Policy brief

The AfCFTA Protocol on Investment: issues and potential impacts

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Supporting Investment and Trade in Africa (SITA)

Key messages

The Draft African Continental Free Trade Area (AfCFTA) Protocol on Investment adopted at the February 2023 African Union Heads of State meeting aims to create a conducive investment climate in AfCFTA State Parties by providing additional measures around investor protection and facilitation.

Standards of investor protection in the draft relate to national treatment, most favoured nation, guarantees against expropriation and free transfer of funds.

There is a novel approach in the Protocol towards investment facilitation. State Parties are required to simplify employee visa and permit processes, streamline investment administration procedures, establish cooperation and coordination among regulatory bodies and set up national focal points to provide information to investors.

The Protocol balances State Parties' right to regulate and investors' protection by including obligations on investors in relation to sustainable development. There is also regulatory and other policy space to promote sustainable investment.

The coming months should see finalisation of remaining articles on expropriation, after which the Protocol can be finalised. Ratification and implementation need to follow adoption of the final AfCFTA Protocol on Investment. State Parties need to harmonise national laws and commitments to ensure policy coherence and smooth implementation of the Protocol. Other legal implications still to be worked out at country level centre around bilateral investment treaties and dispute settlement.

A well-implemented Protocol is expected to lead to more and higher quality intra-African and other investment, through income, market size and investment climate effects.

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Acronyms

AfCFTA	African Continental Free Trade Area
AU	African Union
BIT	bilateral investment treaty
CCIA	COMESA Common Investment Area
COMESA	Common Market for Eastern and Southern Africa
EIC	Ethiopian Investment Commission
FDI	foreign direct investment
FET	fair and equitable treatment
FTA	free trade area
GDP	gross domestic product
IIA	international investment agreement
MFN	most favoured nation
PAIC	Pan-African Investment Code
REC	regional economic community

Executive summary

The African Continental Free Trade Area (AfCFTA) Draft Protocol on Investment adopted at the 36th African Union Heads of State meeting in February 2023 aims to create a conducive investment climate in AfCFTA State Parties by providing additional measures around investor protection and facilitation, and by balancing the obligations of investors and host country states. The Protocol uses a narrow definition of investment and protects against direct and indirect expropriation. There is also a promising emphasis on investment facilitation using national focal points and a pan-African trade and investment agency. This could usher in a new approach towards the private sector. Unfortunately, there are no details yet on dispute settlement which still need to be worked out. There are also some articles on expropriation which needs to to be finalised in coming few days.

This briefing aimed at the African trade communities provides details on what is included in the Draft Protocol, what is specific about this Protocol compared to other Investment Treaties, and what it means for countries in legal and economic terms, with an example of Ethiopia.

The Draft Protocol on Investment contains eight chapters:

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

Some issues included are standard; others are specific to the AfCFTA. This briefing draws out five salient features particular to the AfCFTA Protocol:

1. Who and what is covered: the concept of nationality is less important than usual but the definition of investment is explained in greater detail and is narrow, e.g. it does not include portfolio or sovereign bonds.
2. Standards of protection: the MFN clause excludes dispute settlement and the concept of fair and equitable treatment but includes protection against both direct and indirect expropriations (although the text on expropriation needs final work).
3. Sustainable development-related issues: this entails balancing investor and host country rights consistent with modern treaties, and the promotion of sustainable investments. This means that the state has regulatory space and take appropriate measures to promote sustainable investment
4. Dispute settlement: this section refers to an annex still to be negotiated.
5. Investment facilitation: states should facilitate investment, including through national focal points and the creation of a pan-Africa trade and investment agency (to be detailed in an annex yet to be drafted). This innovative facilitation approach can yield tangible results.

The standards of investment protection relate to national treatment, MFN, guarantees against expropriation and free transfer of funds, and are expected to replace bilateral investment treaties among State Parties within five years. BITs with third parties should be reviewed taking into account requirements of the protocol.

The Protocol aims to facilitate investment by requiring State Parties to simplify employee visa and permit processes, streamline investment administration procedures, establish cooperation and coordination among regulatory bodies, set up national focal points to provide information to investors and make laws and regulations accessible to the public. This focus on facilitation is a feature of modern investment treaties, whilst older treaties tended to focus mostly on protection only.

The Protocol balances State Parties' right to regulate and investors' protection by including obligations on investors. Investment disputes can be settled either through the use of amicable solutions such as negotiations or consultation or through the AfCFTA dispute settlement body. Some details on around the role of BITs, the interplay with national laws and dispute settlement still need to be worked out.

The coming months should see finalisation of remaining articles on expropriation, after which the Protocol can be finalised. Ratification and implementation need to follow adoption of the AfCFTA Protocol on Investment. State Parties need to harmonise national laws and international commitments to ensure policy coherence and smooth implementation of the Protocol. This may have wider spillover effects on how governments approach investment.

If adopted and implemented, the Protocol is expected to lead to more and higher quality intra-African investment. In addition, a more welcoming transparent and consistent approach towards investment will attract more foreign direct investment (FDI) from outside the region. The positive effects of the AfCFTA regarding FDI are expected to come from increased income, market size impacts and predictable rules on investment.

In the example of Ethiopia, concerns centre around policy coherence. In addition, implementation of some commitments could be difficult as a result of current political and economic challenges. It is important to coordinate institutions and start up the AfCFTA national implementation committee. This requires government action and capacity-building activities to be led by the AfCFTA Secretariat and partners.

1. Introduction

Africa's long journey to regional integration has seen the African Continental Free Trade Area (AfCFTA) brought to life. The blueprint for the continent's integration agenda, the 1991 Abuja Treaty, anticipates the formation of the African Economic Community as its pinnacle, with the AfCFTA being one step towards this goal.

The AfCFTA is a flagship project identified under Agenda 2063 of the African Union (AU) Commission. It is an initiative for the free movement of goods and services on the continent through the gradual elimination of barriers to trade in goods and the successive liberalisation of trade in services. The agreement establishing the AfCFTA was adopted in March 2018 and entered into force in April 2019. Unlike many of the AU treaties, the AfCFTA garnered African countries' support and ratification in a short time. At the beginning of 2023, 46 African states, including Ethiopia, had ratified the agreement.

The AfCFTA covers a wide range of areas, negotiated in two phases. Phase I covers the framework agreement and the protocols for trade in goods and in services as well as the dispute settlement procedure. Phase II covers the protocols on investment, competition policy and intellectual property rights. Negotiations on digital trade and women and youth in trade are currently ongoing. This briefing examines one second phase issue: the protocol on investment.

The rest of the briefing is organised as follows. Section 2 discusses the core components of the Draft AfCFTA Protocol on Investment[1]. Section 3 provides an initial assessment of its likely legal implications for African countries. Section 4 looks at the possible economic impacts for these countries. Section 5 examines these issues in the case of Ethiopia. Section 6 provides next steps for implementation and analyses what can be done to maximise the impacts. Section 7 concludes.

1 We refer to the Draft Protocol which was adopted, see https://www.afdb.org/sites/default/files/documents/resolutions_36th_ordinary_session_african_union_assembly_19_february_2023.pdf

2. The AfCFTA Protocol on Investment – a brief overview

The AfCFTA became operational in January 2021, and in October 2022, eight African countries began trading under AfCFTA rules through the Guided Trade Initiative. Under Phase II of the AfCFTA agreement, following a year-long negotiation process, the AU Heads of State adopted the Draft Protocol on Investment in their 36th Summit held in February 2023. The coming months should see finalisation of remaining articles on expropriation, after which the Protocol can be finalised.

The Protocol is an important instrument aimed at nurturing intra-Africa investments. It provides for investor protection and facilitation as well as specific substantive obligations for investors implementing the general objectives of the AfCFTA framework agreement.

As per Article 8 of the AfCFTA agreement, the Protocol forms part of the single undertaking, once it is ratified by 22 of the State Parties and enters into force.

The Draft Protocol on Investment has eight chapters:

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

Some issues included are standard; others are specific to the AfCFTA. This briefing draws out five salient features:

1. Who and what is covered: the concept of nationality is less important than usual but the definition of investment is explained in greater detail and is narrow as it excludes portfolio or sovereign bonds).
2. Standards of protection: the MFN clause excludes dispute settlement and the concept of fair and equitable treatment but includes protection against both direct and indirect expropriations (though these articles still need finalisation in coming months).
3. Sustainable development-related issues: this entails balancing investor and host country rights consistent with modern treaties, as well as the promotion of sustainable investments.
4. Dispute settlement: this refers to an annex still to be negotiated.
5. Investment facilitation: states should facilitate investment, including through national focal points and the creation of a pan-Africa trade and investment agency (to be detailed in an annex yet to be drafted).

Who and what is covered?

International investment agreements (IIAs) generally cover the natural and judicial persons of their signatories. As the AfCFTA has been set up with the aim of establishing a single African market, the Protocol on Investment will apply to investors that are nationals of AfCFTA State Parties, and it becomes important to identify those who can claim to have such nationality. Determining nationality is essential as the substantive standards guaranteed in a treaty will apply only to the respective nationals. As for natural persons, those who can qualify to benefit from the Protocol are natural persons of a State Party considered 'national' as per the relevant laws of said State Party and making investment in another State Party. Sometimes, natural persons may have dual nationality. In such cases, the country of the person's effective nationality or where the person ordinarily or permanently resides will be the exclusive nationality of the person.

For investments made through legal or juridical persons, nationality is determined mainly based on the place of incorporation, or the effective seat of management or the principal place of business. Some BITs, for example the BIT signed between Ethiopia and Morocco in 2016, introduce country of ownership or control test either as alternative or cumulative condition. Under the Protocol on Investment, those juridical or legal persons incorporated or/and registered in a State Party while maintaining a statutory seat and substantial business in the State Party will be eligible for cover when they make an investment in a host State Party. This means that, apart from being incorporated under the law of one of the State Parties, the legal person needs to have their statutory seat and engage in substantive business operations in that State Party in order to qualify for protection under the Protocol while making investment in another State Party. As the Protocol does not introduce 'country of ownership or control' criteria, the nationality of shareholders – whether they are nationals of a State Party or not – does not seem to be relevant. This can contribute positively in attracting investment from the rest of the world and encourage intra-Africa investment.

Mindful of the need to recognise the regulatory space for sustainable development in policy-making, the Protocol tries to avoid using vague provisions and even elaborates some terms in its provisions. This relates mainly to investment protection provisions, which include definitions of investors and investments that enjoy such protection under the treaty. For example, while the Protocol uses the enterprise definition approach in defining 'investment', it stresses a link between economic development and what the investor can claim protection for by requiring the enterprise to maintain substantial business in the territory of the host State Party. It then elaborates what constitutes substantial business activity. Factors include the amount of investment brought, the effect of the investment on the local community and time in operation, as well as the nature, size, scope and sector of business. The Protocol also explicitly excludes assets that are not considered central to developing host state economies, such as government debt securities, portfolio investment, claims to money, etc.

Standards of protection

The Protocol contains, in addition to preambular statements, 54 articles, grouped into 8 chapters. The provisions reflect the fundamental aspects of the draft Pan-African Investment Code (PAIC), particularly with respect to standards of treatment. There are provisions that extend protection to investors and those that impose obligations on them. The standards of protection relate to MFN, national treatment, expropriation and compensation, as well as free transfer of funds.

The MFN clause in the Protocol is crafted in a narrow way: it excludes the application of the principle to dispute settlement procedures. The application of the clause to substantive matters is also limited, as substantive obligations in other investment treaties are not to constitute, in themselves, 'treatment'.

The Protocol does not include the much-contested fair and equitable treatment (FET) standard. In lieu, there is a provision entitled 'Administrative and Judicial Treatment'. This obligates 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'. International investment arbitral tribunals, while fleshing out the content of autonomous FET clauses, have indicated that the constituent elements of this standard include denial of justice and due process, manifest arbitrariness, transparency and protection of investor's legitimate expectations (UNCTAD, 2012). One might then think that the inclusion of these elements in the Protocol is suggestive of the incorporation of a FET standard. However, the Protocol establishes that these elements are not to be interpreted as being equivalent to such a standard. Rather, the minimum standard of treatment under customary international law is incorporated as an element of administrative and judicial treatment.

Another protection extended to investors and their investments in IIAs is the guarantee against expropriation. The Draft Protocol guarantees against expropriation or nationalisation of investments against a set of principles that cover public purpose, procedural due process, non-discriminatory application and payment of compensation.

Expropriation can be conducted either directly or indirectly. Given the contentious scope of the content of indirect expropriation, IIAs signed in recent years have excluded this from the ambit of treaty protection. The bilateral investment treaty (BIT) signed between Ethiopia and Brazil in 2018 is one example. However, the Draft Protocol on Investment has chosen to give protection against both direct and indirect expropriations. Determination of indirect expropriation is to be made on a case-by-case basis, looking into facts like the duration of the measure or series of measures and the character of such measures, particularly their object, context and intent. The sole fact that a measure or series of measures has adverse effects on the economic value of an investment does not necessarily prove the existence of expropriation; rather, the indicated facts have to be considered in making such a determination.

Expropriation, direct or indirect, should be followed by payment of fair and adequate compensation, the Protocol stipulates. Adequate compensation is to be determined based on factors such as current and past use of the investment, history of its acquisition, fair market value of the investment, purpose of the expropriation, extent of previous profit from the investment, previous behaviour of the investor and duration of the investment. It is to be paid in a freely convertible currency within a reasonable period of time.

The coming months should see finalisation of remaining articles on expropriation, after which the Protocol can be finalised. Hence the above discussion may still need to be adapted to the content of the Final Protocol.

Sustainable development-related issues

The primary concern of many IIAs in the past has been protection of the investor. However, through time and with changes in trends has come the inclusion of protection of other areas – particularly sustainable development-related matters. These new agreements, for example, place social and environment goals on the same footing as economic growth, and recognise the need to improve the effectiveness of policies to promote and facilitate investment, among others (UNCTAD, 2015) Following these changes in international investment rule-making, both the draft PAIC and the Protocol try to balance between providing substantive protection for investors and investments and preserving the regulatory right of the host state in the public interest.

In line with this, Chapter 4 of the Protocol contains provisions that guarantee the right of the host State Party to take measures aimed at ensuring that investments in its territory are consistent with the goals and principles of sustainable development; other national environmental, health, climate action, social and economic policy objectives; and essential security interests.

The Protocol outlines that each State Party shall promote and facilitate investments that support actions to mitigate greenhouse gas emissions and to adapt to the negative impacts of climate change, and initiatives that finance regional climate programmes. Additionally, State Parties should promote investment in sectors such as renewable energy and low-carbon technologies and encourage the development of new investment regimes such as low or zero-carbon Special Economic Zones.

In parallel, investors in the host State Party are obliged to comply with all the relevant domestic laws and regulations of the host State Party, as well as applicable international law. In particular, they are required to comply with high standards of business ethics, investment-related human rights and labour standards. In carrying out their activities, they are also required to respect and protect the environment and the rights and dignity of indigenous people and local communities, which include the right to free, prior and informed consent and to participate in the benefits of the investment. Obligations of non-interference in the internal affairs of the host State Party, and to refrain from offering any unlawful or undue pecuniary advantage or present to public officials of the State Party with the aim of obtaining a favour, are among the investor obligations stipulated in the Protocol. There is also an 'endeavour' obligation in relation to corporate social responsibility whereby investors are required to attempt to encourage the strengthening of local capacities, develop human capital, promote gender equality and inclusiveness, refrain from seeking exemptions that are not established in the legislation of the host State Party, etc.

Dispute settlement

An important issue relating to investor protection is whether or not the investor will have recourse to investor–state arbitration or to an international court, or whether access will be limited to the domestic courts of the host. Unfortunately, the Protocol defers this matter to an annex, to be negotiated after adoption – leaving us to continue wondering if there will be any automatic right by any intra-African investor to enforce the guarantees under the Protocol before an arbitral tribunal (Feris, 2021). In the meantime, amicable dispute settlement mechanisms like consultation, negotiation, etc. are provided as initial steps to resolve disputes between investor and host state relating to alleged breach of the Protocol. Resort to the dispute settlement mechanism set up by the AfCFTA is also within sight through espousal of the investor's claim by its home state. Considering that African countries do not have the culture of litigating each other on trade matters, one may question the effectiveness of this system in responding to the concerns of investors.

Investment facilitation

Investment facilitation refers to a set of policies and actions that seek to facilitate the establishment and operation of investors' business in a host state. Investment facilitation makes the administrative environment transparent and more investment-friendly (UNECA 2021).
The Protocol contains provisions that require 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, to establish cooperation and coordination among relevant national regulatory bodies and to cooperate on policies and other related issues related to investment. National focal points that provide support to investors are to be established. These are tasked with providing relevant information on the legal, policy and institutional framework governing investment in the State Party. Publication and electronic accessibility of laws and regulations by a State Party also forms part of facilitation.

The AU Assembly will create the Pan-African trade and investment agency under the AfCFTA Secretariat to assist State Parties, investment promotion agencies and the private sector in securing funds, developing businesses and providing technical support to encourage investment.

3. The legal implications of the Protocol for African countries

Key legal implications which need to be worked out at country level centre around the role of BITs, the interplay with national laws and around dispute settlement. The overall objective of the Protocol on Investment, as gathered from the preambular statements, is to ensure a conducive investment climate in State Parties. Establishing a balanced, coherent, transparent, predictable and mutually advantageous continental framework of rules governing investment is believed to encourage an efficient and competitive private sector. In line with the AfCFTA objective of creating a single African market, investment facilitation and coordination, not competition that will lead to race to the bottom, should be given priority among State Parties. Hence, the efforts undertaken by the AfCFTA have to be streamlined with each State Party's individual efforts towards investment attraction. In this regard, the relationship between the Protocol and existing or future bilateral and regional investment treaties of State Parties has to be determined.

The Protocol requires State Parties to terminate their existing BITs concluded among themselves within five years of its entry into force. The survival clauses contained in these treaties are also to terminate, within a similar timeframe. The Protocol also prohibits State Parties from concluding new BITs among themselves, rationalising the investment landscape in the continent for African investors. While there is no direct requirement to terminate or review investment agreements with third parties, the Protocol suggests considering the requirements contained in it when negotiating and reviewing existing IIAs with such third parties. This will, when implemented, contribute to policy coherence as State Parties' commitments towards each other and with third parties will be on par.

Interplay with national laws

There are three dimensions of rules and regulations applicable in regulating foreign investment in a host state: IIAs, domestic investment laws and investment contracts signed between host state and investor. The Protocol represents one dimension, while national legislation of the host State Party is the most important and immediately applicable source of law in regulating investments. We may have better protection of investors under the Protocol on Investment but the interplay between it and the national law of the State Party still has to be given recognition. For example, while the Protocol extends different forms of protection for the investment, whether it is actually investment for the purpose of treaty protection is to be determined by the national law of the host State Party, as the investment is required to be established, acquired or expanded in conformity with the laws and regulations of the host State Party. The conditions imposed or assurances granted for the operation of an investment are also to be found within the national laws of the host State Party. In view of this, State Parties need to recognize the importance of the interplay between the Protocol and their national laws and strive to ensure coherence between the two.

A state taking a measure in line with its national law may end up violating its commitments under an international agreement. While there is a recognised international law principle that limits states' ability to rely on their national law to justify violation of their international commitment, the exact relationship between the national law and the international commitments of the state is determined by the state's constitution (UNECA, 2021). In Ethiopia, for example, treaties ratified by the parliament constitute part of the laws of the land.[2] In the case of conflict between a domestic law and a specific treaty commitment, it is proposed that the legislator and the courts resolve and harmonise them without violating Ethiopian international legal commitments but without disregarding domestic law (Getachew, 2016).

2 Article 9/4 of the 1995 FDRE Constitution.

4. The economic implications of the Protocol

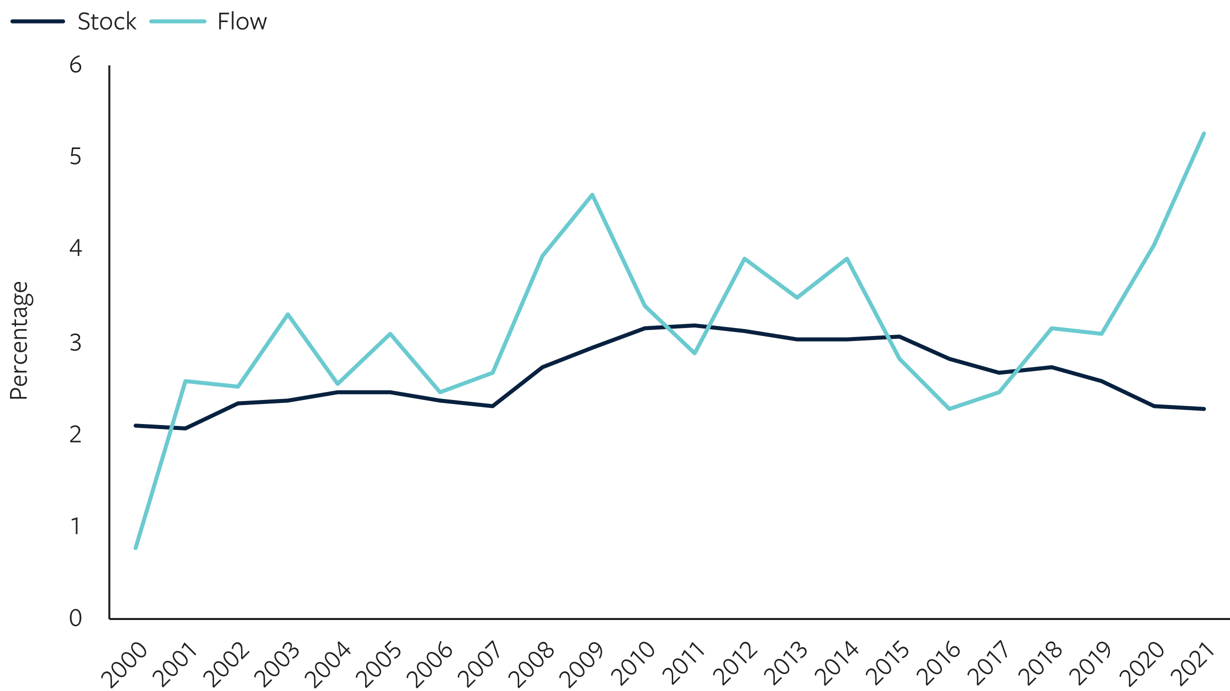
Foreign direct investment (FDI) brings foreign capital, creates employment opportunities and introduces advanced technologies to the host country. Furthermore, domestic firms can benefit from the presence of foreign firms through different channels. In horizontal spillovers, domestic firms take actions to upgrade their technology and hire trained workers to compete with foreign firms. In vertical spillovers, there are benefits when foreign firms enter into contracts with domestic firms to supply some inputs (forward spillovers) or provide technologically advanced inputs to domestic firms (backward spillovers). However, investors that engage in FDI in a foreign country face significant costs and risks, which the host country can impose after the investor has paid the fixed and irreversible setup costs. These risks include potential expropriation, regulatory interference, discriminatory treatment in favour of local firms and constraints on the ability to repatriate profits (Kobrin, 1984; Alfaro et al., 2008; Vandervelde, 2009; Hajzler, 2012). These risks could reduce FDI inflows. To enable confidence and a credible commitment for foreign investors, countries usually sign either bilateral or multilateral investment agreements that provide mechanisms to restrain government exercise of arbitrary or predatory behaviours (Hallward-Driemeier, 2003).

The empirical literature on the impact of investment agreements on attracting FDI is mixed. While some studies, such as a meta-analysis of 74 studies conducted by Brada et al. (2021), find a negligible effect, others, including Yeyati et al. (2002), report a positive impact. However, te Velde and Bezemer (2006) suggest that the scope of regional provisions is a crucial factor. Membership in a region by itself does not have a substantial effect on FDI; however, membership in a region with sufficient trade and investment provisions can draw in more FDI. The stricter the rules and the more protection for foreign firms, the more likely it is that investment rules will help them. In particular, te Velde and Bezemer (2006) report that the depth of investment provisions, which are rated on a scale from 0 to 3, has an elasticity to FDI of 0.17.

Currently, both African and non-African investors in Africa face a multitude of barriers. At the moment, the share of Africa in global FDI and intra-African FDI are low. Figure 1 shows that Africa's portion of the global FDI inflow and stock is generally low. Between 2000 and 2021, its share of inflow averaged 3.1% of the global total, while its share of stock remained at 2.6%. Over the past two decades, FDI stock has remained at around 2%, with no significant changes, although its share in global FDI inflow has begun to increase in recent years, rising to 5.2% in 2021, up from 0.7% in 2000. Figure 2 shows FDI as a percentage of GDP. Over the past two decades, FDI stock as a share of GDP has increased from 22.6% to 37.7% but the FDI inflow as a share of GDP shows little change.

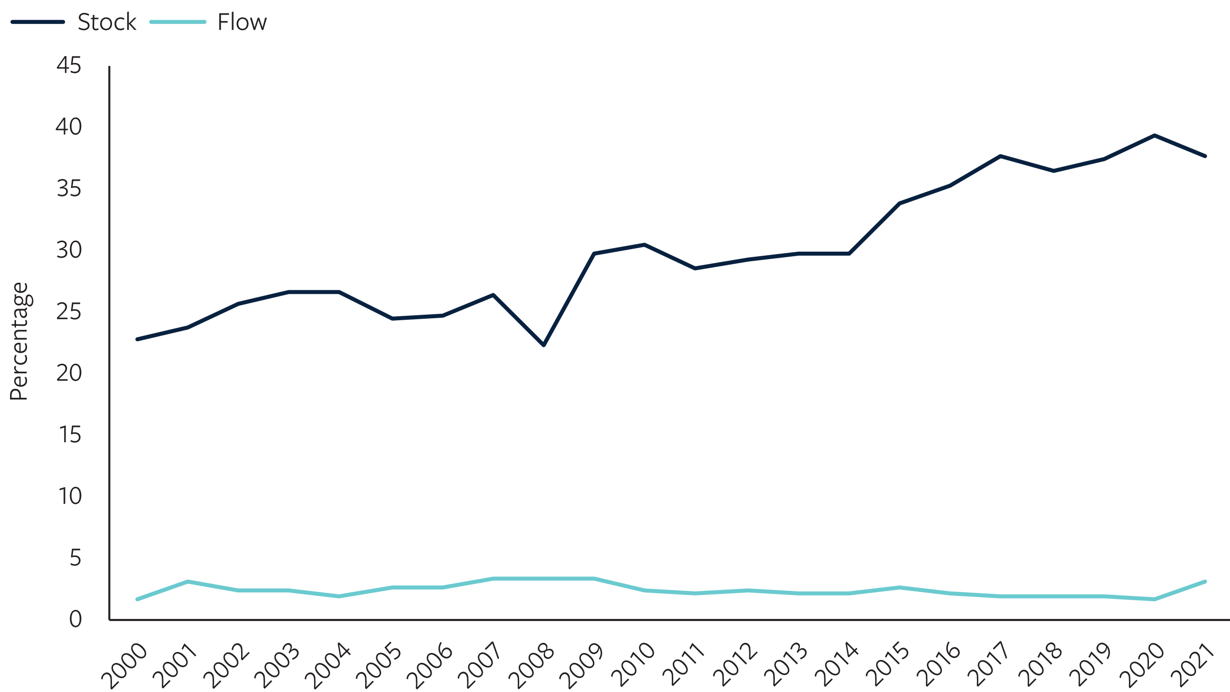
Figure 3 shows the share of FDI stock by source region. It shows that the share of intra-African FDI is very low. It has not changed much over the past two decades, rising from 9% 2002 to 13% in 2017.

Figure 1 Share of Africa in global FDI flow and stock



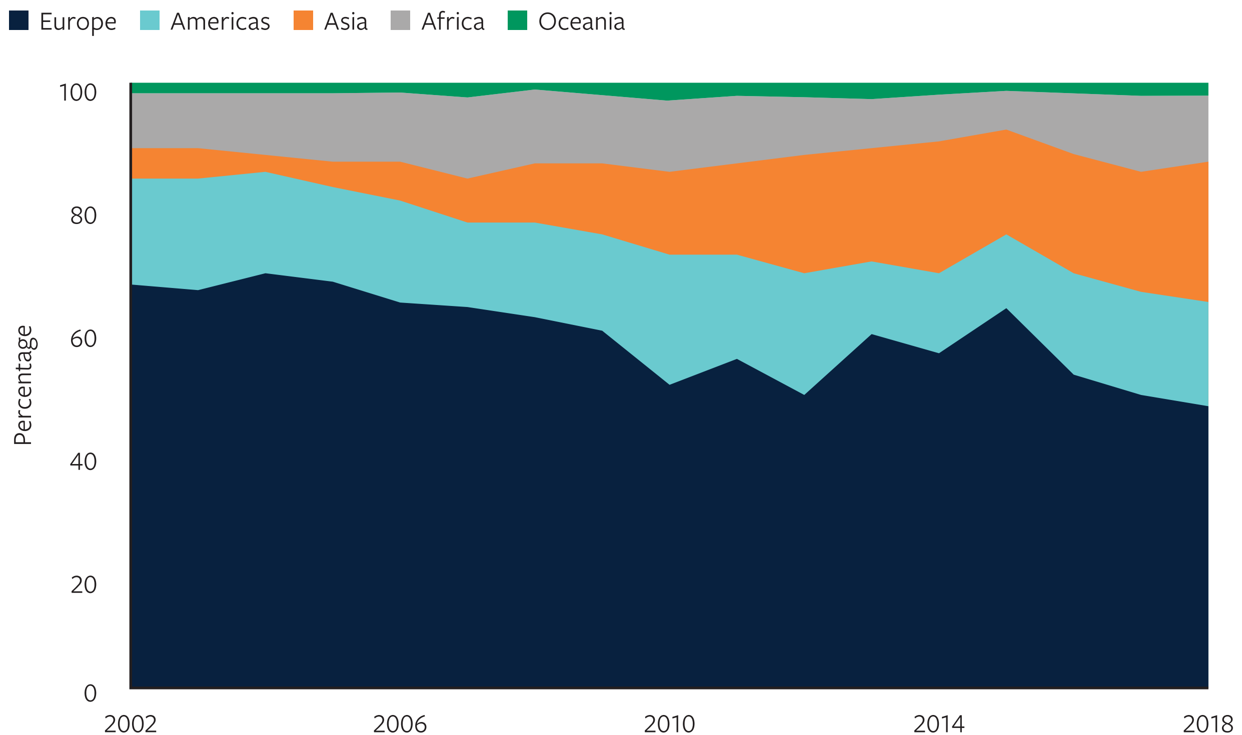
Source: Authors calculations using UNCTAD data.

Figure 2 FDI as a share of GDP, Africa



Source: Authors calculations using UNCTAD data

Figure 3 Share of total FDI stock in sub-Saharan Africa



Source: Adopted from Qiang et al. (2021).

Although over time FDI has diversified into other sectors, so far it has been concentrated in industries related to the extraction of natural resources, such as mining, oil and metals (Qiang et al., 2021).

African leaders are increasingly recognising the potential of intra-African investment to stimulate productive capacity, generate jobs, boost incomes and finance development on the continent. Adoption of the AfCFTA, including its Protocol on Investment, will most likely make Africa more attractive for FDI, from within and outside the continent, as it eliminates tariffs, reduces non-tariff barriers and creates a single unified market giving investors access to a market of 1.3 billion people with a combined gross domestic product (GDP) of $3.4 trillion. There are several ways in which the AfCFTA will influence Africa's journey towards deeper regional integration by making Africa more attractive from both within and outside Africa. Conceptually, the positive effects are expected to come from:

- Increased income effects: Regional integration raises GDP, which has a strong correlation with FDI. Echandi et al (2022) estimates that, with full implementation of the AfCFTA, real income by 7% by 2035, or nearly US$450 billion. African incomes could rise by between 0.2% (through tariff liberalisation only), 2.4% (through tariff and non-tariff barrier liberalisation) and 7% (when trade facilitation is included).

- Market size effects: A more integrated market will lead to higher extra-regional FDI. It is expected that such regional integration efforts could particularly attract FDI that can help with industrialisation.
- Predictable rules on investment: Stronger investment protection and facilitation provisions enable a stronger and more transparent investment framework. These effects can lead to commercial opportunities, increased employment and government revenues, and opportunities to transform African economies through technology and skills upgrading, as well as better integration into international value chains.

Considering these effects, te Velde et al. (2022), for example, estimate that a deeply integrated and effectively implemented AfCFTA could over time lead to a boost of £12.5 billion, or around a 25% increase, in the stock of UK FDI in Africa.[3] Echandi et al. (2022) find that trade and investment liberalisation in Africa should boost FDI: the AfCFTA could result in a 111% increase in FDI in Africa if all African countries are covered by preferential trade agreements, and a 159% increase under the AfCFTA deep scenario, which includes the investment, competition and intellectual property rights protocols. African countries could see a 54–68% increase in their own cross-border FDI under the AfCFTA FDI deep scenario (ibid.).

However, investors have indicated in interviews with ODI's SITA programme that such an uptick in FDI will emerge only if AfCFTA rules on market access, trade facilitation and investment are implemented effectively and lead to complementary actions around trade and investment and improved public–private dialogue. This is a strong message to AfCFTA implementers and support organisations (te Velde et al., 2022) following the adoption of the Protocol on Investment in February 2023. A Kenya National Chamber of Commerce & Industry–ODI roundtable in Nairobi, Kenya, with 70 private sector representatives, highlighted that, to increase overall intra-African investment and trade, there is a need to harmonise and increase the predictability of investment policies among African countries, to facilitate the flow of information among African private sectors, to ensure seamless cross-border connectivity and to improve the overall business environment (Raga et al., 2022).

3 The UK was responsible for a stock of £47.9 billion of FDI in Africa in 2020 (Office of National Statistics).

5. Ethiopia

We now examine the implications for Ethiopia. Ethiopia's participation in regional trade arrangements has been limited. The AfCFTA is the first free trade area agreement that the country has ratified. Ethiopia is a member of the Common Market for Eastern and Southern Africa (COMESA) but has not joined its free trade area (FTA). COMESA is among the pioneer regional economic communities (RECs) in Africa in developing a separate agreement aimed at facilitating and governing investment in the region. The agreement establishing the COMESA Common Investment Area (CCIA) was adopted in 2007 and later reviewed in 2017 (COMESA, 2020). The agreement has the objectives of promoting investment that supports sustainable development in COMESA member states, promoting COMESA as an attractive investment area, strengthening and increasing the competitiveness of COMESA's economic activities and gradually eliminating investment restrictions and conditions in the COMESA region.[4] However, the agreement is yet to enter into force as the required number of ratifications has not been met (Mafurutu, 2021).

On the other hand, Ethiopia has been actively using BITs to promote and regulate FDI. Since signing its first BIT in 1964, with Germany, it has signed total of 35 BITs. Out of these, 2 (concluded with Germany in 1964 and India in 2007) have been terminated and 21 have entered into force.[5] Many of these BITs were concluded in the late 1990s or the early to mid-2000s and constitute the first-generation BITs; the four most recently concluded constitute the second-generation BITs. The first-generation BITs cover only protection of investors without imposing any obligations on them. Among the 21 that have entered into force, only that concluded with Finland mentions labour rights and environmental regulations. Even then, the recognition is contained to a preambular statement and there is no substantive obligation in the body of the treaty. Hence, one can conclude that the contents of these BITs do not reflect what is contained in the Protocol in relation to sustainable development-related matters. The challenge then is with regard to those BITs signed with third parties – that have entered into force – as they could undermine the Protocol, especially if the capital-exporting third party countries have more power in their implementation in the host State Party (Alemayehu et al, 2022). In this regard, it is worth revisiting the BITs (those that are not being replaced by the Protocol itself) in terms of harmonising them with the Protocol so as to strengthen it.

Ethiopia has also issued investment laws and other sectoral laws governing investment matters. One of the results of the economic and legal reform that has been going on in Ethiopia since 2018 is the adoption of a new set of investment laws.[6] The laws aim at increasing the flow of investment in the country and addressing some of the challenges investors face.

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4 Revised Investment Agreement for the CCIA, Article 2.
5 https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia
6 Investment Proclamation No. 1180/2020, Investment Regulation No. 474/2020 and Investment Incentive Regulation No. 517/2022.

One major change introduced in the law relates to the elimination of government monopoly, as there are no longer investment areas reserved only for the government. Those areas that were under government monopoly, like international air transport services and postal services excluding courier services, are now open for joint investment between the government and private investors. Joint venture arrangements with the government are mainly aimed at giving the state the opportunity to ensure compliance with its economic policy and national security interest (Sornarajah, 2010). In areas where joint investment between a foreign investor and a domestic investor is allowed, like logistics, domestic air transport, audio-visual services, and accounting and auditing services, the share of the foreign investor is limited to 49% of the share capital of the enterprise.[7]

The new Investment Law also ends the distinction between Ethiopian nationals and foreign nationals of Ethiopian origin, as sectors exclusively reserved for Ethiopian nationals, like the finance sector, are now open for foreign nationals of Ethiopian origin. This is in line with changes made to the financial laws of the country. However, there is notable deviation in this regard, as the financial law requires the Ethiopian diaspora to acquire a share in financial institutions only in freely convertible foreign currency, while repatriation of profits in foreign currency is not possible.

The Investment Law includes for the first time a clause that obliges investors to promote social and environmental sustainability values, including environmental protection standards and social inclusion objectives, while carrying out their investment projects.[8] This is in addition to the obligation to carry out investment activities in line with other laws of the country. The inclusion of these provisions strives to balance investor and state rights and obligations.

Dispute settlement mechanism

Any complaints that investors may have in relation to the administration of their investment can be submitted to the Ethiopian Investment Commission (EIC), with a right to appeal to the Board. The Investment Law puts in place elaborate grievance handling rules that provide alternative and predictable timelines for resolution of the complaint. In the event the complaint rises to the level of an investment dispute, the law provides for consultation and negotiation as a means of settling the dispute. This is without prejudice to the right of access to justice through the competent courts in the country. The law further gives a mandate to the federal government to submit cases involving foreign investors to arbitration. A 'fork in the road' clause is contained, as the investor's choice to use either arbitration or a competent court, once made, will be final.

Institutional framework (investment facilitation)

The key investment administration organs include the Investment Board, the EIC and the regional investment organs. The new law provides clarity on the composition and mandate of these organs and introduces new bodies: the Investment Advisory Committee and the Inter-Regional Council.

7 Article 5/2 of Regulation No. 474/2020
8 Article 54/2 of the Investment Proclamation.

The role of the latter will be to coordinate federal and regional state administrations in the area of investment – but it is yet to be set up. The EIC is to conduct major investment promotion and facilitation activities. It is tasked with the responsibility of providing a one-stop service to investors to which it has issued investment permits. It also has the responsibility of compiling and making available information on investment opportunities, the legal framework and other related matters, as well as preparing a forum for exchange of information and experiences, among others. In general, the EIC is the primary point of contact on matters related particularly to foreign investment.

Focus points and key challenges

The 10-year Economic Development Plan for Ethiopia for the years 2021–2030 indicates the emphasis the Ethiopian government has given to FDI as a means of achieving its development and economic transformation goals (FDRE, 2021). The plan also recognises the significance of linking the country's economy with the continent and the region. The AfCFTA presents a great opportunity, and the Protocol on Investment is a potential tool in this regard. However, there are some challenges impeding the full utilisation of this opportunity.

While Ethiopia was among the first countries to ratify the AfCFTA agreement, it has yet to submit its goods and services offer. The engagement of the private sector in analysis and negotiations on this matter also seems to be limited. This is attributed to the weak capacity of the private sector to engage in a substantive manner (Alemayehu et al, 2022). Implementation of the Protocol on Investment will require the capacity-building of relevant government bodies, including regional investment offices, as well as the private sector.

Another area for serious attention is the security of investments. The Protocol requires State Parties to show due diligence in providing physical protection and security to investors and their investments. In recent years, Ethiopia has seen political unrest and conflicts that have led to the destruction of investments in different parts of the country. The government needs to focus on this area if it is to make use of the Protocol in attracting investment.

Yet another area of concern relates to the transfer of remittances and funds. While the Protocol guarantees the free transfer of funds without delay, a guarantee that is contained in the national Investment Law as well, implementation of this right could be challenged by a shortage of foreign currency. Cognisant of this issue, the 10-year development plan suggests mechanisms to increase foreign currency inflows, which include strengthening the tourism sector and broadening the incentive structure to encourage the diaspora to send foreign currency through the formal banking system.

6. Next steps

Realisation of the benefits that the Protocol aspires to bring to the AfCFTA State Parties hinges on its ratification and domestication by State Parties. The Protocol provides the basis for the State Parties' common understanding on issues that are of common concern. Hence, its implementation will contribute to improvement of these areas of common concern and will lead to stable inter-state relations. Unfortunately, the pace of ratification of treaties concluded under the auspices of the AU is very slow (the AfCFTA agreement being an exception). This is an impediment to regional integration – and it could also lead to State Parties missing the opportunities it could access from the Protocol. The pace with which the AfCFTA agreement has been ratified raises hope regarding ratification of the Protocol. However, there is still a need to work on creating awareness and understanding on the role of the Protocol and lobbying for its ratification. Non-ratification could be attributed to a country's need to revise its domestic laws as there is a need for policy coherence at the national and continental level. In this regard, technical assistance to the State Parties will prove vital.

A long road will remain even after ratification of the Protocol with regard to its full implementation. Some of the commitments under the Protocol, for example establishing a national focal point, need positive action and have financial implications. Staffing the national focal point with personnel with knowledge and expertise in the area of investment is paramount. Technical support in this regard will enhance implementation.

There is also a need to enhance coordination among the different national government bodies that have an overlapping mandate. In Ethiopia, for example, the Ministry of Trade and Regional Integration is responsible for AfCFTA-related matters while the promotion, facilitation and regulation of foreign investment is the mandate of the EIC. Implementation of the Protocol will touch upon both institutions, and thus a high level of coordination between the two institutions will be necessary.

7. Conclusions

The Draft AfCFTA Protocol on Investment provides investors with legal protection to alleviate investment risks by incorporating standards found in the new generation of investment treaties at the national, regional and continental levels. These standards of protection relate to national treatment, MFN, expropriation and free transfer of funds. The Protocol permits State Parties to take measures aimed at ensuring that investments comply with the goals and principles of sustainable development, and requires investors to act in an ethical and responsible manner. In relation to disputes, for the time being amicable dispute settlement mechanisms like consultation and negotiation are the available means for settlement. This is in addition to the dispute settlement mechanism provided for by the AfCFTA dispute settlement body. The fact that this body can be accessed only by State Parties, and not by private investors, puts into question its effectiveness in extending protection to such investors – especially given that African countries do not have a culture of litigating trade disputes.

The Protocol's aim of ensuring a conducive investment climate in State Parties can be achieved through the establishment of a balanced, coherent, transparent and predictable legal environment. State Parties' efforts at the national level to promote and facilitate investment must be synchronised with the Protocol. In order to rationalise the investment landscape, the Protocol requires the termination of BITs concluded among State Parties within five years and that they cease concluding future BITs among themselves. Synchronisation can also entail stocktaking of national investment laws and other sectoral laws regulating investment.

For Ethiopia, there are some challenges in using the Protocol that need attention. One such challenge entails ensuring coherence between commitments under the Protocol on Investment and other international agreements and national legislation. Unlike the Protocol, the first-generation Ethiopian BITs impose no obligation on investors. This creates unfavourable conditions (an increased burden) for investors relying on the Protocol. Unlike in the Draft Protocol, meanwhile, the national Investment Law recognises only direct expropriation. This is also true for the second-generation Ethiopian BITs. How far the rights of an investor under the Protocol will be limited as a result of non-recognition of indirect expropriation in the national legislation is debatable. In any case, it signals a lack of coherence and needs attention.

The other challenge relates to the implementation of commitments on the security and protection of investments and on the transfer of funds. These commitments are one way or another incorporated in the national investment legislation. However, the current political and economic climate in the country makes it challenging for it to ensure full compliance with these commitments.

Technical assistance is central to facilitating ratification of the Protocol and addressing implementation-related challenges. The Protocol also recognises this, as it requires State Parties

to support the provision of technical assistance, capacity-building and cooperation for investment promotion and facilitation under the Protocol. In this regard, the AfCFTA Secretariat is tasked with working with a Pan-African trade and investment agency, State Parties, RECs and partners to coordinate technical assistance and undertake capacity-building activities.

The AfCFTA national implementation committee for Ethiopia – consisting of 11 institutions represented by state ministers – has been established but its first meeting is yet to take place. The committee's role is to ensure effective and coordinated implementation of the AfCFTA national strategy. For Ethiopia, the national strategy, which is expected to promote the country's deeper integration in the continent and facilitate the expansion of African investment, has not been communicated to the public. Technical assistance through the Secretariat or partners could help the country in taking the first steps towards accomplishing these important milestones in the integration process.

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