Will investment flows increase under the AfCFTA Investment Protocol?

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Africa needs investments to develop and industrialize. The bulk of it comes in the form of foreign direct investment (FDI). In 2021 FDI into African countries amounted to $83 billion, according to UNCTAD's World Investment Report 2022.[1] There is considerable room for improvement; investment into Africa accounted for only 5.2% of global FDI.

When it comes to "greenfield" investments,[2] investors will opt for investment destinations linked to larger market access opportunities and exports to global markets, typically through preferential trade arrangements. They would presumably be keen to learn more about the African Continental Free Trade Area (AfCFTA), its trade preferences, rules of origin, its Investment Protocol and the AfCFTA plans for industrialization and continental value chain development.

How will the AfCFTA Investment Protocol impact on future investment destination decisions? The AfCFTA is touted as a major new opportunity in terms of unlocking a massive market for goods and services and serving as a framework for continent-wide industrialization. But this will only happen if the AfCFTA is properly implemented across all its disciplines, and if the production of consumer goods and services will follow. Increased FDI flows will be vital.

As is the case with other AfCFTA instruments, the AfCFTA Investment Protocol will exist alongside bilateral treaties with global partners, other global and REC instruments. This Protocol aims to promote, facilitate, and protect investments that foster sustainable development, establish a transparent and sound continental legal framework on investment, provide security and predictability in the prevention and management of

[1] Investment flows to Africa reached a record $83 billion in 2021 | UNCTAD

[2] Under a "greenfield investment" a firm establishes operations in a foreign country by constructing new facilities. This may bring control over business operations, quality control over manufacturing and sale of products and services, and control over brand image. National legal requirements in respect of these matters will then become directly relevant, including issues such as domestic ownership requirements.

investment disputes, create a level playing field for African investors, and promote common positions among the AfCFTA State Parties.[3]

The ability of this Protocol to attract FDI from global sources may be hindered by the fact that it applies only to investments from the AfCFTA State Parties. However, foreign investors already established in a AfCFTA State Party will qualify as an investor for the purposes of this Protocol. It will not replace existing investment treaties with third parties, but existing bilateral investment treaties between the State Parties are terminated upon the entry into force of this Protocol. The State Parties will also review existing regional investment agreements adopted by the RECs to achieve alignment with the Protocol 5 years from the entry into force of the Agreement.[4]

Investments and investors do not have an automatic right of admission or establishment. They are not parties to this Protocol. The State Parties will admit foreign investments in accordance with their domestic laws.[5] A State Party may “at any time” deny an investor the benefits of this Protocol if certain practices or conditions are present; for example when an investment has no substantial business activity in the territory of the Home State, when an investor is engaged in activities prejudicial to national interests of the Host State, or an investment is owned or controlled by natural or juridical persons of a Third Party with which the denying Party does not maintain diplomatic relations prohibits transactions.[6]

How will this Protocol work? It is essentially about cooperation among the State Parties in respect of domestic laws and procedures for investment promotion, facilitation, and protection. The State Parties “may cooperate on policies and other related issues that encourage and facilitate the use of “special purpose vehicles” to increase the participation of the private sector in development programmes of State Parties.”[7] They may introduce incentives to attract, retain and expand investments that foster sustainable development. Such incentives may include financial and fiscal incentives, such as investment insurance, grants or loans at concessionary rates, subsidized infrastructure or services, and market preferences.[8] The danger of investment incentive competition will remain a challenge.

[3] Art 2 AfCFTA Investment Protocol.
[4] The AfCFTA Agreement entered into force on 30 May 2019.
[5] Art 4 AfCFTA Investment Protocol.
[6] Art 5 AfCFTA Investment Protocol.
[7] Art 7(4) and (5) AfCFTA Investment Protocol.
[8] Art 8 AfCFTA Investment Protocol.

Disputes between the State Parties (about the interpretation or application of this Protocol) shall be settled in accordance with the AfCFTA Protocol on Dispute Settlement. Only the AfCFTA State Parties have standing to file applications for dispute settlement under the AfCFTA Dispute Settlement Protocol. They may submit claims on behalf of their nationals.

Investors and States are required to resolve their disputes through consultations, negotiations, conciliation, mediation, or other amicable resolution mechanisms available in the Host State. If a dispute is not settled amicably, it may be resolved through the Annex on Rules and Procedures governing Dispute Prevention, Management and Resolution of Disputes under the Investment Protocol. (This Annex is yet to be developed)

The State Parties are prohibited from expropriating or nationalising investments unless this is for a public purpose, in accordance with due process of law, in a non-discriminatory manner, and upon payment of fair and adequate compensation. They are required to facilitate the prevention of disputes and management of grievances, through their competent bodies.

The State Parties must allow investors to freely transfer their investment-related funds. However, the State Parties may restrict the transfer of investment-related funds in the event or a threat of serious balance of-payment deficits or external financial difficulties, or where the transfer of funds causes or threatens to cause serious economic or financial difficulties.

The Protocol also establishes obligations for investors and investments. They are required to carry out their operations in compliance with all relevant domestic laws and applicable international law. They must contribute to the sustainable development of the Host State, comply with high standards of business ethics, human rights, labour and environmental standards. They should not engage in corrupt practices and must comply with national, regional and internal standards of corporate governance, and conduct their operations in a manner that fully complies with all applicable tax laws.

The Protocol establishes the Pan-African Trade and Investment Agency (PATIA) as an institution of the AfCFTA Secretariat. It shall assist the State Parties, investment promotion agencies and the private sector by mobilising financial resources, fostering business development and providing technical support for investment promotion and facilitation.

The AfCFTA Protocol on Trade in Services will also impact on investment in Africa. Mode 3 of the AfCFTA Protocol on Trade in Services provides (just as in the General Agreement on Trade in Services (GATS) of the World Trade Organization, for a foreign service provider to establish a commercial presence in another State Party. The establishment of a commercial presence in another state will often be accompanied by substantial investments. They will be regulated through domestic laws and measures, in accordance with the AfCFTA Protocol on Trade in Services.

Some commentators argue that FDI in Africa is not directed at the right sectors.[9] It is concentrated in the mining, banking, and telecommunication sectors. It is claimed that only about two percent of FDI is directed to the agricultural sector, where about 80 percent of the African population operates and which contributes 23 percent of GDP.[10] This may now change; agro-processing is one of the sectors identified for the establishment of continental value chains.

Another problem is that African countries traditionally compete for FDI. This often results in conflicting national incentive schemes. This problem will not necessarily disappear once they AfCFTA Protocol is operational. Like the other AfCFTA instruments it is designed as a member-driven arrangement. Most of the action in respect of future FDI promotion will be determined through national laws and measures. Hopefully there will be better coordination, harmonization of domestic laws and measures, and more transparency. The new PATIA may become a forum to pursue such outcomes.

[9] Economic Development: Investment and Industrialization Challenges in Africa - Kujenga Amani (ssrc.org)
[10] Ibid.

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