



Creating One African Market

Negotiating Principles of the Protocol on Sustainable Investment

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Table of Contents

Objectives 2

Scope and Guiding Principles for Negotiating the Protocol on Sustainable Investment..... 3

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Negotiating Principles for the AfCFTA Protocol on Sustainable Investment

Objectives

1. Within the broader framework of the Abuja Treaty Establishing the African Economic Community (1991), Agenda 2063 and the Agreement Establishing the AfCFTA, the objective of launching negotiations for the Protocol on Sustainable Investment (hereinafter, the Protocol) is to promote intra-African sustainable investment and trade for the long-term sustainable development of African Union Member States.
2. The Protocol should aim at facilitating, promoting and protecting sustainable investments between African Union Member States by creating a modern legal framework that provides for a sound intra-African investment climate.
3. The specific Objectives of the Protocol are as follows:
 - i) To promote social and economic transformation for inclusive growth and sustainable development in line with Agenda 2063;
 - ii) To facilitate and stimulate intra-African investment flows through better harmonization and coordination of investment regimes and instruments across RECs and across Africa in general;
 - iii) To strengthen the regional markets, create wealth in Africa, and enhance competitiveness through increased production, trade and investment flows in African countries;
 - iv) To promote within Member States an environment conducive to the development of a more vibrant and dynamic private sector that facilitates job creation, promotes technology transfer, supports long-term economic growth and contributes effectively to the fight against poverty;
 - v) To boost intra-Africa trade and investment based on the free movement of business persons and capital, regional industrialization, as well as the development of cross-border value chains.
 - vi) To resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes.

Scope and Guiding Principles for Negotiating the Protocol on Sustainable Investment

4. Negotiations for the Protocol will build on the progress that has been made in the various Regional Economic Communities (RECs) and their indispensable role in contributing to regional economic integration and strengthening economic cooperation among African Union Member States.
5. Negotiations for the Protocol will build on the existing investment treaty reform objectives being pursued within the African Union, the RECs, the United Nations Conference on Trade and Development (UNCTAD), as well as recently concluded Bilateral Investment Treaties (BITs) concluded by African and national investment laws or codes across Africa.
6. In this regard, and in accordance with Article 5 of the AfCFTA and consolidated practice in relation to the AfCFTA, negotiations for the Protocol shall be guided by the following principles:
 - i) The scope of the Protocol shall cover the facilitation, promotion and protection of sustainable intra-African investment flows, while maintaining the right of African countries to regulate in the public interest;
 - ii) The Protocol will aim at creating a facilitative, predictable, and competitive investment environment for African investors investing in other African countries. Negotiations under the Protocol will cover investment facilitation and promotion for sustainable development, investment protection, and responsible investment;
 - iii) The Protocol should build on the codification of the best practices and trends in terms of investment regulation reflected in the Pan-African Investment Code (PAIC);
 - iv) The Protocol should reflect recent best practices and trends in terms of investment regulation formulated by the RECs, and in particular by COMESA, EAC, ECOWAS and SADC;
 - v) The Protocol should reflect the guiding principles for investment policymaking recommended by the United Nations Conference on Trade and Development (UNCTAD) in its Investment Policy Framework for Sustainable Development (IPFSD) and its IIA Reform Accelerator;
 - vi) Due consideration should also be given to the right of each AU Member State, under customary international law, to regulate investments and investors on their territories and to take measures to achieve legitimate public policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection;
 - vii) The Protocol should include provisions on sustainable development, including on climate change in line with the Paris Agreement. The Protocol should also contribute to the promotion of human rights and international labour standards, including through provisions on transparency and corporate social responsibility/responsible business conduct. Provisions ensuring that African countries can regulate for the protection of public health should also be included, this is especially important in the wake of the COVID-19 pandemic;

- viii) The Protocol should consider ongoing reform developments at both the multilateral and African levels regarding the settlement of investment disputes, in particular ongoing multilateral reforms of investor-to-state dispute settlement, such as those within United Nations Commission on International Trade Law (UNCITRAL) Working Group (WG III) and International Centre for Settlement of Investment Disputes (ICSID);
- ix) The Protocol, in line with the AfCFTA, should promote the movement of African persons, goods, services and capital by ensuring that Parties to the Protocol maintain transparent procedures and consult relevant stakeholders in developing regulations that may affect intra-African investment flows;
- x) In common with other international trade and investment agreements, the Protocol should take into account, and avoid overlap with, obligations and commitments under the Protocol on Trade in Services by providing that the Protocol [on Sustainable Investment] shall not apply to measures adopted or maintained by a Member State affecting trade in services under the Protocol on Trade in Services; and that in the event of any inconsistency between this Protocol and the Protocol on Trade in Services, the latter shall prevail to the extent of the inconsistency;
- xi) Due consideration should be given to the different levels of development of the Member States and their ability to participate effectively in investment facilitation, promotion and protection;
- xii) During the Negotiations for the Protocol, Member States of the RECs that intend to enter into negotiations of international investment agreements (IIAs) with third parties shall notify other Member States of the AU through the AfCFTA Secretariat;
- xiii) In recognition of the principle of Variable Geometry, countries are allowed to join the Protocol at a later stage in accordance with accession criteria agreed upon;
- xiv) Negotiations for the Protocol shall be Member State driven and decisions shall be taken by consensus;
- xv) Negotiations for the Protocol shall be conducted in a transparent manner including sharing information on measures/regulations affecting investment in countries. They should also allow for inclusive participation of African experts in order to offer technical assistance to the Member States during the process of negotiations;
- xvi) Negotiations shall allow adequate time for Member States to conduct national consultations and to receive inputs from African business associations and civil society.
- xvii) The negotiations for the Protocol will commence on 23rd February 2021 and should conclude by an indicative date of (?) 2022.