CAN AFCFTA DELIVER ON WHAT IT PROMISES?

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Legal Briefings – By **Peter Leon, Natasha Rachwal and Ernst Müller**

It is worth exploring whether the AfCFTA will indeed afford greater protection to investors across Africa and here in SA?

African Continental Free Trade Area (AfCFTA) secretary-general Wamkele Mene has described the agreement as sending "a strong signal to the international investor community that Africa is open for business, based on a single rule-book for trade and investment."

Unfortunately, like much else, the July 1 commencement for trading under the AfCFTA has been postponed to January 2021 owing to the global Covid-19 pandemic.

Given the imperatives for an Africa-wide free trade agreement, there is no doubt that a new date will be finalised in due course. With phase two negotiations expected to be completed by December 2020, it is worth exploring whether the AfCFTA will indeed afford greater protection to investors across Africa and here in SA, and thus provide greater confidence to potential investors for whom the current global market offers a plethora of opportunities.

While the AfCFTA agreement does not itself regulate the protection of investments, it contemplates that the implementation of the agreement should facilitate investment-building and, to this end article 4 provides that state parties shall co-operate on investment.

The protocol on trade in services specifically identifies the fostering of domestic and foreign investment as a key objective. If properly implemented the protocol on trade in services should assist in the creation of common continental standards for various services trades and professions, promote competitive business practices and eliminate restrictions on international transfers and payments for transactions relating to state parties' specific commitments.

In addition, where state parties have undertaken to provide greater market access for trade in services in certain sectors, the protocol on trade in services provides that state parties may not place limitations on “the participation of foreign capital in terms of a maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment” While the schedules of specific commitments are pending, the extent to which state parties agree to extend market access for trade in services, particularly in the financial services sector, could be significant.

In SA this could have far-reaching consequences for sectors where restrictions are placed on foreign investment. In the telecommunications sector, for example, the Electronic Communications Act of 2005 prescribes that foreign investors may not (i) exercise control over a commercial broadcasting licensee, or (ii) have a financial interest or an interest either in voting shares or paid-up capital in a commercial broadcasting licensee, exceeding 20%. In the aviation sector, similar restrictions are placed on the ownership and control of air carriers by the Air Services Licensing Act of 1990 and International Air Services Act of 1993, with foreign ownership of domestic airlines capped at 25%.

To the extent that undertakings are made to liberalise market access to such services this would reduce transaction costs, assist in achieving economies of scale and constitute a significant step forward in promoting foreign investment. Once the investment protocol is finalised it will enter into force 30 days after the deposit of the 22nd instrument of ratification in accordance with article 23.2 of the AfCFTA agreement.

In light of last year's 15% decline in foreign direct investment in SA (to $4.6bn) — before the onset of the current pandemic — it is crucial that the investment protocol strikes the right note that balances the interests of investors and host governments. These should include predictable and comprehensive commitments on investment protection and investor obligations. This may include, for example, provisions aimed at reducing barriers to foreign investment entry or providing protection against expropriation and nondiscrimination.

In recent years there has been a discernible trend in the formulation of bilateral investment treaties (BITs) in Africa in which host governments are increasingly afforded greater policy space. Furthermore, in an attempt to facilitate the achievement of policy goals corporate social responsibility (CSR) obligations and environmental, social and governance (ESG) standards are increasingly being included in BITs.

In addition to the developing nature of protections afforded under BITs there are also several regional investment agreements and free trade agreements with investment protocols aimed at reforming the regulation of foreign investment. The Pan-African Investment Code (Code), which was adopted by the AU in October 2017 as a nonbinding, guiding instrument for member states and investors, expressly affirms the rights of member states to regulate “all the aspects relating to investments within their territories with a view to meeting national policy objectives and to promoting sustainable development objectives”.

The recent amendment to the Southern African Development Community’s protocol on finance and investment has likewise expanded the scope of host states’ right to regulate.

It remains to be seen to what extent these developments in African investment policy will influence the forthcoming AfCFTA investment protocol. Following the World Trade Organisation (WTO) model, recourse under the AfCFTA agreement is limited to state parties. It is unclear whether the investment protocol will supplement the interstate dispute settlement mechanism provided for in the protocol on rules and procedures on the settlement of disputes with additional measures aimed specifically at resolving investor-state disputes.

While it remains to be seen how disputes arising under the investment protocol are to be resolved, it is unlikely that a traditional investor-state dispute settlement (ISDS) system will be implemented given the concerns that some African states have raised about the independence of arbitrators, the consistency of decision-making and the duration and costs of cases.

These concerns about ISDS have gained more widespread attention with the work of the Uncitral Working Group III (WGIII) in considering reform of the ISDS system. Significantly, WGIII has served as a forum for intergovernmental discussions about the European Commission’s proposed multilateral investment court, which has been suggested as an alternative to the current ISDS system. This would take the form of a permanent decision-making body with independent judges responsible for adjudicating disputes under investment treaties, rather than ad hoc investor-state arbitral tribunals.

To the extent that the AfCFTA negotiators decide that the investment protocol requires a dedicated dispute settlement mechanism, which international experience indicates it should, the multilateral investment court model could constitute a useful template. Regardless of the particular dispute resolution mechanism adopted, it is important that dispute settlement under the investment protocol provides confidence to investors and host governments alike.

It is hoped that the finalised investment protocol will provide a framework capable of facilitating investment across Africa in an appreciable way. At present, however, it is not yet clear to what extent the various interests represented across the continent will be able to come to an agreement on investment, not least because of the diverse and often overlapping regional and bilateral investment treaties. Potential, and current, investors should watch developments in Addis Ababa carefully.

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KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

PETER LEON
PARTNER,
JOHANNESBURG
+27 10 500 2620
Peter.Leon@hsf.com

ERNST MÜLLER
ASSOCIATE,
JOHANNESBURG
+27 10 500 2628
ernst.muller@hsf.com

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