Negotiating the AfCFTA Investment Protocol: An Opportunity for Africa to Set its Own Investment Facilitation Agenda

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Background

Lauded to be the largest free trade area in the world, parties to the African Continental Free Trade Area (AfCFTA) officially began trading under Phase I of the accord on January 1, 2021. This is a significant milestone in enhancing trade relations throughout the African continent and is one step in a larger process planned for the coming years.

With the first phase on goods and services in operation, AfCFTA parties will now develop the other "phases" of the agreement, including the protocols on investment, intellectual property, and competition. A further Phase III will involve negotiations for an e-commerce protocol. On investment, there are already indications that investment facilitation (IF) could form part of the negotiations – a “new” issue in the context of regional investment treaty negotiations. “New” because, historically, African states have tended to enter into older-style investment treaty models, designed in a post-colonial era and aiming at protecting assets in Africa of former colonial powers. This treaty model, originally applied with European countries, and later also served as a template for negotiations with other countries and amongst themselves. These treaties did not typically address the promotion and facilitation of investment flows but instead focused on investment protection. There are currently 180 intra-African BITs and 770 extra-African BITs that are either signed and in-force or signed and not yet in-force. How IF will be incorporated into the AfCFTA’s investment protocol is a new and fundamental question to consider.

To date there is no clear understanding on what IF means and how it should be incorporated in an international agreement, leaving the door open for a range of different approaches more or less reflective of the interests by various actors. For instance, the Joint Statement Initiative on Investment Facilitation (JSI) draft negotiating texts reflect language elements stemming in large part from Free Trade Agreements (FTAs) championed by the EU and US, albeit under another terminology (domestic regulation, regulatory coherence, transparency, etc.). Meanwhile, Brazil has championed a different style of investment facilitation and cooperation, aimed at replacing the focus on investment protection and ISDS with cooperation and dispute prevention. Notably, China has not yet concluded investment facilitation agreements at the bilateral or regional level but has been a big proponent of the discussions at the WTO, convincing a number developing and least developed country governments to join. By contrast, India has agreed to integrate Brazil’s investment facilitation provisions into its bilateral investment agreement with the latter but is opposed to the JSI negotiations at the WTO along with other major developing country governments like South Africa.

In order to decide whether to include IF in the AfCFTA and how, African policymakers should be aware of all these different approaches and dynamics around IF to be able to set their own priorities in this relatively “new” area in international investment law, crafting an innovative and holistic approach for their future investment protocol. To date, international and regional approaches in IF are still in the making – making it easier for policymakers to identify what works best for Africa. In the process, policymakers can also leverage their own cutting-edge reform efforts on investment protection and regulation, and set a regional standard as a rule-maker – which could, in turn, influence ongoing or other future global processes on this topic.

Room for Innovation: Defining and Understanding Investment Facilitation

According to the treaty objectives establishing the Africa Continental Free Trade Agreement (AfCFTA), the agreement aims to facilitate investments in the region and build on the initiatives and developments in the parties and regional economic communities (RECs). Currently, intra-African investment flows are low at 10% relative to other world regions such as the European Union (EU) at 67%, and FDI has taken a further hit as a result of COVID-19 . According to the UN Economic Commission for Africa, “revitalizing [investment] flows is fundamental to the recovery of the continent’s economy,” and investment facilitation in the AfCFTA is named in their report as a “critical” tool for doing so.

But what does the term “investment facilitation” mean? Countries throughout the world over have embarked on various ways to facilitate foreign and national investment in their territories, and it is clear that having sound and robust facilitation mechanisms in place will enable and boost intra-African investments. In this sense IF is an old issue. However, there is no widely accepted benchmark on what IF covers in scope, nor which kind or form of IF works best in specific contexts, including where international rules are useful and appropriate. Lacking a set definition for IF and a deeper understanding on the potential role of international rules could pose a challenge for AfCFTA negotiators.

A vital distinction that they need to make will be between “investment facilitation” and “trade facilitation” – two terms, despite the similarity in name, are not equivalent or directly comparable in theory or practice. There may be some areas of overlap, however, and that interaction is important to understand. Trade facilitation focuses on facilitating the flow of goods across borders and dealing with cumbersome red tape. Investment facilitation goes several levels deeper. Investments are needed to produce the products and services that will be traded by a country, and how these investments are structured and operated determines whether these will ultimately lead to sustainable and inclusive development. In turn, investment is directly linked to states' sovereignty when it comes to the conditions, processes, and requirements that they enact to regulate and admit investments – a very different proposition to what trade facilitation entails. Therefore, the rationale behind the development of international rules on trade facilitation does not necessarily or automatically equate to international rules on investment facilitation.

There is also the distinction between investment promotion and investment facilitation which has been a topic of discussion in the past. The two operate in tandem, but essentially involve two different types of activities. As noted by the United Nations Conference on Trade and Development's (UNCTAD) Global Action Menu for Investment Facilitation, investment promotion is about raising the profile of a location as an investment destination, usually making it country-specific and competitive in nature. Investment facilitation, UNCTAD notes, is about making it easier for investors to establish or expand their investments, along with simplifying how they conduct their day-to-day business in host countries.

Given this context how countries choose to facilitate foreign investment will determine how it contributes to development and sustainable growth, and this will depend largely on how AfCFTA parties design their protocol. There is growing scholarship and expertise on how this can be done including by international organizations such as UNCTAD, the International Trade Centre (ITC) and the Organization for Economic Co-operation and Development (OECD) though there is no clearly defined roadmap yet.

The Need for a Tailored Approach: Africa as a Leader in Investment Law and Policy

In practice, IF is already acknowledged in the treaty preambles and stated objectives of several African bilateral and regional investment agreements. Usually, the contracting parties are required to promote and facilitate investments in accordance with their national laws and regulations. However, the actual provisions on IF in those treaties are very limited in number and in detail. If negotiators decide to make IF a major feature of the AfCFTA investment protocol, they may need to determine its scope and approach in far more depth and nuance than before.

The AfCFTA parties therefore have an invaluable opportunity to set their own approach and priorities in investment facilitation – and this, in turn, will be vital to ensure that the outcome is in line with regional and national objectives and needs. They should avoid simply duplicating approaches developed elsewhere, which may not reflect the priorities and aspirations of the region and have not been tested given their recent emergence. By crafting a protocol driven by local needs and priorities, the AfCFTA negotiators will set a standard at the continental level, while informing and inspiring negotiators elsewhere.

The AfCFTA negotiators also have many valuable examples to draw from when crafting innovative features in investment policy. Over the years, countries across the African continent have developed an innovative ecosystem of investment agreements, including international investment agreements (IIAs) and regional investment agreements (RIAs). These instruments set creative, progressive trends regarding how countries can promote and protect investments and foster investor accountability with a view to achieving sustainable development in African countries. In the same spirit, and given the novelty of IF in investment agreements, African policy makers should aim to do the same i.e., design and negotiate an investment protocol that meets their needs and aspirations not least by ensuring public interest objectives work in tandem with investments facilitated into the region.

Notable examples of the instruments that promote both public interest objectives and sustainable investment include the Pan African Investment Code (PAIC), the ECOWAS Common Investment Code, the Southern African Development Community's (SADC) Model Bilateral Investment Treaty Template 2012, and the 2017 Investment Agreement for the Common Market for Eastern and Southern Africa's Investment Area (COMESA-CCIA). Along with these regional agreements and templates, there are valuable lessons from the sphere of bilateral investment treaties (BITs), such as the one between Nigeria and Morocco in which the negotiators can draw inspiration from in terms of creating their own pathway to design compatible instruments for development.

Developments on Investment Facilitation in Africa and Elsewhere

It was Brazil that introduced the idea of investment facilitation as an element to be included in an international treaty. In 2013, Brazil developed a new model investment agreement, the Cooperation and Investment Facilitation Agreement (CIFA). This CIFA prioritizes cooperation and dispute prevention, rather than the more traditional approach of investment protection and investor-state dispute settlement (ISDS). In this sense, this model was designed as an alternative to the "old style" bilateral investment treaties that Brazil never ratified.

By design, CIFAs promote amicable ways to settle disputes and propose state–state dispute settlement as a last resort – and do not involve ISDS at all. The CIFA has formed the basis of Brazil's later negotiations with other countries, including several in Africa, such as Morocco, Mozambique, Ethiopia, Malawi, and Angola. This move away from ISDS is important in the AfCFTA context, should negotiators decide to combine investment protection, promotion, and facilitation in their investment protocol. Another key element of the Brazilian model is its emphasis on a cooperative approach regarding facilitation, instead of setting binding rules on state parties, which is important for negotiating dynamics.

More recently, the European Union adopted a decision to begin negotiations on its first-ever bilateral agreement on investment facilitation with Angola. The EU's negotiation directives spell out that one of the objectives of the agreement would be to improve the investment climate and facilitate the mobilization and retention of investment, based on principles of non-discrimination, openness, transparency and stability. However, there are already concerns on whether the draft framework will indeed protect Angola's right to regulate investment in line with its sustainable development objectives.

At a global level, a process on investment facilitation is underway in Geneva, where 107 out of 164 WTO members are developing a binding investment facilitation framework. They announced the launch of "structured discussions" for this framework in 2017 on the sidelines of the organization's Eleventh Ministerial Conference in Argentina, transitioning to negotiations in 2020.

Notably, this process does not include the full WTO membership, nor all African countries, and whether proponents succeed in bringing the final agreement into the WTO legal architecture is currently unclear. There are only 26 of the 54 AfCFTA State Parties engaging in the negotiations out of the 106 WTO members currently involved.

The stated purpose of these negotiations is to “improve the transparency and predictability of investment measures; streamline and speed up administrative procedures and requirements; and enhance international cooperation, information sharing, the exchange of best practices, and relations with relevant stakeholders, including dispute prevention.” Some of the envisioned rules, as reflected in the current negotiating draft text (“the Easter text”), contain binding disciplines that might be highly burdensome to implement for developing countries. The scope of the agreement is very broad extending to all services and non-services sectors, and covering a wide range of “behind-the-border” measures, thus regulating countries’ administrative law procedures which would be subject to a multilateral dispute settlement mechanism if agreed upon. This creates discomfort for some governments, who worry about lacking the capacity to implement these commitments and then risking a state-state dispute as a result, along with what it would mean for such disputes to cover permitting and other authorization processes – which are normally the remit of national legal systems. Moreover, although the draft text currently explicitly excludes market access, it remains unclear how the disciplines under negotiation would interact with the issue. The rules clearly cater to the needs of capital exporting, market seeking economies that are wishing to gain increased control over domestic processes and institutions.

The 26 AU member states engaged in these negotiations will need to identify and prioritize what, if any, aspects of these ongoing negotiations would address their own objectives and efforts. They would also need to fully understand the implication of the texts being proposed in Geneva. More importantly, all AU members States, whether engaged or not in the joint statement initiative on IF, would need to ensure that the final outcome among this WTO member group does not limit their ability to regulate investment domestically or regionally under their own terms. They must also ensure that the proposed framework does not complicate their governments’ efforts to make collective decisions on investment facilitation under the AfCFTA process or in other forums.

An Investment Facilitation Approach for Africa: Guiding Questions for Policymakers

From the outset, not all FDI can be deemed to contribute to sustainability or to enhance national or regional development objectives. Therefore, integrating IF alone to facilitate any kind of foreign investment could do more harm than good. Moreover, IF is still a new and evolving issue in investment law with various approaches taken for different purposes and interests. To ensure the AfCFTA investment protocol achieves its intended objectives on enhancing sustainable investment, we propose these guiding reflections and questions for negotiators to consider

1. African policy makers have a clean slate in envisioning an IF framework that works for them. As such, what are the IF measures and mechanisms that have worked well in Africa and elsewhere at national and regional levels? What measures have countries taken domestically to attract and facilitate investment that advances sustainable development in the host state? Why did they work? Are there any gaps existing that the investment protocol could build upon and fill?
2. What components of investment facilitation measures or mechanisms should be addressed at the continental level, regional and national level? How would AfCFTA parties ensure coherence and complementarity within and across these levels?
3. For those investment facilitation components that require a continental approach, do the parties prefer (a) a binding investment facilitation framework, (b) a cooperative approach with flexible best endeavour language, or (c) a combined approach? If they choose a combination, which components would involve binding requirements and which would be non-binding and focus instead on cooperation? The answer to this last question will be critically important given the different development levels and capacities of government. A more flexible approach could ensure each country adapts and adjusts to compliance measures accordingly and with respect to its specific needs.

Given the broad and varying nature of investment agreements across the region, African states could learn from each other during the AfCFTA negotiating process and build upon the momentum generated by the investment protocol. They could use this new arrangement, once finalized, not only to facilitate intra-African investments but also as a model to influence other negotiations outside the region.

Fundamentally, IF negotiations happening elsewhere should not distract policymakers from reforming old style- BITs as well as broader investment governance issues. In case included in the IP as an add on, IF alone will not address the current challenges presented by investment protection and ISDS provisions which have been exacerbated by a fragmented and complex investment landscape. The AfCFTA IP negotiations could however, present a unique opportunity of ensuring policy coherence and sustainable investment across the region.

In so doing, Africa can demonstrate its potential to be a rule maker rather than a rule taker in this vital and vibrant area of international economic law.

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