Investment for Sustainable Development: Opportunities and Challenges for the African Continental Free Trade Area Investment Protocol

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Introduction

The African Continental Free Trade Area (AfCFTA) aims to achieve the expansion of intra- African trade through the harmonisation and coordination of trade liberalisation and facilitation across Regional Economic Communities (RECs) and Africa in general and "enhance competitiveness at the industry and enterprise level through exploiting opportunities for scale production, continental market access and better reallocation of resources"[1].

Negotiations for the Phase II Protocols of the AfCFTA are ongoing[2]. Of particular importance to this paper will be the Protocol on Investment which is currently under negotiation. This paper will focus on how the Investment Protocol can contribute to promoting sustainable development on the African continent.

Foreign Direct Investment (FDI) is closely related to the process of regional economic integration[3]. By extending the effective size of the market, regional trade agreements (RTAs) strengthen the investment climate for investors from within and outside the region, thereby attracting more FDI flows into the region[4]. Beyond boosting intra-African trade, the larger market offered by the AfCFTA is expected to trigger increased FDI flows, leading to higher productivity and value addition in the continent, and greater contributions to infrastructural development, resulting in better jobs and broader welfare benefits, thus further enlarging the market[5]. The treatment of investments within the framework of the RTA is, therefore, a critical component in increasing FDI flows into the region. This is an important factor to be considered in the context of the AfCFTA, especially in light of the current investment framework in Africa and the global calls for reforming the investment regime.

The existing framework of international investment law in Africa

The investment regime in African countries is characterised by an interlocking web of rights and obligations arising out of contracts, domestic investment laws, bilateral investment treaties (BITs), and regional agreements.

African countries are a party to approximately 517 BITs[6], with a further 367 still yet to come into force[7]. At a regional level, the RECs that have adopted investment codes include SADC with the Finance and Investment Protocol, the investment agreement for the COMESA common investment area, the East African Community Model Investment Code and the Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS.

Most African states still use the classic BIT model to protect international investments at the national level[8]. While there may be some differences in the substantive protections provided in the BITs, most BITs share six core provisions: protection from expropriation or nationalisation; standards of protection; full protection and security; fair and equitable treatment; repatriation and investment of earnings; observation of contractual obligations; and dispute resolution[9]. An exception to this is South Africa, which implemented the Promotion and Protection of Investment Act 22 of 2015 (PPIA)[10] and Tanzania, which has also amended its Public-Private Partnership Amendment Act[11] and the Natural Wealth and Resources (Permanent Sovereignty) Act 2017[12].

The different approaches adopted by African states at both regional and national level has brought about policy inconsistencies and incoherence within and between states. The inconsistencies are worsened by the spaghetti bowl effect between RECs, where one country is a party to more than one regional organisation and, therefore, is subject to more than one investment rule, sometimes conflicting.

The achievement of sustainable investment goals

Against the above backdrop, it is clear that the Investment Protocol of the AfCFTA has the mammoth task of uniting the patchwork investment framework that exists on the continent, providing a suitable, acceptable and effective method for the settlement of disputes and ensuring that the provisions which govern intra-Africa investment will lead to an increase in sustainable, intra-Africa investment FDI flows. The drafters of the Investment Protocol must also guard against creating an investment regime that is more favourable to foreign investors by creating more onerous obligations than those that currently exist under the already existing BIT framework.

Sustainable development and Investment Policies in Africa

Sustainable development refers to "development that meets the needs of the present without compromising the ability of future generations to meet their own needs"[13]. Sustainable investment (as used in this paper) refers to mobilising investment and ensuring that it contributes to sustainable development objectives. This is a priority for all countries and for developing countries in particular to achieve greater and more inclusive economic prosperity[14].

Initial investment policies aimed primarily at attracting FDI, and support for BITs was based mainly on the premise that enforceable investor protections would attract greater investment flows[15]. However, with changing trends and shifts in the global landscape, more emphasis has begun to be placed on ensuring the achievement of and protection of socio-economic rights[16].

This shift in the focus has resulted in the emergence of a new generation of investment policies that pursue a broader developmental agenda while at the same time maintaining an environment that is favourable to investment[17]. This new generation of investment policies is characterised by the following:

● Recognition of investment as the primary driver of economic development, a desire to pursue sustainable development through responsible investment,

● Placing social and environmental goals on the same footing as economic growth

● Shared recognition of the need to improve the effectiveness of policies to promote and facilitate investment[18].

The shift to the new generation of investment policies on the African continent is evident in the conclusion of the Pan African Investment Code (PAIC). The PAIC attempts to facilitate the drafting of new generation BITs that find a balance between providing effective and substantive protections for investors and investments while preserving the right of the host State to regulate in the public interest[19]. It also balances the rights and obligations of States and investors in the context of investment protection and promotion[20]. The PAIC also makes provision for the settlement of disputes through arbitration administered by African institutions as well as the use of state-to-state mechanisms[21]. By doing so, the PAIC seeks to harmonise the existing investment arrangements and set out a uniform structure which can be followed by the African states. One of the major limitations faced by the PAIC is that it is not binding; therefore, African states have no obligation to implement its provisions.

The need for sustainable investment is particularly important in the context of developing countries such as those in Africa. Achieving the Sustainable Development Goals will require tremendous mobilisation of public and private investments. FDI does not always generate positive economic, environmental and social outcomes and can sometimes cause harm to the host state and communities. There are numerous examples on the continent of incorrect investment incentives and outcomes, investments that have caused environmental and social harm, as well as the 'red tape' and bureaucratic processes that often undermine investor confidence. Laws, policies and practices in the host countries and at a regional and international level often shape whether FDI ultimately contributes to sustainable development and how it impacts stakeholders and the environment.

To ensure that the Investment Protocol creates an investment environment that is favourable to both host states and the relevant stakeholders and to the investors, the following issues need to be addressed:

● There needs to be greater self-awareness of the needs of the different nation-states and greater policy coherence at the national, regional and continental levels. At an individual level, African states would have to comprehensively analyse their investment goals and needs at a national, regional, continental, and global level. These investment goals should be set with the entire domestic policy of the country in mind to ensure coherence between investment objectives and the country's domestic policy at large. This will assist negotiators in ensuring that they do not bind their nation-states to obligations that would be contrary to their domestic policy objectives, thereby perpetuating the current backlash against the investment regime.

● Once individual nation-states have developed their separate investment policy objectives, there is a need for the states to collectively negotiate common investment objectives, an African Investment Agenda of sorts. Agreeing on a common continental investment objective will direct the negotiations and lead to the implementation of an Investment Protocol that will fulfil the common objectives as well as the individual objectives of the states. Although it will be impossible to achieve perfect compatibility across the board, this approach limits the possibility of conflicts as all parties are actively pursuing a common agenda.

● There has to be a commitment by African states to the sustainable investment agenda such that they are willing to be bound by the sustainable investment provisions in the Investment Protocol. Further, they should be willing to reassess their already existing BITs to bring them into conformity with the sustainable development agenda. This is important as it will ensure that the same sustainable development obligations bind 3rd country investors as well as African investors. This will increase the impact of the sustainable investment initiative by African countries.

Types of substantive provisions that have to be included

The Investment Protocol will also have to sufficiently balance the rights and protections granted to investors with rights and protections for states and local communities and impose new obligations on investors to promote sustainable investment and sustainable development.

Provisions that can be included in the Investment Protocol that will ensure that the investment contributes to the achievement of sustainable development include[23]:

● Sustainability assessments;

● Obligations to comply with the laws of the host state;

● Obligations to respect internationally recognised human rights and undertake human rights due diligence;

● Obligations to refrain from commission of or complicit in the grave violation of human rights;

● Obligations to comply with core labour standards and to refrain from using child labour;

● The recognition by the investor of the host state's right to regulate in the public interest;

● A mechanism for the enforcement of investor obligations and recourse for the failure to comply with investor obligations.

While it may seem that some of these provisions may already be implicitly agreed to by their inclusion in other treaties or agreements, experience has shown that it is often difficult for the host state to raise these aspects as defences to claims by investors in investor-state arbitration. Host states generally have no right to raise counterclaims in investor-state arbitration disputes, and there is no effective mechanism for enforcement of any rights that the host state may have against the investor. Their inclusion in the Investment Protocol would render these rights and obligations justiciable and enforceable in the context of investor-state dispute settlement, thereby giving more protection to host states and other stakeholders who are undoubtedly affected by investment activities.

Conclusion

To effectively achieve the goals of the AfCFTA, the Investment Protocol has to overcome some challenges. It has to harmonise the patchwork arrangements of international investment laws on the continent in a manner agreeable to member states and the RECs. It also has to unite the needs, concerns and views of states at varying levels of development with different policy objectives. Finally, it must ensure that it does not create a more favourable investment environment for non-African investors by placing more onerous obligations on African investors. Despite these challenges, the Investment Protocol has the opportunity to create a new generation of investment arrangements within Africa that will lead to the achievement of sustainable socio-economic development and more prosperous communities. The Investment Protocol can also set the basis for negotiating future BITs with 3rd parties that will promote sustainable development while balancing the interests of the host states and the investors. The Investment Protocol can also be a means by which African countries can contribute their voice to the current global discussions on the reform of the investment regime and ensure that the views and needs of African countries are adequately represented at a global level.

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[16] This includes the achievement of objectives such as food security, protection of the environment, alleviating the effects of climate change, ensuring the protection of human rights even in business transactions, the alleviation of social challenges and poverty eradication. UNCTAD Investment Policy Framework for Sustainable Development 2015 UNCTAD/DIAE/PCB/2015/

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