



AfCFTA Policy Brief

Sustainable development under the AfCFTA Protocol on Investment

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Contents

Acknowledgements	3
Executive summary	5
1 Background	7
2 Introduction	2
3 Foundations of sustainable development provisions in AfCFTA Protocol on Investment	5
4 The AfCFTA Protocol on Investment and sustainable development	9
5 Investment dispute settlement and sustainable development	18
6 Policy recommendations	19
7 Conclusion	23
References	24

Executive summary

Among the objectives of the *Agreement Establishing the African Continental Free Trade Area* (AfCFTA) Agreement is the promotion and attainment of sustainable and inclusive socio-economic development in Africa. The Protocol on Investment (PoI) to this Agreement contains in its preamble, references to, and substantive provisions on sustainable development which demonstrate the importance members states to the AfCFTA Agreement attach to sustainable development. Sustainable development under the AfCFTA Protocol on Investment is defined broadly to include economic, environmental and social dimensions, which embraces equitable development and poverty reduction.

A stated principal objective of the AfCFTA Protocol on Investment is the promotion, facilitation and protection of investments that foster sustainable development of state parties. The Protocol imposes substantive sustainable development obligations on states and investors. Most of these provisions are innovative because they effectively preserve the right of states to regulate and impose enforceable obligations on foreign investors. This approach is not the case with most investment chapters/protocols to free trade agreement and bilateral investment treaties. Significantly, the Protocol provides that investors must be denied its benefits if they breach their obligations including those on sustainable development and gives states the legal standing to initiate civil actions against investors for breaches of their obligations.

The AfCFTA Protocol on Investment provisions are legally significant because they are binding and enforceable which is uncommon under international economic treaties. The binding effect of the substantive provisions on sustainable development means that states must, in the first place, admit investments that can foster sustainable development which, as already stated, embraces environmental, social and economic dimensions. States must also reform their domestic foreign investment laws to include sustainable development obligations of investors and develop sustainable development guidelines and policies and set standards and requirements for investors to comply with. Investors, on their part, must ensure that the investments they make, and their operations are consistent with their sustainable development obligations. They must integrate all aspects of sustainable development in their activities and operations and establish mechanisms that demonstrate how their investments will contribute to the sustainable development of their host states and

how they will respect and uphold human rights and the right to a clean and safe environment and promote social and economic development generally.

The investment dispute settlement mechanism under the AfCFTA Protocol on Investment also intersects with sustainable development. Investors may use the right to dispute settlement under the AfCFTA Protocol on Investment to challenge measures on sustainable development that adversely affect their investments.

Above all, to achieve uniformity in the approaches to developing and implementing policies and taking other actions to address sustainable development concerns arising from investments at the national level, the African Union through the AfCFTA Secretariat should develop a continental framework on sustainable investment to serve as a guide to states in the development of national policies on sustainable development. This does not mean states must wait. States must proceed with actions to ensure they and investors meet their sustainable development obligations under the AfCFTA Protocol on Investment.

1 Background

In line with Article 7 of the AfCFTA Agreement, the PoI, negotiated under Phase II, was adopted by the 37th Assembly of Heads of State and Government of the African Union, in February 2024. The PoI is a binding legal instrument designed to, inter alia, promote, facilitate, and protect intra-African investments with a view to fostering sustainable development of the continent while preserving the regulatory autonomy of the States. The PoI is further expected to establish a continental legal framework for investment building on the regimes in the State Parties and RECs.

The PoI consists of a Preamble and eight (8) Parts comprising general provisions; investment promotion and facilitation; investment protection standards; sustainable development-related matters; investor obligations; institutional arrangements; management and settlement of disputes and final provisions. This plan will, therefore, provide a comprehensive roadmap for its effective execution and enforcement. Negotiations on the Annex on the Rules and Procedures on Dispute Prevention, Management and Resolution under the PoI are still ongoing.

With the adoption of the PoI, countries have begun the process of implementation, the AfCFTA Secretariat has begun the work of awareness creation on the AfCFTA Agreement and the PoI to provide clarity and understanding of the core principles, objectives and rationale of the provisions contained therein. This engagement is an ongoing process that will see the Secretariat undertake various awareness creation initiatives, including generating publications and making presentations at national, regional and international forums, investment and policy advocacy forums and conferences, and undertaking capacity building engagements among others.

This policy brief therefore aims to provide an analysis of key Sustainable Development provisions of the AfCFTA PoI to be used as one of the awareness creation tools by the AfCFTA Secretariat.

2 Introduction

The World Commission on the Environment has defined sustainable development to mean development “meets the needs of the present without compromising the ability of future generations to meet their own needs ... [S]ustainable development requires meeting the basic needs of and extending to all the opportunity to fulfil their aspirations for a better life.”¹ The United Nations Conference on Trade and Development (UNCTAD) defined sustainable development to cover economic, environmental and social dimensions.² This definition has been adopted in Article 1 of the Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment (AfCFTA Protocol on Investment).³ Sustainable development is broad in the sense that it refers to development that is equitable including one that reduces poverty, improves the health of people and promotes respect for human rights and gender equality.⁴ This is the sense in which it is said sustainable development covers environmental, social and economic dimensions.

While investment may lead to sustainable development, foreign investment can equally lead to the pollution and degradation of the environment, the exploitation of local workers and violation of human rights and the social and economic livelihoods of people.⁵ Many measures relating to sustainable development have been at the centre of investment treaty claims against states which necessitates African states’ consideration of how to ensure that investments in Africa are aligned with sustainable development objectives and principles. Globally the total investor-State dispute settlement (ISDS) cases against states reached 1,332 in 2023.⁶ Sixty new arbitrations were initiated in 2023, 70 per cent of which were brought against developing countries, including Senegal and Tanzania. Most of the respondent states to the 1,332 ISDS claims are developing countries (about 62 per cent), suggesting African countries are at risk of

¹ World Commission on Environment and Development, Report of the World Commission on Environment and Development: Our Common Future (20 March 1987) [27] <<https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>> (accessed 34 October 2024).

² United Nations Conference on Environment and Development, Sustainable Development (United Nations, 1992) [2.6] <<https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>> (accessed 24 October 2024).

³ Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment, Accra, Ghana, January 2023.

⁴ J. Anthony VanDuzer, Penelope Simons and Graham Mayeda, Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries (Commonwealth Secretariat, August 2012) 24

⁵ Ibid 28.

⁶ UNCTAD, 2024 World Investment Report: Investment Facilitation and Digital Government (UNCTAD/WIR/2024, United Nations 2024) 65-74

dispute settlement claims because of large investments in the extractive sector in Africa.⁷ In terms of the measures that have been challenged in these ISDS cases, the 2023 ISDS cases involved disputes in economic sectors such as construction, manufacturing and extractive industries which accounted for over half of the claims. By the end of 2023, a total of 235 fossil fuel-related cases had been filed by foreign investors against states and the measures that were challenged related to mining of coal and lignite, crude petroleum and natural gas extraction, coal, oil and gas power generation and manufacturing petroleum products.⁸

These measures are ultimately related to sustainable development in its environmental, social and economic development dimensions because they are about the protection of the environment, climate change, the protection of water bodies, and human rights. These cases can also affect the economic development dimension in the sense that state resources budgeted for development purposes could be diverted to defend expensive investment dispute settlement claims. Fifty-eight of the over 100 investment treaty claims against African states are estimated to amount to US\$56 billion, and this includes US\$2.1 billion against Egypt, US\$1.4 billion against Libya and US\$920 million against Algeria.⁹ These investment treaty claims also intersect with social development dimension of sustainable development when they involve, for example human right and the rights of indigenous peoples.¹⁰ In effect, the choice of dispute settlement mechanism can have serious consequences for the achievement of the sustainable development objectives.

The substantive standards of investment protection such as national treatment, expropriation and physical protection and security under the AfCFTA Protocol on Investment incentivize investments in all sectors of African economies in a manner that puts priority to long-term and holistic sustainable outcomes. African countries must therefore work to ensure that their individual and collective needs for sustainable development are not compromised by the activities of investors. This requires that they include provisions on sustainable development in their domestic legislation and international economic treaties and effectively implement them.

Given the activities of foreign investors could pose a challenge to sustainable development in all its aspects, it is appropriate that the AfCFTA Protocol on Investment focuses not just on substantive standards of investment protection but also contains provisions to ensure that investments are compatible with and foster sustainable development. This *Policy Brief* reviews and interprets relevant

⁷ Ibid

⁸ Ibid.

⁹ Transnational Institute, ISDS in Numbers: Impacts of Investment Arbitration against African States ((October 2019) < https://www.tni.org/files/publication-downloads/isds_africa_web.pdf> (accessed 25 October 2024).

¹⁰ See for example, Judith Levine, 'The interaction of international investment arbitration and the rights of indigenous peoples' in Freya Baetens (ed), *Investment Law within International Law* Integrationist Perspectives (Cambridge University Press, 2013) 106

provisions on sustainable development of the AfCFTA Protocol on Investment and makes proposals on how to implement these provisions to achieve the objective of sustainable development under the Protocol and the AfCFTA Agreement. The *Policy Brief* is intended to enable states and investors understand what their sustainable development-related obligations under the AfCFTA Protocol on Investment are and what they need to do to meet those obligations. Sections 2 to 4 cover the context and substantive issues while Section 5 covers the policy and reform issues.

3 Foundations of sustainable development provisions in AfCFTA Protocol on Investment

Sustainable development has a long history.¹¹ In part, the United Nations General Assembly's adoption of the Sustainable Development Goals¹² (SDGs) in 2015 and the conclusion of the Paris Climate Agreement in 2015 make it even more imperative that states and non-state actors take sustainable development considerations seriously in the design and implementation of their policies (whether public or business policies). The SDGs Resolution and the Paris Climate Agreement in sum require states and non-state actors to promote and advance the achievement of the sustainable development goals. The Paris Climate Agreement according to its Article 2.1(c) "aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty by ... [m]aking finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development." Goal 12 of the SDGs focuses on sustainable consumption and production. States through Goals 12.2 and 12.6 committed themselves to "achieve the sustainable management and efficient use of natural resources" and "[e]ncourage companies, especially large and transnational companies, to adopt sustainable practices and to integrate sustainability information into their reporting cycle."

Foreign direct investment intersects with sustainable development. Climate, economic development, environmental and social challenges require collaborative efforts of all actors including governments and foreign investors to ensure access to basic goods and services including food, utilities such as water and energy and healthcare. Governments alone cannot provide these goods and services and must work with the private sector, including foreign

¹¹ See World Commission on Environment and Development, Report of the World Commission on Environment and Development: Our Common Future (20 March 1987) [27] <<https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>> (accessed 34 October 2024).

¹² United Nations, Transforming our World: The 2030 Agenda for Sustainable Development (Resolution adopted by the General Assembly on 25 September 2015)

investors, to ensure access to them. Foreign investment can contribute to making these goods and services available to the citizens of host states to foreign investment. Governments also have responsibilities to manage climate change and attendant consequences and to protect the environment. To meet these challenges, governments must engage private economic actors such as local and foreign investors. In this regard, it is apposite that African states have concluded the AfCFTA Protocol on Investment to attract and retain investments. However, while foreign direct investment leads to international capital flow which may be used to engage in economic activities to meet environmental and social challenges, foreign direct investment can adversely impact on the environment and the social lives of host states. Thus, foreign investment must be looked at not just in terms of its potential to contribute to the national economy, but also in terms of how it may adversely impact on the environment and the social lives of the people.

The adverse impact of foreign investment activities on the environment, human rights, economic development regulation and social policy initiatives necessitates regulatory measures and international trade and investment agreements that ensure a transition to a green and sustainable economy and respect human rights. Foreign indirect investment is “green” or “green investment” arises when the investment contributes to environmental and climate protection objectives.¹³ Domestic laws and international economic treaties such as trade and investment agreements must ensure that foreign investment and trade activities are carried out in accordance with sustainable development objectives, including the advancement of environmental and climate protection and socio-economic development objectives. This is what the AfCFTA Protocol on Investment seeks to do.

At the global level, in recognition of the relationship between trade and investment and sustainable development, states have long since included provisions relating to sustainable development in international economic treaties. The approach to sustainable development in international investment promotion and protection in Africa as shown in Section 3 is consistent with the global position on integrating sustainability concerns in trade and investment agreements. The preamble to the Marrakesh Agreement Establishing the World Trade Organization emphasises the need to expand the production of goods and services and trading in them in a manner that is consistent with “optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment.”¹⁴ Consistent with this Agreement, Article XX(g) of the General Agreement on Tariffs and

¹³ Columbia Centre for Sustainable Investment, Green Foreign Direct Investment in Developing Countries (United Nations Environment, 2017) 7

¹⁴ Marrakesh Agreement Establishing the World Trade Organization, signed 15 April 1994, entered into force 1 January 1995.

Trade 1994 makes exception for states to adopt and implement measures relating to the conservation of exhaustible natural resources. The World Trade Organisation's Committee of Trade and Environment has emphasised the need for trade and environmental policies to support each other in a mutual manner. According to the Committee, international trade and trade policy need to support global efforts aimed at achieving the SDGs and international environmental commitments including on matters such as reducing pollution, promoting conservation and sustainability in the use and restoration of biodiversity.¹⁵ Similar objectives are contained in the *Ministerial Statement on Trade and Environmental Sustainability*.¹⁶ Integrating sustainable development concerns in global trade and investment agreements furthers the objectives of various multilateral treaties on the environment and climate change.¹⁷ As investment treaties are presented as necessary to attract foreign investment for development, investment protection and social and economic development must also mutually support each other, such that social and economic development objectives are not compromised or subordinated to the investment protection objective.

In furtherance of sustainable development, many programmes have been initiated on the African continent. One such programme of relevance is the African Development Bank's Green Investment Programme for Africa (GIPA),¹⁸ a mechanism which seeks to boost climate finance and green technologies inflows in Africa through the provision of activities that lack support from existing sources. GIPA is also aimed at supporting African countries to track SDGs and build an alliance among reserve banks, institutions on climate change and financial institutions. The GIPA will help African countries in their quest to transition to sustainable agriculture, blue economy and ecotourism and make a net-zero transition. A similar initiative is the *Africa Green Industrialisation Initiative*¹⁹ which emphasises green industrial growth in Africa and decarbonisation of global industry and manufacturing through the promotion and facilitation of green businesses. Specifically in relation to foreign investment, the objective of the 2016 Draft Pan-African Investment Code as reflected in its Article 1 is "to promote, facilitate and protect investments that foster the sustainable development" of the host state. The Code in

¹⁵ Committee on Trade and Environment, Communication on Trade and Environmental Sustainability (WT/CTE/W/249, 17 November 2020).

¹⁶ World Trade Organisation, Trade and Environmental Sustainability Structured Discussions: Ministerial Statement On Trade And Environmental Sustainability (WT/MIN(21)/6/Rev.2, 14 December 2024).

¹⁷ See for example, the United Nations Framework Convention on Climate Change entered into force on 21 March 1994; the Paris Agreement adopted 12 December 2015, entered into force on 4 November 2016; United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, adopted 17 June 1994, entered into force 26 December 1996; Convention on International Trade in Endangered Species of Wild Fauna and Flora, entered into force 1 July 1975; and Convention on Biological Diversity, entered into force on 29 December 1993.

¹⁸ African Development Bank, Green Investment Program for Africa <<https://www.afdb.org/en/topics-and-sectors/initiatives-and-partnerships/green-investment-program-africa>> (accessed 8 January 2025).

¹⁹ Africa Green Industrialisation Initiative launched at the 28th Conference of Parties (COP28) to the United Nations Framework Convention on Climate Change, held 30 November-12 December 2023 <<https://pwnlyias.com/current-affairs/africa-green-industrialisation-initiative/#about-the-africa-green-industrialisation-initiative>> (accessed 8 January 2025).

Article 22(3) imposes an obligation on foreign investors to “contribute to the economic, social and environmental progress with a view to achieving sustainable development of the host State.” The AfCFTA Protocol on Investment builds on and continues from these early norms. The sustainable development provisions of the AfCFTA Protocol on Investment are intended to achieve the objective that foreign investment respects and upholds environmental and social considerations and make positive contribution to the economy of the host states, not just the investors’ private economic motive of profit-making.

4 The AfCFTA Protocol on Investment and sustainable development

4.1 Sustainable development as an objective of the AfCFTA Protocol on Investment

The Agreement Establishing the African Continental Free Trade Area (AfCFTA Agreement) was adopted and opened for signature on 21 March 2018 and entered into force on 30 May 2019. Among the objectives of this Agreement is the promotion of sustainable development. Specifically, Article 3(e) of the AfCFTA Agreement states that it is a general objective of the AfCFTA to “promote and attain sustainable and inclusive socio-economic development, gender equality and structural transformation of the State Parties.” The preamble to the AfCFTA Agreement reaffirms the state parties’ right to regulate and their “flexibility to achieve legitimate policy objectives in areas including public health, safety, environment, public morals and the promotion and protection of cultural diversity.”

Article 7 of the AfCFTA Agreement requires member states to enter into Phase II negotiations in several areas including on investment to further its objectives. Based on this provision, the AfCFTA Protocol on Investment was negotiated and subsequently adopted by the 37th Assembly of Heads of State and Government of the African Union, in February 2023. Based on Articles 7(1)(b) and 8(3) of the AfCFTA Agreement, the AfCFTA Protocol on Investment forms an integral part of AfCFTA Agreement and is, therefore, legally binding on all member states. This goes without saying that the AfCFTA Protocol on Investment’s provisions on sustainable development are binding unless expressly stated in the Protocol.

The preamble to the AfCFTA Protocol on Investment and its substantive provisions are replete with twenty-24 references to the phrase *sustainable development* which show the importance members states attach to sustainable investment. The preamble expressly refers to *Transforming our World: The 2030 Agenda for Sustainable Development*,²⁰ *Investment Policy Framework for*

²⁰ United Nations General Assembly, Transforming Our world: The 2030 Agenda for Sustainable Development (Resolution A/RES/70/1 adopted by the United Nations General Assembly on 25 September 2015

*Sustainable Development*²¹ and to new generation investment policies that address sustainable development concerns. The preamble also acknowledges the role of the private sector in sustainable development and the contribution an investment can make to the sustainable development of the state parties.

Sustainable development according to the Article 1 of to the AfCFTA Protocol on Investment, embodies economic development, social development and environmental protection pillars. In relation to these dimensions, the preamble reaffirmed:

the inherent right of State Parties to regulate in their territories and to introduce measures in order to achieve their national public policy objectives, promote sustainable development objectives and protect legitimate public welfare objectives, such as public health, national security, the environment, the conservation of living and non-living exhaustible natural resources, labour standards, the integrity and stability of the financial system and public morals.

Beyond the preambular language, the promotion of sustainable development is expressly stated in the AfCFTA Protocol on Investment as an objective. Thus, it is stated in Article 2(a) that the Protocol is designed principally to achieve several objectives including “encouraging intra-African investment flows and opportunities and promoting, facilitating, retaining, protecting and expanding investments that foster sustainable development of State Parties.” Article 7(1) of the Protocol also requires state parties to “facilitate investments that contribute to sustainable development.” Significantly in relation to sustainable development, the Protocol says in Article 1 that to qualify as an investment the investment must, among other characteristics, make “a significant contribution to the Host State’s sustainable development.” This essentially means that to qualify as an investment and be entitled to legal protection under the Protocol, the profit motive of the investor in making investment is not the sole and exclusive consideration. The investment must also make contribution to the development of the host state. This a legally significant definition requiring both states and investors to ensure that investment works for sustainable development of the host state as much as it works for the profit of the investor.

This African commitment to sustainable development does not originate under the AfCFTA Agreement and the AfCFTA Protocol on Investment. Through the various multilateral agreements including the agreement establishing the World Trade Organisation and its instruments as well as continental agreements such as *African Convention on Conservation of Nature and Natural Resources* which entered into force in 1969, Africa has long committed itself to sustainable development issues. The inclusion of sustainable objective in the AfCFTA Agreement and its protocols then means that

²¹ United Nations Conference on Trade and Development (UNCTAD), Investment Policy Framework for Sustainable Development (UNCTAD/DIAE/PCB/2015/5, United Nations, 2015).

the investment landscape and sustainable development in Africa are taken seriously. It demonstrates that the African continent seeks to attract and retain investments that promote sustainable development with the objective of ensuring that investments come not only with economic benefits but also with environmental and social well-being benefits for present and future generations.

African countries are parties to multilateral trade agreements and environmental treaties and thus have obligations to ensure that trade and investment promote sustainable development in Africa. Aspiration 1 of the African Union's Agenda 2063 addresses the subject of inclusive growth and sustainable development. In accordance with Agenda 2063, Africa must participate in efforts at the global level aimed at mitigating climate change to create policy flexibility for sustainable development in Africa. In participating in global trade and multilateral treaties on the environment and addressing sustainable development objectives in the AfCFTA Agreement and AfCFTA Protocol on Investment, Africa is fulfilling its duty under Agenda 2063 "to speak with one voice and unity of purpose in advancing its position and interests on climate change"²² and sustainable development in generally.

The academic literature and investor-State dispute settlement tribunals are divided on whether an investment is entitled to protection if it does not make contribution to the development of the host state.²³ This issue does not arise under the AfCFTA Protocol on Investment. The Protocol states that to qualify as investment, an investment must make contribution to the development of the host state and provides that states must facilitate investment that fosters sustainable development. This approach to the status of an investment under AfCFTA Protocol on Investment removes doubt as to the role of an investment's contribution to development in determining whether that purported investment qualifies an investment and is entitled to legal protection. This means that an African state sued in an investment treaty arbitration can argue that an investment is not entitled to protection because it has made no significant contribution to the state's sustainable development. Such an argument can result in an investor losing the protection of the AfCFTA Protocol on Investment if the state succeeds in establishing that the investment has in fact made no significant contribution to its sustainable development.

²² African Union, Agenda 2063: The Africa We Want (10 June 2013) para 17.

²³ Dominic Dagbanja, 'The Development Objective as an Imperative in Interpretation of International Investment Agreements' (2018) 44(2) University of Western Australia Law Review 144

4.2 Substantive sustainable development-related obligations

4.2.1 States' obligations on sustainable development

There are many innovative substantive provisions in the AfCFTA Protocol on Investment that address the obligations of states relating to sustainable development. Those provisions are relevant for policy and legislative consideration at the domestic level and for investors in terms of how they establish and operate their investments. They are innovative because they impose substantive duties on states and effectively preserve the right of states to regulate. This is not the case with most investment treaties which come with provisions on the right to regulate qualified in a manner that weakens their legal effect.

Obligation to admit and incentivise investments that foster sustainable development

Article 4 of the Protocol on Investment states that states must admit investments in accordance with their laws and regulations. The laws and regulations of the states include those on human rights and labour rights and the environment which are relevant aspects of sustainable development. African states also have a duty under Article 7(1) of the Protocol on Investment to facilitate investment that contributes to sustainable development. It is expressly stated in Article 31(2) of the AfCFTA Protocol on Investment that state parties “shall ensure that investors and their investments comply with their domestic law and regulations and international law.” The duties to admit investments in accordance with domestic laws and regulations, ensure investors and their investments comply with those laws and regulations, and to facilitate investment that contribute to development require African states to ensure that investment activities will be consistent with sustainable development before admitting the investment. They must not seek to admit investment at the expense of sustainable development. For investment in the extract sector which has direct damaging impacts on the environment and sustainability, fulfilling these duties require African states to satisfy themselves as to an investor's readiness and capacity to comply environmental sustainability and human rights laws prior to admitting the investment. Investments must also be admitted only when their operations will comply with domestic law requirements relating to sustainable development and the investments will make contribution to the sustainable development of the host state.

In fact, Article 8(1) of the AfCFTA Protocol on Investment envisages that African states will introduce incentives “to attract, retain and expand investments that foster sustainable development.” These incentives could include: (1) those that are development-oriented and are aimed at encouraging specific investments in the sectors related to attaining sustainable development; (2) incentives for technology,

technology transfer, and research and development; (3) incentives for low-carbon investments; and (4) incentives that encourage responsible business conduct. Domestic laws and policies are necessary to give effect to Article 8 of the AfCFTA Protocol on Investment.

Social, Economic, and Environmental Sustainability

The exercise of the regulatory authority of states including for environmental protection and public health have been challenged by foreign investors using the investment dispute settlement mechanism. In view of this, states now include provisions in international economic treaties seeking to preserve their regulatory authority.²⁴ The efficacy of many of these provisions on the right of African states to regulate have been questioned in the literature.²⁵

The provisions the AfCFTA Protocol on Investment address the right of states to regulate for social development (e.g. labour rights, health and so on) and environmental protection purposes. Specifically, Article 24(1) states that the host state has the right to regulate, including to take all measures to ensure that investment is consistent with sustainable development goals and principles and “with national environmental, health, climate action, social and economic policy objectives and essential security interests.” This right derives from domestic law, customary international law and general principles of international law. Article 24(2) and (3) of the Protocol strongly preserve the right to regulate by making it clear that measures taken by a state to comply with its international obligations under other relevant treaties do not constitute a breach of the Protocol. This means that measures taking to enforce international environmental treaties, and international human rights treaties do not constitute a breach of the Protocol even if the measures have an adverse effect on investments. This interpretation is strengthened by Article 24(2) of the Protocol which says the exercise of the right to regulate (such as taking measures to ensure that investment is consistent with sustainable development or to achieve the objective of complying with an international obligation) “cannot give rise to any claim by an investor for compensation.”

Under Article 25(1), states must ensure “high levels of environmental, labour, and consumer protection” in accordance with their international environmental and human rights treaty obligations and other internationally accepted standards. States must continue to improve domestic standards on environment, labour and consumer protection. Under Article 25(2), states must not relax or waive domestic standards or compliance with environmental, labour and

²⁴ Dominic Dagbanja, *The Investment Treaty Regime and Public Interest Regulation in Africa* (Oxford University Press, 2022) 18-32; and United Nations Conference on Trade and Development, *International Investment Policies and Public Health* (IIA Issues Note No. 2, United Nations, July 2021).

²⁵ Dominic Dagbanja, ‘The Legal Efficacy of Investment Treaty Reforms in Africa’ (2022) 3 *African Journal of International Economic Law* 40.

consumer protection laws to encourage investment. With respect to climate change, African states must under the Article 26 of the AfCFTA Protocol on Investment “promote and facilitate investments” that support actions to mitigate greenhouse gas, are relevant for a transition to renewable energy and low carbon technologies or investments that are capable of mitigating climate change impacts on exhaustible natural resources such as fresh water and biological diversity.

The AfCFTA Protocol on Investment also provides for African states obligations relating to public health. There have been over 30 investment disputes related to public health.²⁶ For example, a foreign investor’s investment in water supply and treatment which is directly related to public health generated an investment dispute between Tanzania and the foreign investor that made the investment. In *Biwater Gauff (Tanzania) Ltd v Tanzania*,²⁷ the investor made investment in a concession to supply water and manage sewerage services. The concession was awarded by Tanzania to a British company. The Government of Tanzania said the company failed to meet performance obligations and cancelled the contract. This cancellation led to an investment treaty suit under the United Kingdom-Tanzania bilateral investment treaty alleging Tanzania breached the fair and equitable treatment and full protection and security standards. This was a USD165 million project funded by the World Bank. Tanzania argued that the failure of the investor threatened public health and welfare. The Tribunal found that Tanzania had breached the UK-Tanzania investment treaty but held that none of Tanzania’s beaches caused the loss and damage giving rise to the investment dispute settlement claim and dismissed the claims for damages. Each party to the arbitration bore its own legal costs. The costs of the arbitration were shared between the parties in equal proportions. In *Philip Morris v Australia*²⁸ and *Philipp Morris Uruguay*,²⁹ legislative and regulatory measures to regulate tobacco packaging and sale to address public health issues arising from smoking were challenged in investor-State arbitration.

Perhaps, it is in direct response to investors’ use of investment dispute settlement mechanism to challenge public health regulatory measures that African states have included Article 27 on public health and pandemic in the AfCFTA Protocol on Investment. This provision asserts the right of the contracting states to determine their public health policies, to establish levels of protection for public health and adopt or change when there are epidemics, pandemics and other public health emergencies. African states must also promote and facilitate investments in public health including in

²⁶ United Nations Conference on Trade and Development, International Investment Policies and Public Health (IIA Issues Note No. 2, United Nations, July 2021) 5.

²⁷ *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID CASE NO. ARB/05/22, Award, 24 July 2008.

²⁸ *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility dated 17 December 2015.

²⁹ *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award dated 8 July 2016.

medical equipment and pharmaceuticals especially for chronic diseases. Article 27 is meant to preserve policy space for public health regulation.

Article 28 of the AfCFTA Protocol on Investment deals with the pursuit of development goals generally (economic and social dimensions) by allowing state parties to introduce measures to promote domestic development and local content. The measures that may be taken to further these development goals include (1) granting of preferential treatment to enterprises; and (2) measures to address economic and development disparities. Economic development as a pillar of sustainable development under the AfCFTA Protocol on Investment can be achieved through technology. Accordingly, African states must facilitate the transfer of technology in terms of Article 30 of the Protocol. African states have socio-economic development obligations relating to human resource development under Article 29 of the AfCFTA Protocol on Investment to develop national policies to guide investors in developing human capacity of the labour force. They must also promote, according to Article 6(g) of the Protocol, investments that “contribute to gender equality, the empowerment of women, youth and people with disabilities.” The social development dimension of sustainable development is also reflected in Article 31(1) of the Protocol which says despite investor obligations, states may still promote and enforce laws and policies to protect investment-related human rights, labour rights, anti-corruption and anti-bribery measures and the rights of indigenous peoples and local communities

4.2.2 Investors’ Obligations on Sustainable Development

The AfCFTA Protocol on Investment also comes with substantive obligations of foreign investors relating to sustainable development and environmental protection.³⁰ These provisions are unique and innovative in the sense that equivalent provisions in other regional and bilateral international economic treaties are soft law in nature because they are not binding and enforceable. Most of the provisions of this Protocol are legally enforceable against foreign investors. The specific provisions are analysed below.

Obligation to comply domestic and international sustainability laws

Under Article 31(2) of the AfCFTA Protocol on Investment, states must ensure that must carry out their operations consistent with domestic laws and regulations and international law. Foreign

³⁰ Jean Ho and Mavluda Sattorova (eds), *Investors’ International Law* (Hart Publishing 2021); and Dominic Dagbanja DN Dagbanja, ‘Book Review: Investors’ International Law by Jean Ho and Mavluda Sattorova’ (2024) 27(1) *Journal of International Economic Law* 196.

investors and their investments have specific binding obligation under Article 32 of the Protocol to carry out their operations in compliance with domestic laws and regulations, administrative guidelines and international law. This provision places obligations on investors to comply sustainable development-related international treaties and instruments whether binding or not binding including the Sustainable Development Goals. Investors must also comply with standards of business ethics, support and respect human rights and comply with labour standards. They must not be complicit in human rights abuses and comply with international labour standards pursuant to Article 33 of the Protocol. Compliance with these norms and standards is therefore mandatory unlike provisions on corporate social responsibility in most investment treaties. The effect of these investor obligations is that states must hold foreign investors accountable in accordance with domestic law and international law if investors' actions breach their domestic law and international law obligations on sustainable development.

Environmental, economic and social development obligations

According to Article 34 of the Protocol, investors in carrying out their business activities must respect and protect the environment. They must respect the right to a clean, healthy and sustainable environment and comply with the principles of prevention and precaution when conducting business activities. This is necessary to anticipate and prevent any risk of significant harm to the environment. Investors must carry out an environmental impact assessment and should their business activities cause harm to the environment, they must take steps to mitigate the harm and to restore a clean, healthy and sustainable environment. Investors' exploitation or use of local communities' natural resources must be consistent with the rights and interests of the host state and local communities.

There are also investor socio-economic development obligations under Article 35 of the Protocol on Investment to respect and uphold the rights of indigenous peoples and local communities and tenure rights to land, water, fisheries, and forests in accordance with relevant domestic laws and regulations, international law, norms and best practices. In accordance with domestic law, investors must submit environmental and social impact assessments to relevant government institutions and make those reports available and accessible to the public. The contents of these obligations are dependent on the contents of investor obligations under domestic law and in international law. The obligations are thus of limited legal potency without specific domestic laws and international treaties imposing them on foreign investors. This requires that as states have control over the making of municipal law and international treaties, they must use their lawmaking powers to enact and make domestic laws and regulations and international treaties that specifically

address the obligations of investors with respect to indigenous and local communities' rights and rights relating to land and natural resources. The application of Article 35 of the AfCFTA Protocol on Investment depends on these laws. A relevant international instrument in this respect is the United Nations Declaration on the Rights of Indigenous Peoples.³¹

Corporate social responsibility

Another significant provision addressing the obligations of investors relating to sustainable development is Article 38 of the AfCFTA Protocol on Investment which deals with corporate social responsibility. It states in pertinent terms in paragraph 1 that investors and covered investments “shall endeavour to achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of a high degree of socially responsible practices.” Accordingly, investors must, in the terms of Article 38(2)(a) and (e), “stimulate economic, social and environmental progress, aiming at achieving sustainable development” and “refrain from seeking or accepting exemptions that are not established in the legislation of the Host State, relating to environment, health, security, work or financial incentives.” In relation to these corporate social responsibilities of investors, states are to encourage investors to incorporate internationally recognised standards into internal policies and guidelines and the principles of corporate social responsibility contained in Article 38(2) of the AfCFTA Protocol on Investment.

³¹ Resolution adopted by the General Assembly on 13 September 2007.

5 Investment dispute settlement and sustainable development

The dispute settlement mechanism is central to the achievement of the sustainable development objective under the AfCFTA Protocol on Investment because it provides a basis for disputes relating to sustainable development to be resolved. Through the dispute resolution process, states can ensure that investors meet their sustainable development obligations and are held accountable when they fail to do so. In this connection, under Article 5 of the Protocol a state party may deny an investor and its covered investment the benefits of the Protocol if the investor or its investment breaches the binding obligation of the investor including obligations on sustainable development. The denial of an investor of the benefits of the Protocol could lead to a dispute settlement claim because investors are entitled to submit a claim for disputes settlement under Article 46 for resolution.

States may also hold investors accountable for their sustainable development obligations by initiating civil actions against them in domestic courts. Thus, under Article 47(1) of the AfCFTA Protocol on Investment, civil actions may be brought against investors and their investments for liability in the judicial process for the acts, decisions or omissions in relation to the investments that lead to significant damage in the host state.

6 Policy recommendations

The statement of sustainable development as an objective, the requirements that states facilitate investment that *fosters* sustainable development, the specification of contribution to sustainable development as an element in the definition of investment and the substantive obligations of both states and investors on sustainable development under AfCFTA Protocol on Investment necessitate changes, practical steps and actions on the part of states and investors as recommended below.

6.1 Statement of sustainable development as an objective: policy considerations

- a States must ensure investments they admit will foster sustainable development, and the operation of those investments must be consistent with sustainable development goals. They must first satisfy themselves as to the contribution an investment can make to sustainable development prior to admission, that is to satisfy themselves that a proposed investment has qualified as an investment under Article 1 of the AfCFTA Protocol on Investment. An investment must not be admitted if it does not qualify as an investment in terms of capacity to contribute to the sustainable development of the host state, that is if the investment will not foster sustainable development.
- b States must ensure that investments that their domestic legislation permits to be admitted are the investments that will foster sustainable development in terms of the AfCFTA Protocol on Investment. Domestic legislation will provide for the criteria for sustainable investment which foreign investors must meet to be admitted.
- c Investors must demonstrate at the point of application to establish the investment how their investments will contribute to the sustainable development of the host state, including

how their operations will be consistent with the sustainable development goals generally.

6.2 States' obligations on sustainable development: policy considerations

- a As states are required to admit investment subject to their laws and regulations and facilitate investment that fosters sustainable development, they must assess investments in terms of their consistency with state's laws and regulations on sustainable development prior to admitting the investment. The admission of investment must be subject to the laws of the host state, including the state's international treaty obligations on sustainable development. Investments must be assessed in terms of their overall potential impacts on the environment, human rights and local and indigenous communities before they are admitted. Sustainability criteria must be established as part of the conditions of an application for admission of investment. The conditions for admission for investment should include requirements that investors carry out a sustainability assessment of proposed investment considering all aspects of sustainable development dimensions. Investment policies and laws should be designed primarily to ensure the achievement of national sustainable development goals.
- b To preserve the right to regulate, states must include provisions in domestic foreign investment laws regarding their right to regulate in furtherance of sustainable development goals. Enforceable provisions on corporate *legal* obligations and not just on corporate *social* responsibilities including to respect and uphold human rights and the right to a healthy environment must be made in domestic foreign investment laws. To add or improve their domestic standards and regulations on sustainable development, existing domestic legislation on foreign investment must be amended to address investor obligations on, and the right of states to regulate for, sustainable development. These will allow states to have the legal basis under domestic foreign investment law to ensure that foreign investors comply with domestic standards and laws on sustainable development and if the investors fail to do so the state can rely on the civil liability provisions of the AfCFTA Protocol on Investment to sue the investors.
- c To ensure investments contribute to the development of the host states, states must include provisions on domestic content in domestic laws and regulations including on preferential treatment of qualifying investors under domestic

law, training and employment of local workers, transfer of technology, skills and know-how and measures to support the development of local entrepreneurs and their businesses.

6.3 Investors' obligations on sustainable development: policy considerations

- a Investors must state in their investment proposals and applications for admission and establishment of investments how those investments and their operations will comply with domestic laws and regulations including business ethics, human rights and labour standards before they are admitted. States' regulatory requirements on admission and establishment must be clear on these issues and what the investors and are required to do.
- b As investors in carrying out their business activities must respect and protect the environment, they must demonstrate how they will respect and uphold the right to a clean, healthy and sustainable environment and comply with the principles of prevention and precaution when conducting business activities. This is necessary to anticipate and prevent any risk of significant harm to the environment and economic policy objectives if the host state. Investors must carry out an environmental impact assessment and if their business activities will cause harm to the environment, they must demonstrate the steps they will take to mitigate the harm and restore a clean environment. Investors must show how their exploitation or use of local natural resources will be consistent with the rights and interests of the host state and local communities. They must prepare periodic reports and submit to relevant government departments showing how their operations comply with the sustainable development obligation. These reports must be accessible to the public and local communities.
- c Investors must develop measurable socially responsible programmes and practices on how to contribute to achieve sustainable development of the host state and the local community. In this connection, State parties must ensure that investors incorporate internationally recognised standards, guidelines and principles of corporate social responsibility into their internal policies and hold them accountable when these are not observed. State parties must also develop or improve regulatory and institutional framework for corporate social responsibility to ensure that investors can comply with their disclosure obligations related to environmental and social risks associated with the investment activities. These measures

must enhance transparency so that states can easily know when investors are complying or not complying with their disclosure obligations.

6.4 Investment dispute settlement: policy considerations

- a States must develop guidelines on denial of benefits to provide clear guidance on how Article 5 of the AfCFTA Protocol on Investment will be implemented or operationalised. The guidelines will specify the grounds or criteria for the denial and consequences of such denial.
- b States must develop rules specifically to address how civil actions for significant damage, personal injuries and loss of life in the host country resulting from the acts, the decisions and omissions of investors may commence and the grounds for the initiation of those actions and the remedies to the state to guide the courts, the states themselves and investors.

6.5 African continental level initiatives on investment and sustainable development

- a To minimise divergence in the approaches to implementing the AfCFTA Protocol on Investment to achieve the sustainable development objective of the AfCFTA Agreement, a comprehensive continental level framework on sustainable investment is recommended. Sustainable investment is about corporate legal and social accountabilities and the adoption of responsible business practice. It requires investors to take all dimensions of sustainable development into account in their business undertakings, including the economic, environmental, human rights and social dimensions. Based on this continental framework on sustainable investment and development, national policy guidelines on sustainable development could be developed. The mandate of developing this framework falls within the functions of the Committee on Investment and the Pan-African Investment Agency established under Articles 41 and 42 of the AfCFTA Protocol on Investment. These institutions must work with the AfCFTA Secretariat and National Focal Points established under Article 9 of the Protocol. Such a policy will provide a framework for African countries to design policies to attract sustainable investment and green foreign direct investment.

- b The AfCFTA Secretariat should undertake research on how domestic laws and policies comply or align with AfCFTA Protocol on Investment to provide a basis for knowing which states are complying with their obligations and which are not and the nature of support to provide to the state parties.

7 Conclusion

Sustainable development is an objective of the AfCFTA Agreement and the AfCFTA Protocol on Investment. In this connection, it is apposite that the AfCFTA Protocol on Investment provides for enforceable obligations of foreign investors and specifically states that investors should be denied the benefits of the Protocol if they conduct their business activities in breach of these provisions. This Policy Brief outlined states and investor's sustainable obligations, and proposed policy options African states must adopt to ensure investments contribute to the attainment of this sustainable development objective. Actions are required on the part of the African Union and its AfCFTA Secretariat, at the national level and by investors to fulfil this objective.

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