disputes.
- Moving forward, African countries negotiating BITs need to carefully consider the wording of their BITs to ensure that a balance is struck between protecting the investors and preserving sufficient policy space to achieve their development objectives.
- Reforming the IIAs regime should also include widening the options for dispute settlement venues. At the moment, the system is skewed against national and regional venues for investment arbitration. There is a need to consider local remedies such as domestic and regional courts as an alternative to international arbitration. An associated challenge in this regard is the need to build adequate institutional capacity and autonomy so that disputes may be more effectively addressed locally.