AFREXIMBANK

Transforming Africa's Trade

African Export-Import Bank
Banque Africaine d'Import-Export

TRADE POLICY BRIEF

THE AFCFTA PROTOCOL ON INVESTMENT

For more information contact ARTP@afreximbank.com

JULY 2023

This Trade Policy Brief was prepared by Yusuf Daya, Director AU/AfCFTA Relations and Trade Policy, Adham Abdelaal, Manager AU/AfCFTA Relations and Trade Policy and Chidozie Ezeani, Associate AU/AfCFTA Relations and Trade Policy.

Introduction

The 36th Ordinary Session of the Assembly of the African Union Heads of State and Government which held from the 15-19 February 2023 in Addis Ababa, Ethiopia, adopted Protocols to the AfCFTA Agreement on Investment, Intellectual Property and Competition Policy. The 3 legal instruments are complementary to the existing package of Phase I AfCFTA legal instruments including the Protocol on Trade in Goods and the Protocol on Trade in Services. The adoption of these legal instruments marked the conclusion of the "Phase II" negotiations.

The Protocol on Investment aims to increase intra-African trade and investment by replacing 173 intra-African bilateral investment treaties with a uniform set of investor protections, while balancing those protections with requirements placed on investors themselves, notably in promoting sustainable development. Since Niger entered a bilateral investment treaty ("BIT") with Switzerland in 1962, African states have concluded more than one thousand BITs with each other and with countries around the world. This will change radically under the Protocol on Investment, as State Parties will have to terminate all existing intra-African BITs within 5 years and will no longer be permitted to conclude BITs amongst themselves (Kendra and Lewis: 2023).

The Protocol on Investment aims to create a conducive investment climate in AfCFTA State Parties by providing measures around investor protection and facilitation, and by balancing the obligations of investors and host country states. 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 and establish a transparent and sound continental legal framework on investment, taking into account the interests of State Parties and investors.

The Draft Protocol on Investment contains eight chapters:

- Chapter 1 contains general provisions, including: definitions, objectives, and scope;
- Chapter 2 deals with investment promotion and facilitation including: promotion, facilitation, incentives for sustainable investment, national focal points, and provision of information;
- Chapter 3 covers investment protection standards: national treatment, most favoured nation (MFN), administrative and judicial treatment, expropriation, and transfer of funds;
- Chapter 4 deals with sustainable development-related issues, including: the right to regulate, standards, climate change, public health, development goals, human resources, and technology transfer;
- Chapter 5 addresses investor obligations, including: national law, business ethics, human rights, labour standards, environmental protection, indigenous people, anti-corruption, corporate social responsibility, corporate governance, and taxation;
- Chapter 6 sets up institutional arrangements including: a committee on investment, the pan-African trade and investment agency, and technical assistance;
- Chapter 7 deals with management and settlement of disputes: state–state, dispute prevention, investor liability;
- Chapter 8 contains final provisions, including: entry into force, relationship to other international investment agreements, relationship to other AfCFTA protocols and notifications.

Scope and Objectives

Given that the AfCFTA has been set up with the aim of establishing a single African market, the Protocol applies to both natural and juridical investors that are nationals of AfCFTA State Parties. For natural persons, those who can qualify to benefit from the Protocol are natural persons of a State Party who is a national or citizen of a State Party in accordance with its laws and regulations and making an investment in another State Party. In instances of dual nationality, the exclusive nationality of the person will be the country of the person's effective nationality or where the person ordinarily or permanently resides.

For investments made through legal or juridical persons, nationality is determined based on whether the juridical or legal persons are incorporated or/and registered in a State Party while maintaining a statutory seat and substantial business in the State Party. Therefore, the Protocol provides protection to foreign or "non state party" shareholders provided that the entity is incorporated in and has substantial business in a State Party. The exclusion of a country of ownership or control criteria in favor of statutory establishment in a State Party, will assist in attracting foreign investment into the continent as investors seek to take advantage of the integrated market created under the AfCFTA.

The principal objective of the AfCFTA Protocol on Investment is to support the objectives of establishing an integrated market through the nurturing of intra-African investments. Article 2 sets out the specific objectives of the Protocol as follows:

a) promoting, facilitating and protecting investments that foster sustainable development of State Parties;

b) establishing a transparent and sound continental legal framework on investment, taking into account the interests of State Parties, investors and local communities;

c) providing security and predictability in the prevention and management of investment disputes;

d) creating a level playing field for African investors; or

e) promoting and enhancing common positions and cooperation on matters related to investment promotion, facilitation and protection.

Investment Promotion and Facilitation

The Protocol promotes investment facilitation measures to make the administrative environment transparent and more investment friendly. This includes, among others, simplifying administrative procedures, enhancing transparency, and providing information services for investors. By reducing bureaucratic hurdles, investors can navigate the investment process more smoothly, thereby attracting more capital into Africa. The Protocol requires State Parties, in line with their national laws, to facilitate the granting of visas and permits for employees, to streamline investment administration procedures by setting up one-stop shops, establish cooperation and coordination among relevant national regulatory bodies and to cooperate on policies and other related issues related to investment. The Protocol also requires State Parties to designate a National Focal Point that will provide information on the legal, policy and institutional framework governing investments.

Investment Protection Standards

The Protocol contains several provisions aimed at guaranteeing fair and equitable treatment, safeguarding against expropriation without compensation, and preventing discriminatory practices. Under National Treatment provisions, State Parties, subject to some exceptions, are required to accord to investors of another State Party and their investments, treatment no less favorable than it accords to its own investors. In addition, State Parties are required to extend Most Favored Nation (MFN) Treatment to investors of another State Party and their investments. However, the application of the MFN principle does not extend to dispute settlement procedures.

The Protocol also includes provisions on 'Administrative and Judicial Treatment'. This requires State Parties to ensure that 'investors and investments of another State Party are not subject to treatment which constitutes a fundamental denial of justice in civil, criminal and administrative adjudication proceedings, evident denial of due process, manifest arbitrariness, discrimination based on gender, race, religious beliefs or abusive treatment in administrative or judicial proceedings'. The Protocol also provides protection against direct and indirect expropriation or nationalization of assets by requiring due process and the payment of fair and adequate compensation. Discussions around the provisions addressing expropriation continue among State Parties to finalize the Protocol. In addition, the Protocol requires State Parties to permit transfer of funds related to an investment, including among others, initial capital, profits, capital gains, dividends, royalties, license fees and interest.

Sustainable Development-Related Issues

The Protocol confers on State Parties the right to regulate, including taking measures to ensure that investments made in its territory are consistent with the goals and principles of sustainable development; and with other national environmental, health, climate action, social and economic policy objectives, and essential security interests. In addition, to avoid a 'race to the bottom' the Protocol requires that State Parties do not encourage investment by relaxing or waiving domestic standards or compliance with environment, labour and consumer protection laws and international minimum standards. State Parties are however, allowed to introduce measures to promote domestic development including local content, human capacity, and technology transfer.

Investor Obligations

The Protocol obliges investors in a State Party to comply with relevant domestic laws and regulations, administrative guidelines as well as applicable international law. In particular, investors are required to comply with high standards of business ethics, investment-related human rights and labour standards. Investors are also required to respect and protect the environment and not exploit natural resources to the detriment of the rights and interests of the State Party and local communities. The Protocol also requires investors to respect the rights and dignity of indigenous people and local communities, including the right to free, prior and informed consent and to participate in the benefits of the investment. Investors are further required to refrain from interference in the internal affairs of a State Party, and to refrain from offering any unlawful or undue pecuniary advantage or gift to public officials in order to obtain a favour. Investors are also encouraged to contribute to social development by strengthening local capacities, developing human capital, and promoting gender equality and inclusiveness, among others. The Protocol further requires that investors meet national, regional and international standards of corporate governance, in particular in respect of transparency and accounting practices.

Institutional Arrangements

The Protocol establishes a Committee on Investment that is tasked with facilitating the implementation of the Protocol and its objectives. The Protocol also provides for joint investment promotion and facilitation by African states, including the establishment of a Pan-African Trade and Investment Agency under the AfCFTA Secretariat. The Agency is expected to assist State Parties, their investment promotion agencies, and their private sector through mobilizing financial resources, fostering business development and providing technical and other support for the promotion and facilitation of investment. It is also expected to assist State Parties in building their capacity in the formulation and implementation of investment policies to foster the expansion of intra-African investments. State Parties are also required to support the provision of technical assistance, capacity building and cooperation to facilitate and promote investment under the Protocol.

Management and Settlement of Disputes

In instances of a dispute between an investor of a State Party and a Host State, the Protocol requires that the dispute initially seek to be resolved amicably through consultation, negotiations, conciliation, and mediation. Should these not yield a resolution, disputes will be resolved in accordance with an Annex to the Protocol on Dispute Resolution that is still under negotiation, and is expected to be concluded by February 2024.

Entry into Force

The Protocol on Investment is expected to come into force in accordance with Article 23(2) and 23(4) of the AfCFTA Agreement, which requires 22 ratifications by State Parties.

Conclusion

The AfCFTA Investment Protocol constitutes a significant step towards creating a coherent integrated market by improving the business and investment environment in Africa. Key elements that affect investor confidence are addressed by the Protocol including strong investment protection and investment facilitation. Continued efforts towards capacity building, policy harmonization, sensitization, and collaboration among member states will be crucial to ensure the successful implementation and impact of the Protocol.

By leveraging the opportunities presented by the Protocol and addressing the existing challenges, African countries can position themselves as attractive investment destinations, driving economic growth, job creation, and improved living standards across the continent. To further boost investment in Africa, it is crucial for African governments to collaborate and harmonize investment policies and regulations across the continent. Cooperation among Member states will foster an environment of trust and consistency, making Africa a more attractive investment destination.

REFERENCES

1. Ayele Y, Belete, M, and te Velde D W (2023), The AfCFTA Protocol on Investment: issues and potential impacts, https://odi.org/en/publications/the-afcfta-protocol-on-investment-issues-and-potential-impacts/
2. Kendra T, Sawadogo-Lewis L, and Crawford G (2023). Zooming in on the Investment Protocol to the AfCFTA: a new era for investment disputes across Africa https://www.engage.hoganlovells.com/knowledgeservices/viewContent.action?key=Ec8teaJ9VaoBJLJbA%2FYpgF7eOOGb-nAEFKCLORG72fHz0%2BNbpi2jDfaB8IgiEyY1JAvAvaah9IF3dzoxprWhI6w%3D%3D&nav=FR-bANEucS95NMLRN47z%2BeeOgEFCt8EGQ0qFfoEM4UR4%3D&emailtofriendview=true&-freeviewlink=true
3. Draft Protocol to the Agreement Establishing the AfCFTA on Investment, African Union

Disclaimer

Data and information used in this document was gathered from reliable sources, but the analyst(s) and the publishers of this document do not hold themselves responsible for the accuracy or completeness of data used. The document provides the opinions, analyses and conclusions of the authors only does not purport to reflect the views of Afreximbank. Afreximbank does not accept any liability for any direct or remote loss or damage arising out of the use of all or any part of the information contained in this document.

Headquarters

72B El-Maahad El-Eshteraky
Street, Roxy, Heliopolis,
Cairo 11341, Egypt

info@afreximbank.com
T +(202) 2456 4100/ 1/2/3/4

Abuja Branch

No. 2 Gnassingbe
Eyadema Street,
Off Yakubu Gowon Crescent,
Asokoro, Abuja, Nigeria

PMB 601 Garki,
Abuja, Nigeria

abuja@afreximbank.com
T +(234) 9 460 3160

Harare Branch

Eastgate Building,
3rd Floor (North Wing),
Sam Nujoma Street,
Harare, Zimbabwe

P.O. Box CY 1600
Causeway, Harare, Zimbabwe

harare@afreximbank.com
T +(263) 24 2 700 904 / 941

Abidjan Branch

3ème Etage, Immeuble
CRRAE-UMOA,
Angle Boulevard
Botreau Roussel
– Rue Privée CRRAE-UMOA
Abidjan, Côte d'Ivoire

abidjan@afreximbank.com
T +(225) 2030 7300

Kampala Branch

Rwenzori Towers, 3rd Floor,
Wing A, Plot 6 Nakasero

P.O. Box 28412,
Kampala, Uganda

kampala@afreximbank.com
T +(256) 417 892 700
T +(256) 312 423 700

Yaoundé Branch

National Social Insurance Fund (NSIF)
Headquarters Building, Town Hall,
Independence Square

P.O. Box 405,
Yaoundé, Cameroon

yaoundebranch@afreximbank.com

afreximbank.com