Policy brief

AfCFTA Investment Protocol: issues and opportunities for Kenya

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Key messages

There is significant momentum behind AfCFTA negotiations, which include discussions on trade in goods and services, dispute settlement and also issues such as investment.

The Investment Protocol provides opportunities and challenges for firms in Kenya, for example around more coordinated and effective investment protection and facilitation, and access to dispute settlement. Other provisions in AfCFTA will make countries more attractive to foreign direct investment.

A new KNCCI–ODI survey of 79 respondents from Kenya's private sector suggests that there is much awareness of AfCFTA among firms but also that they do not yet feel fully prepared. Firms confirmed the presence of a legal framework to protect investment. However, they also felt that a comprehensive framework (laws and policies) for investment promotion was lacking, that investor protection regulations could be more effective and that there should be more public–private consultation to facilitate investment.

The survey results were validated during the KNCCI–ODI roundtable meeting on 28 March 2022, where participants also raised the need for harmonised and predictable investment policies across Africa, seamless cross-border logistics and the facilitation of market information among African investors to boost Kenya's intra-African investment.

The AfCFTA Investment Protocol may help address these issues by putting in place complementary policies at the national level and enhancing public–private dialogue.

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Contents

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
DSM	dispute settlement mechanism
EAC	East African Community
ECOWAS	Economic Community of West African States
FCDO	UK Foreign & Commonwealth Development Office
FDI	foreign direct investment
FIP	Finance and Investment Protocol (SADC)
GDP	gross domestic product
ICSID	International Centre for Settlement of Investment Disputes
IGAD	Intergovernmental Authority on Development
ISDS	investor–state dispute settlement
KenInvest	Kenyan Investment Authority
KIP	Kenyan Investment Policy
KNBS	Kenya National Bureau of Statistics
KNCCI	Kenya National Chamber of Commerce & Industry
MFN	most-favoured nation
MIT	Model Investment Treaty
MITC	Ministry of Industry, Trade and Cooperatives
OECD	Organisation for Economic Co-operation and Development
PAIC	Pan-African Investment Code
SADC	Southern African Development Community
SITA	Supporting Trade and Investment in Africa
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNECA	United Nations Economic Commission for Africa
US	United States
USDOS	US Department of State
WDI	World Development Indicators
WTO	World Trade Organization

Executive summary

This briefing identifies issues and opportunities for Kenyan firms that may emerge from the African Continental Free Trade Area (AfCFTA) Investment Protocol. It also provides new insights into how firms view issues related to investment in Kenya, based on a new survey. There is considerable momentum behind AfCFTA, with some negotiations (Phase 1), for example on trade in goods and services, nearing completion. Others (e.g. negotiations on the Phase 2 issue of investment) are in full swing, expected to be completed by September 2022. Implementation and domestication of AfCFTA provisions and their impact on complementary policies will be key factors in how AfCFTA will eventually raise the volume and quality of investment in Africa.

Negotiations on and implementation of the Investment Protocol and complementary policies provide opportunities and challenges for firms based in Kenya. The impact of the Protocol on investment will depend on what is negotiated, how this relates to existing investment provisions in Kenya and the region (e.g. the East African Community), and whether this leads to better policies for a more attractive investment climate.

The Investment Protocol could lead to a more coordinated approach to investment, and include a range of measures to enhance investment. It is likely to emphasise the importance of regulatory space (e.g. around health or environmental issues), and it may rebalance rights and responsibilities towards sustainable investment. It may not lead to significant liberalisation or increased market access for investors. However, there will be significant value in a common African voice on issues such as dispute settlement, investor protection and investment facilitation. Moreover, discussions on Investment in AfCFTA will lead to complementary policies at country level, leading to a more favourable investment climate.

The briefing is based on a new survey of 79 respondents from the private sector, implemented by the Kenya National Chamber of Commerce & Industry (KNCCI) and ODI. Firms have been asked about Kenya’s investment protection, facilitation and promotion efforts in the context of AfCFTA. The briefing argues that Kenya should seek to leverage AfCFTA to provide a better regime for investor protection, and increase efforts on promotion and facilitation.

Investment in Kenya in the context of AfCFTA: *The views of 79 respondents from the private sector and implications for AfCFTA*

Most respondents (84%) are **aware of AfCFTA** but only a third are convinced of the overall **readiness** of Kenya's private sector for AfCFTA implementation. More needs to be done to prepare for AfCFTA.

More than 71% of respondents indicated that Kenya had a legal framework to **protect investment,** but less than half of these believe that the framework is effective in providing such protection for firms. There should be more and deeper discussions on protection in the context of AfCFTA.

More than half of respondents feel that the government aims to anchor its **investment promotion** strategy towards industrial and economic transformation. However, only 27% of respondents are convinced that the government has a comprehensive framework (legal and policies) to promote investment. AfCFTA could set standards for investment promotion.

More than half of respondents believe that Kenya has an attractive overall business environment. However, only a third are convinced of the effectiveness of **investment facilitation** agencies. Only 25% think there are sufficient public–private sector consultations to facilitate investment. AfCFTA is expected to support public–private dialogue.

Some 38% of respondents are aware of government initiatives that leverage AfCFTA to **promote intra-African investment.** However, most respondents highlighted a major challenge of very limited linkages among intra-African investors (61%), as well as lack of information on investment opportunities on the continent (58%). More than half also highlighted as challenges an unstable political environment, weak institutional and coordination frameworks, and complex market systems in other African countries.

With regard to changing the incentive framework towards **outward investment,** most respondents underlined a need to improve and involve the private sector in AfCFTA discussions (68%), to provide all-round support on logistics and market linkages (61%), to develop infrastructure in African markets (57%) and to increase investor incentives (51%). A few also expressed a need to include discussions on supporting local actors/content and micro, small and medium-sized enterprises. AfCFTA provides a larger market for investment by Kenyan firms but this is not inevitable, and there are many challenges to overcome.

1 Introduction

This briefing aims to identify the issues and opportunities that may emerge from the African Continental Free Trade Area (AfCFTA) Investment Protocol for Kenyan firms. AfCFTA became operational in January 2021, and some countries have already begun to trade under AfCFTA rules. There is considerable momentum behind AfCFTA, with some negotiations (Phase 1), for example on trade in goods and services, nearing completion. Others (e.g. negotiations on Phase 2 issues such as the Investment Protocol) are in full swing and expected to be completed by September 2022. Implementation and domestication of AfCFTA provisions and the impact on complementary policies will be key factors in how AfCFTA will eventually raise investment in Africa.

Africa's journey towards deeper regional integration through AfCFTA will make Africa more attractive for foreign direct investment (FDI), from both within and outside Africa. The positive effects of AfCFTA for FDI are expected to come from (i) increased incomes; (ii) stronger trade provisions, harmonisation of standards, trade facilitation and the market size effects; and (iii) stronger investment protection and facilitation provisions. These effects could lead to greater commercial opportunities, increased employment and government revenue, and the transformation of African economies through technology and skills upgrading, as well as better integration into international value chains. However, investors have indicated that this will be the case 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 (te Velde et al., 2022).

This briefing discusses how negotiations on and implementation of the Investment Protocol and complementary policies provide opportunities and challenges for firms based in Kenya. The impacts will depend on what is negotiated, how this relates to existing investment provisions in Kenya and the region (e.g. the East African Community – EAC), and whether this leads to better policies for a more attractive investment climate. Given the strong intra-Africa component of Kenya's trade and investment, the country has a strong interest in comprehensive AfCFTA trade and investment rules.

A significant innovation of this paper is that it is based on a new survey of 79 respondents, implemented by the Kenya National Chamber of Commerce & Industry (KNCCI) and ODI. Firms were asked about Kenya's investment protection, facilitation and promotion efforts in the context of AfCFTA. The survey results were discussed and validated by around 70 private sector representatives during a ODI–KNCCI roundtable meeting on 28 March 2022 in Nairobi, Kenya.

The briefing is organised as follows. Section 2 presents on a range of investment issues in the context of AfCFTA, including investment facilitation, investment protection, dispute settlement and outward FDI. Section 3 describes the FDI landscape in Kenya, including existing investment laws and organisations supporting investment. Section 4 highlights the views of Kenyan firms, as well as relevant associations and investment agencies, on issues and challenges related to the AfCFTA Investment Protocol, based on the new survey and insights gathered during the ODI–KNCCI roundtable meeting. Section 5 concludes and presents issues for consideration for Kenya’s negotiations on the AfCFTA Investment Protocol.

2 Investment in AfCFTA: concepts, issues and potential benefits

This section introduces the AfCFTA Investment Protocol (Section 2.1) and a selection of relevant issues that may emerge within it or alongside it (Section 2.2). Section 2.3 looks at potential benefits and challenges of the Investment Protocol for member states.

2.1 The AfCFTA Investment Protocol

African leaders are increasingly recognising that investment in Africa, if channelled well, can expand productive capacity, generate jobs, boost incomes and finance development on the continent. At this stage, the bulk of FDI into African countries comes from sources outside Africa, including the US, the UK, France, the Netherlands, China, Brazil and India. However, important developments are occurring related to intra-Africa investment. For example, South Africa, Nigeria, Algeria, Morocco and Egypt are major investors on the continent. The biggest FDI recipients in Africa are Egypt, South Africa, DR Congo, Morocco, Tanzania, Kenya and Ethiopia.

AfCFTA will attract market- and efficiency-seeking FDI only if it accelerates economic growth, raises consumer incomes, reduces tariff and non-tariff barriers, and improves governance of trade and investment. Investment is complementary or closely related to trade in goods, trade in services (especially mode 3 supply), intellectual property rights, and competition policy and law (UNECA, 2021).

The envisaged Investment Protocol is a critical AfCFTA instrument in governing and fostering intra-Africa investment. It could also potentially help provide a transformative legal framework for investment, capable of driving and regulating investments in services and manufacturing, to deliver significant development benefits associated with FDI. The Protocol will also have indirect benefits for non-African investors and investment through the most-favoured nation (MFN) principles and improved governance in AfCFTA, which would enhance African economic relations with the rest of the world and in turn attract more external investment.

The ambition of African Union (AU) member states is to cooperate on investment (Article 4 (c) of the AfCFTA Agreement). The word ‘cooperate’ indicates a non-mandatory obligation for member states. Based on the *acquis* principle in Article 5 of the AfCFTA Agreement, it is anticipated that the elements of the AfCFTA Investment Protocol will leverage the investment agreement models of regional economic communities as well as the Pan-African Investment Code (PAIC) (African Union Commission, 2016). Regional investment protocols or other regulations include the Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area, the Supplementary Act adopting Community Rules on Investment and the Modalities for their Implementation with the Economic Community of West African States (ECOWAS), and the Southern African Development Community (SADC) Protocol on Finance and Investment (UNECA, 2016). The EAC and SADC have developed model laws on investment – namely, the EAC Model Investment Code and the SADC Model Bilateral Investment Treaty (BIT) Template (ibid.).

Negotiations on the AfCFTA Investment Protocol are ongoing (after a first reading of the whole text, real negotiations have only started in March 2022), and are expected to conclude by September 2022. Thus far, it is not yet clear what the member states will agree on investment: whether they will adopt binding or non-binding commitments; what substantive issues they will agree to cooperate on; and what level of harmonisation they will aim for (e.g. a minimum standard of investment protection, dispute settlement mechanisms through pan-African or domestic courts). Section 2.2 discusses a selection of investment issues that may emerge at country level.

2.2 Selected investment issues in the AfCFTA Investment Protocol

2.2.1 Investment protection

Investor protection that aims to ‘afford investors explicit protection of their investments and recourse in the case that such investments are expropriated or otherwise compromised by the host state’ is one of the core motivations of traditional investment agreements (WTO, 2018), and has often been included in traditional bilateral investment treaties. Investment protection obligations are intended to reduce political risks and provide international investors with an additional layer of protection standing above national law (Mendez-Parra, 2020).

However, the investment protection clause in traditional investment agreements is being criticised for the impact is has in terms of limiting policy space (Mendez-Parra, 2020). More recent investment agreements have addressed this by covering protection of policy space and administrative space; transparency and misuse and abuse of treaties; investor obligations that need to be met prior to accordance of investor protection; and state commitments to reduce 'race to the bottom' issues on specific areas such as taxation and labour rights (ibid.). This may also be the case for AfCFTA; it is already significant that there will be an African voice on issues such as investment protection.

The PAIC, which informs the AfCFTA Investment Protocol, also includes new generation investment agreement elements such as definitions of rights and obligations of both member states and investors. It contains standard protection covering MFN, national treatment, expropriation and compensation, and free transfer of funds. In this sense, AfCFTA has the potential to address overlaps and inconsistencies on the definition of investment protection in regional and bilateral investment agreements. Currently, regional investment agreements include the SADC Finance and Investment Protocol (FIP), the ECOWAS Supplementary Act (both in force), the COMESA Common Investment Agreement (not yet in force), and the SADC Model BIT and the EAC Investment Code (both non-binding model BITs).

One important issue for negotiating countries entails the extent of commitment and coverage of investment protection that would be extended to investors at the continental level. For example, at the regional level, Annex 1 of the SADC Finance and Investment Protocol contains binding commitments on investment cooperation. The FIP also contains binding commitments for state parties on investment protection standards, and a dispute settlement mechanism (DSM).

The Investment Protocol has the opportunity to replace existing bilateral investment agreements. Almost all African countries have signed these. In some cases (notably Egypt), they have negotiated a large number (109). In many cases, there a significant number negotiated with other African countries. According to the International Centre for Settlement of Investment Disputes (ICSID) Database of Bilateral Investment Treaties, Kenya has signed only nine BITs (joint 23rd in Africa, and behind Tanzania's 16 and Uganda's 11), and only one with an African country. Many of the BITs negotiated in the past are different from recent models of agreements and do not reflect the likely content of the AfCFTA Investment Protocol.

2.2.2 Dispute settlement

When a foreign investor enters the territory of a host country, it is inclined to seek protection in the form of specified standards (e.g. MFN, national treatment, fair and equitable treatment) embodied in BITs or regional/multilateral agreements (UNCTAD, 2003a). Within the context of regulation and protection of foreign investment, disputes may arise between states or between states and investors

(UNCTAD, 2003b). Investment disputes between states may arise from issues directly occurring between signatories to the investment agreement, or from issues that first occur between investors and their host countries but subsequently become inter-state disputes (ibid.).

DSMs in investment agreements give foreign investors safeguards on investment protection standards and an assurance that these safeguards are available on a non-discriminatory and timely basis to foreign investors (UNCTAD, 2003a). Conversely, DSMs ensure that host countries will have the means to resolve the legal aspects of a dispute with foreign investors expeditiously, and in a way that takes into account the concerns of the state as well as those of foreign investors (ibid.).

Article 20 of the AfCFTA Agreement establishes a DSM to settle all inter-state disputes, which largely follows the design of the World Trade Organization's (WTO's) dispute settlement understanding (Erasmus, 2021). AfCFTA has a dedicated Protocol on Rules and Procedures on the Settlement on Dispute, which includes the following annexes: Working Procedures of the Panel, Expert Review and Code of Conduct for Arbitrators and Panellists. It is already a significant step for African countries to have a common voice on DSM and investor protection.

AfCFTA does not have a mechanism for investor–state dispute settlement (ISDS), and this could be an area for discussion in the negotiations on the Investment Protocol. African countries have raised concerns around traditional ISDS, including on legitimacy and transparency, on the exorbitant costs of arbitration proceedings and arbitral awards, on allowing foreign investors to challenge legitimate public welfare measures of host states before international arbitration tribunals, and on sovereignty or policy space (Chidede, 2018). These concerns may partly reflect the divergence of approaches on ISDS in Africa, as described by Chidede:

- Some countries (e.g. Namibia, South Africa and Tanzania) have adopted national investment and related laws omitting or limiting ISDS provisions.
- The SADC FIP and the ECOWAS Supplementary Investment Act do not grant ISDS but rather make provision for investors to use local remedies.
- The COMESA Common Investment Agreement incorporates ISDS arbitration through the COMESA Court of Justice, African arbitration tribunals, ICSID and the United Nations Commission on International Trade Law (UNCITRAL) arbitral tribunals.
- PAIC provides for arbitration through African arbitration institutions governed by UNCITRAL arbitration rules subject to applicable laws of the host state or consent of the disputing parties, and subject to exhaustion of local remedies.

2.2.3 Investment facilitation

The WTO defines investment facilitation as a means to ensure 'a more transparent, efficient and investment-friendly environment business climate by making it easier for domestic and foreign investors to invest, conduct their day-to-day business and expand their existing investment' (WTO, 2021).

Investment facilitation is different but complementary to investment promotion. Investment promotion focuses on image building to promote a location as an investment destination (UNCTAD, 2016). It leverages on the destination's strong investment environment, highlights profitable investment opportunities and helps identify local partners (OECD, 2014). Activities are aimed at tackling ground-level obstacles to investment – such as increasing the efficiency of administrative procedures for investors, enhancing the predictability of investment policies, increasing government accountability in mitigating investment disputes, initiating cross-border agency coordination on outward and inward investment, and technical cooperation and support mechanisms for investment, among others (UNCTAD, 2016).

Traditional concepts of investment facilitation tend to be investor-centric, focusing on speeding up approvals, removing hurdles or regulatory barriers, and stabilising the legal and regulatory environment. Some countries (e.g. South Africa and Zimbabwe) have already adopted unilateral investment facilitation measures such as one-stop investment services. But beyond this, the United Nations Conference on Trade and Development (UNCTAD) (2016) envisions that effective investment facilitation, especially in low-income countries, should aim to support the mobilisation and channelling of investment towards sustainable development, including the build-up of productive capacities and critical infrastructure. There are active discussions at the global level on recognising critical factors to advance, alongside investor-oriented policies: environmental protection, local economic and social development (including with respect to female entrepreneurship), industrial upgrading, employment and skills training, human rights, health, climate, and other elements of national, regional, continental and international development plans and agendas (Mendez-Parra, 2020).

Continent-wide discussions on standards around investment facilitation through AfCFTA would help tackle barriers to investment entry, reduce the time and costs of investment approvals, enhance transparency, improve efficiency, and promote investment-related cooperation and coordination across the continent. The Investment Protocol could adopt binding investment facilitation commitments with special and differential treatment, or perhaps follow the Trade Facilitation Agreement through self-selection commitments and provide technical and financial assistance to countries to implement these. It could, for example, discuss the importance of centralised focal points in this regard.

2.2.4 Outward foreign direct investment

A range of African countries (e.g. Algeria, Egypt, Kenya, Morocco, Nigeria, South Africa) are major investors on the continent. Measures to enhance outward FDI are more common in developed countries but they are also relevant for these other major outward investors, who need to overcome hurdles in target countries but also at home . The Investment Protocol provides an opportunity to enhance coordination and standardise measures around outward FDI. This will relate to both sending and receiving countries and has the potential to assist significantly in the development of regional value chains.

2.3 Potential benefits and challenges of the Investment Protocol for member states

The Investment Protocol could thus lead to a more coordinated approach to investment and include a range of measures to enhance it. The definition of investment is likely to be enterprise-based (so not including portfolio investment). It is likely to emphasise the importance of regulatory space (e.g. around health or environmental issues), will rebalance rights and responsibilities towards sustainable investment and may not lead to significant liberalisation or increased market access for investors. However, there will be significant value in a common African voice on issues such as DSM, investor protection and investment facilitation. Moreover, it is hoped that the discussions on investment in AfCFTA will lead to complementary policies at country level, leading to a more favourable investment climate. Assessment of past regional investment provisions suggests that they can lead to additional FDI (te Velde and Bezemer, 2006).

3 Foreign direct investment in Kenya

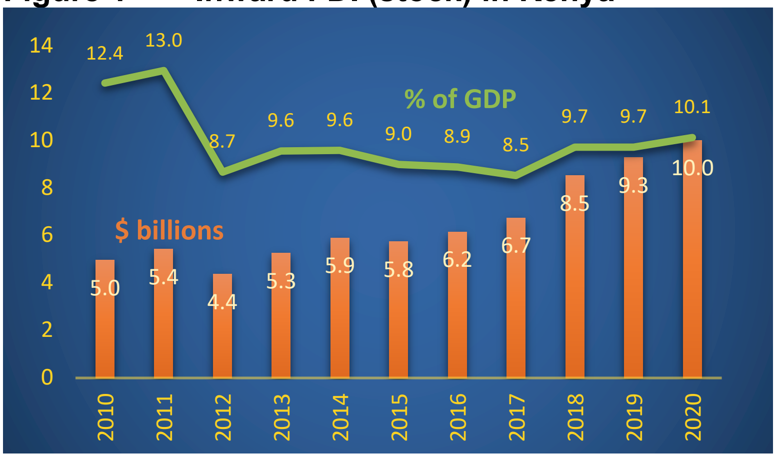
This section discusses four dimensions of the FDI landscape in Kenya. Section 3.1 discusses FDI performance. Section 3.2 briefly reviews national investment laws and policies. Section 3.3 discusses Kenya's regional commitment. Finally, Section 3.4 provides an overview of the institutional context behind Kenya's FDI regime.

3.1 FDI performance

3.1.1 Inward FDI

The stock of FDI in Kenya has doubled over the past decade, reaching $10 billion in 2020 (Figure 1). However, its importance in terms of percent of gross domestic product (GDP) has hovered around 9% since 2012.

Figure 1 Inward FDI (stock) in Kenya

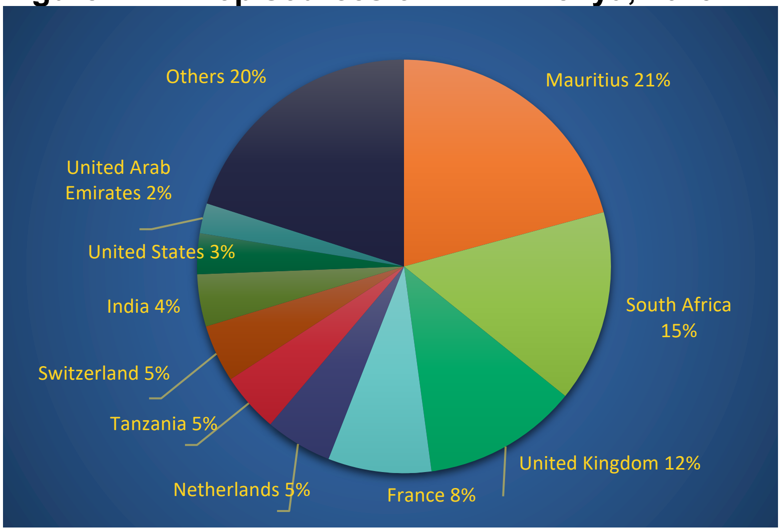


Source: Authors' computations based on UNCTAD data

Disaggregated data as of 2019 suggest that almost half of FDI stock (45.3%) in Kenya is from Africa, dominated by investment from Mauritius (20.8%), South Africa (15%) and Tanzania (4.6%) (KBNS, 2020). These countries drove the significant increase in the share of intra-Africa FDI in Kenya from 19.4% in 2015 to 45.3% in 2019 (Table 1). During the same period, FDI from Africa almost quadrupled, reaching $4.2 billion as of 2019 (Table 1).

By economic activity, a third of FDI stock in 2015 and 2019 consistently went to finance and insurance activities (Table 2). Other dominant sectoral recipients of FDI include information and communication and the manufacturing sector, although the shares of these sectors in total FDI have declined since 2015 in favour of an increase in the shares of agriculture and wholesale and retail trade (Table 2).

Figure 2 Top sources of FDI in Kenya, 2019



Source: Authors' computations based on data from KBNS (2020)

Table 1 Regional sources of FDI in Kenya

Region	2015 US$ million	2015 % share	2019 US$ million	2019 % share	% growth
Africa	1,163.2	19.4	4181.7	45.3	259.5
America	643.7	10.7	487.3	5.3	-24.3
Asia	1,132.0	18.9	964.7	10.5	-14.8
Europe	2,906.9	48.5	3274.9	35.5	12.7
Australia and Oceanic	132.4	2.2	270.4	2.9	104.2
Others	20.6	0.3	46.4	0.5	125.2
Total	5,998.9		9225.3		53.8

Note: According to KBNS data, Middle East countries are aggregated in Asia.

Source: Authors' computations based on FDI data from KBNS (2016, 2020) and exchange rates (period average) data from the World Bank WDI

Table 2 Sectoral recipients of FDI

Economic activity	2015 US$ million	2015 % share	2019 US$ million	2019 % share
Agriculture, forestry and fishing	25.4	0.4	719.1	7.8
Mining and quarrying	70.0	1.2	242.1	2.6
Manufacturing	1,240.2	20.7	1,360.9	14.8
Electricity, gas and air conditioning supply	141.4	2.4	15.6	0.2
Construction	157.3	2.6	70.2	0.8
Wholesale and retail trade	730.8	12.2	1,421.8	15.4
Transportation and storage	-4.0	-0.1	201.4	2.2
Accommodation and food service activities	152.3	2.5	191.0	2.1
Information and communication	1,198.3	20.0	1,489.7	16.1
Finance and insurance activities	2,068.6	34.5	3,061.3	33.2
Real estate activities	1.3	0.0	293.1	3.2
Others	217.4	3.6	159.2	1.8
Total	**5,998.9**	**100**	**940,898.6**	**9,225.3**

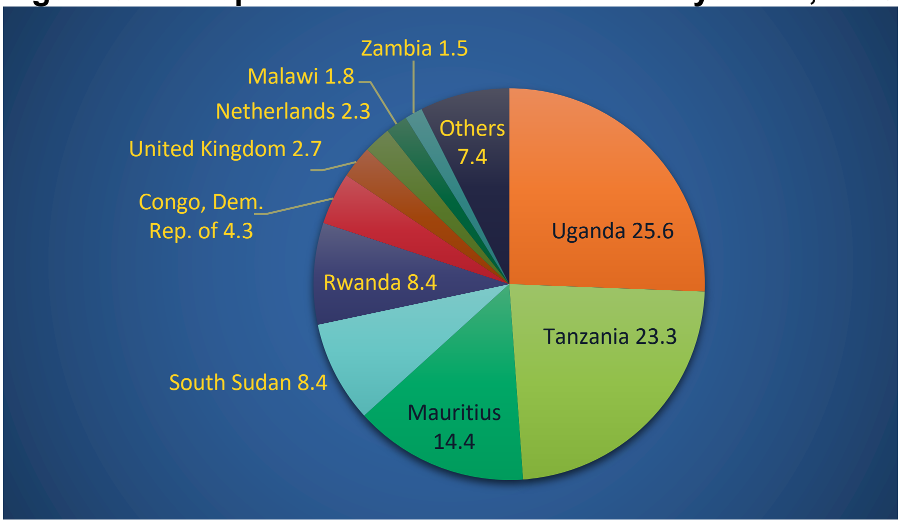
Source: Authors' computations based on FDI data from KBNS (2020) and exchange rates (period average) data from the World Bank WDI

3.1.2 Outward FDI

The stock of outward FDI from Kenya grew by 45.9% between 2015 and 2019, reaching $1.4 billion (KSh 145 billion) as of 2019.[1] The importance of outward FDI (as a percentage of GDP) has been low and declining, from 2.2% of GDP in 2015 to 1.6% of GDP in 2019.[2]

As of 2019, 91% of total Kenyan investment (stock) abroad went to African countries, mostly in Uganda, Tanzania and Mauritius (Figure 3). This is a significant increase from the 68.8% share of Kenyan FDI to Africa in 2015 (Table 1). Between 2015 and 2019, Kenyan FDI in Uganda and Tanzania doubled, while that in Mauritius increased by almost six times.[3]

Figure 3 Top destinations of outward Kenyan FDI, 2019



Source: Authors' computations based on data from KBNS (2020)

Table 3 Regional destinations of Kenyan outward FDI

Region	2015 US$ million	2015 % share	2019 US$ million	2019 % share	% growth
Africa	975.8	68.8	1,423.6	91.0	45.9
America	83.1	5.9	5.7	0.4	-93.1
Caribbean	31.8	2.2	19.9	1.3	-37.2
Europe	203.0	14.3	104.1	6.7	-48.7
Asia	119.6	8.4			
Others	5.4	0.4	11.3	0.7	109.1
Total	1,419		1,565		10.3

Note: According to KBNS data, Middle East countries are aggregated in Asia.

Source: Authors' computations based on FDI data from KBNS (2016, 2020) and exchange rates (period average) data from the World Bank WDI

3.2 National investment laws and policies

At the national level, the Investment Promotion Act (2004) provides primary regulations governing FDI in Kenya (USDOS, 2021). Under this Act, the Kenyan Investment Authority (KenInvest) was

[1] Authors' computations based on outward FDI data from KNBS (2020, 2016) and period average exchange rates data from the World Bank WDI.
[2] Authors' computations based on outward FDI data from KNBS (2020, 2016), period average exchange rates data from the World Bank WDI and GDP data from the UNCTAD database.
[3] Authors' computations/analysis based on outward FDI data from KNBS (2020, 2016).

established to promote and facilitate investment locally and internationally. Other laws and policies directly related to investment in Kenya include the National Industrialisation Policy 2011–2015; the Companies Act 2015; the Economic Processing Zones Act 2015; the Ministry of Industrialisation and Enterprise Development Draft Strategic Plan 2013–2017; the Special Economic Zones Act 2015; and the Kenya Industrialisation Transformation Programme 2015 (MITC, 2019).

There are also other several laws that provide a framework for the initiation, management and dissolution of investments, such as:

- *The Constitution of Kenya 2010* promotes and protects private investments, and restricts land ownership in Kenya.
- *The Foreign Investment Protection Act 2012* defines the rights of a foreign investor and provides guarantees on capital repatriation, remittance of dividends and interest.
- *The Competition Act No. 12 of 2010* prohibits restrictive trade practices that seek to either hinder or prevent the sale or supply or purchase of goods or services between persons engaged in the selling or buying of goods or services.
- *The Insolvency Act 2015* provides a more enabling legal regime that transforms insolvency into a second chance for recovery to profitability.
- *The Private Security Regulation Act assented into law in 2016* seeks a 30% local equity threshold for foreign security companies that are registered in Kenya.
- *The Investment Disputes Convention Act 1967* stipulates that awards granted by the ICSID Arbitration Tribunal are binding in Kenya and have the same validity as final decrees of the High Court, among others (MITC, 2019; EAC, 2022).

Through existing legislation and policies, foreign investors can have up to 100% ownership (except in securities, insurance, power and lighting, and any other sectors identified by the government as posing a security risk to the country). A One-Stop Centre was set up in 2017 to provide for timely and transparent processing of investment applications and approvals. An online portal (http://eregulations.invest.go.ke/) has been developed as a repository of investment procedures in order to increase accuracy and transparency on access to relevant information and data by investors. The court of law also provides for arbitration mechanisms; foreign investors may also seek recourse from ICSID.

In 2019, the government launched the Kenyan Investment Policy (KIP) (MITC, 2019). The KIP aims to consolidate the country's fragmented investment-related legislation and to address fundamental requirements in establishing a well-coordinated investment environment that will attract high-quality FDI while upscaling the capacity of local small and medium-sized enterprises.

The KIP outlines the measures for implementation in order to achieve its objectives, covering investment entry and establishment, investment protection and guarantees, responsible investment (e.g. obligations regarding corruption, minimum labour and human rights standards, domestic value-added, environmental protection), investment promotion and facilitation, incentives frameworks and a sector framework. In addition, the KIP aims to implement policy measures on negotiating Kenya's position in international and regional investment agreements; and supporting domestic firms (outward investment) to compete internationally, especially in regions where Kenya has investment or regional agreements in place.

3.3 Kenya's regional commitments on investment issues

Kenya is a member of regional economic communities including COMESA, EAC and the Intergovernmental Authority on Development (IGAD). In 2007, COMESA members adopted the COMESA Common Investment Area (CCIA) Agreement, which aims to promote investment that supports sustainable development, encourages gradual elimination of investment restrictions, and balances rights and obligations between investors and states, among others. Granting national treatment equally to COMESA investors and provision for a DSM (inter-state and investor–state) are some of the key features of the CCIA Agreement. As of 2020, no COMESA member state (including Kenya) had ratified and domesticated the CCIA Agreement; at least six members' ratification is needed for it to enter into force (Gakunga, 2020). The latest COMESA workplan aims to conduct public awareness campaigns aimed at highlighting the benefits of the CCIA Agreement and the need for its ratification (COMESA, 2020; Gakunga, 2020).

Meanwhile, in 2006 the EAC adopted a model investment agreement, which was subsequently revised (in 2015) to become the EAC Model Investment Treaty (MIT) (Mafurutu, 2021). The EAC MIT has provisions on national treatment, MFN, expropriation, transfers, compliance with domestic laws, right of states to regulate and pursue development goals, and dispute settlement. It may be noted, however, that the EAC MIT is not a legally binding document but rather serves as a template for investment negotiations of the EAC and/or EAC countries with third countries or blocs of countries. In this sense, EAC members would likely draw on the EAC MIT (together with other existing models such as PAIC) in negotiations on the AfCFTA Investment Protocol.

In 2015, member states of SADC, EAC and COMESA launched the Tripartite Free Trade Area, which considers cross-border investment as a major area of cooperation.

3.4 Kenyan organisations supporting FDI

The KIP highlights the following key institutions involved in investment-related activities in Kenya (MITC, 2019):

- *National government ministries* have roles in promoting and facilitating investment directly related to their sector, including licensing. These include the Ministry of Foreign Affairs, the National Treasury and the Ministry of Industry, Trade and Cooperatives (MITC), which is heavily involved in facilitating investment promotion, contracts and agreements.
- *County governments:* Following the introduction of devolution in 2010, 47 counties have been granted power, including on investment promotion and negotiation, at the local level.
- *Export-related and special economic authorities:* The Export Promotion Zones Authority and the Export Promotion Council have been established as principal institutions to lead export promotion. The Export Promotion Zones Authority has also been mandated to promote export-oriented investments. The Special Economic Zones Act 2015 established the Special Economic Zones Authority, with the objective of promoting investment in the newly established zones.
- *Investment promotion agencies:* The Investment Promotion Act 2004 established KenInvest under MITC as Kenya's investment promotion agency. KenInvest is mandated to promote and facilitate investment, as well as to work with potential and current investors to increase private investment. The Parliament has also instituted the National Investment Council as an advisory body to identify areas of impediment to economic development and investment, review the economic environment and propose incentives for investment, monitor industrial development and promote cooperation between the public and the private sectors in the formulation and implementation of economic policy. However, this body has not yet been operationalised.

4 Views of Kenyan firms on investment issues in the context of AfCFTA

To gather views on the AfCFTA Investment Protocol from firms in Kenya for this study, a survey was conducted among 79 respondents in March 2022.

Most respondents (84%) are aware of AfCFTA. However, a smaller share of respondents (32%) are convinced of the overall readiness of Kenya's private sector for AfCFTA implementation. The discussion that follows provides details on the views of Kenyan firms and organisations on particular issues around investment promotion, facilitation and protection (as discussed in Section 2), and how these are situated in the context of AfCFTA.

In terms of investment promotion, more than half of respondents feel that the government aims to anchor its investment promotion strategy towards industrial and economic transformation (Table 4). Some 47% of respondents also recognise government efforts to promote foreign and domestic business linkages. However, only a small share of respondents (27%) are convinced that the government has a comprehensive framework (legal and policies) to promote investment at the local, regional, continental and international level, or has been working towards promoting linkages between foreign and local firms.

Table 4 Perceptions on Kenya's investment promotion efforts

Interview question	Share of respondents (%)			
	Yes	Maybe	No	No response/ not aware
1. Is the government investment promotion strategy anchored on long-term industrial and economic transformation?	57		37	6
2. Does the government work with the private sector to promote business linkages between foreign and domestic enterprises?	47	23	23	8
3. Do you believe the government has established a comprehensive legal and policy framework or strategy to promote investments (local, regional, continental and international)?	27	25	44	4

More than half of the respondents are confident that Kenya has an attractive overall business environment that can potentially facilitate domestic, regional and continental businesses (Table 5). However, the survey highlights some gaps in Kenya's investment facilitation efforts. Only a third of respondents are convinced of the effectiveness of investment facilitation agencies – which may partly reflect a large share of respondents' view that there is a lack (42%), or uncertainty over the presence (29%), of simplified rules and application procedures to facilitate investment. In addition, only 25% of respondents think there is sufficient public–private sector consultation to facilitate investment. In this context, only 24% feel that Kenya's investment facilitation regime is robust enough to deliver AfCFTA commitments.

Table 5 Perceptions of Kenya's investment facilitation

Interview question	Share of respondents (%)					
	Yes		Maybe		No	No response/ not aware
1. Is the overall business environment attractive to facilitate domestic, regional and continental, business?	53				42	5
2. Do we have simplified rules and application procedures for investment facilitation?	24		29		42	5
3. Do we have a mechanism for investment information-sharing?	44		10		42	4
	5 (best)	4	3	2	1 (low)	No response
4. How effective are private investment facilitation agencies	9	23	49	9	6	4
5. To what extent do you believe Kenya has policies to facilitate investment that are aligned with national objectives for industrial development and regional and continental economic integration?	5	19	49	15	6	5
6. What is the level of consultation between the public and private sectors to facilitate investment?	4	22	49	16	5	4
	Strongly agree	Agree	Neutral	Disagree	Strongly disagree	No response
7. Kenya's investment facilitation policy regime is robust to seamlessly deliver AfCFTA	4	20	56	15	1	4

In the area of investment protection, more than 70% of the respondents feel that Kenya has a legal framework to protect investment but less than half of these believe that the legal framework is working to protect firms (Table 6). Only a small portion of respondents are certain that there is sufficient investment protection in Kenya (15%) and that Kenya's investment regime is consistent with those within and outside the region (17%) (Table 4).

When asked how to improve investment protection, most respondents cited the need to harmonise investment policies (68%), to strengthen the legislative and judicial systems in Africa (65%) and to raise awareness on government support for investment protection and dispute resolution (61%).

Table 6 Perceptions on Kenya's investment protection

Interview questions	Share of respondents (%) Yes	Maybe		No		No response/ not aware
1. Is there a legal framework to protect investments?	71			19		10
1.1 If yes, has it worked to protect firms?	45			48		7
2. Do you think there is enough protection for investments?	15	32		52		1
3. Are there strong investment protection advocacy associations that you are affiliated with?	46			49		5
	5 (best)	**4**	**3**	**2**	**1 (low)**	**No response**
4. How effective has the judicial system been in protecting investments?	1	13	43	28	11	4
5. How consistent are Kenya's investment protection regime with East African countries and with other countries outside the region?	4	13	57	14	8	5

In terms of outward investment, 38% of respondents are aware of government initiatives that leverage AfCFTA to promote intra-African investment. However, most respondents highlighted as major challenges the very limited linkages among intra-African investors (61%) and the lack of information on investment opportunities on the continent (58%). At least half of respondents also highlighted challenges around limited financial resources as well as the unstable political environment, weak institutional and coordination frameworks, and complex market systems in other African countries.

With regard to changing the incentive framework towards outward investment, most respondents highlighted the need to improve and involve the private sector in AfCFTA discussions (68%), to provide all-round support on logistics and market linkages (61%) and to develop infrastructure in African markets (57%) and to increase investor incentives (51%). A few survey respondents also expressed the need to include discussions on supporting local actors/content and micro, small and medium-sized enterprises. These survey results were discussed and validated during an ODI–KNCCI roundtable meeting that saw participation by around 70 private sector actors on 28 March 2022 in Nairobi, Kenya. During the meeting, the participants expressed that, to boost Kenya's intra-African trade and investment, there was a need to:

- increase the harmonisation and predictability of investment policies among African countries

- facilitate the flow of information among private sector players on market opportunities in Africa
- ensure seamless cross-border connectivity by road, rail, air and sea, in terms of both physical infrastructure and harmonisation of border fees
- implement a holistic approach in improving the business environment to attract as well as enhance the impact of investment in Kenya (for example, alongside investment-related policies, implement complementary policies such as facilitating movement of people, widening technological adoption, enhancing interoperability of financial systems, incorporating environmental and gender considerations in investment negotiations, and improving competition policies, among others).

5 Conclusions and implications for AfCFTA

The Kenyan government recognises the role of FDI in achieving its development and economic transformation goals. AfCFTA presents an opportunity to further boost African investment in Kenya and to encourage Kenyan firms to expand at the continental level. Indeed, almost 50% of FDI in Kenya is from Africa and almost all Kenyan FDI abroad went to African countries as of 2019.

The second phase of AFCFTA negotiations on the Investment Protocol is ongoing and expected to be completed by September 2022. The impact of the Protocol will depend on what is negotiated, how this relates to existing investment provisions in Kenya and the region (e.g. EAC) and whether this leads to better policies for a more attractive investment climate.

This briefing has discussed the FDI landscape in Kenya and identified the issues and opportunities for Kenyan firms that may emerge from the AfCFTA Investment Protocol. There is much awareness of AfCFTA among Kenyan firms but these firms do not yet fully prepared for its implementation. Firms overwhelmingly confirmed the presence of a legal framework to protect investment but also suggested that a comprehensive framework (legal and policies) for investment promotion was lacking, that investor protection regulations could be more effective and that there should more public–private consultation to facilitate investment. These results were validated by around 70 private sector representatives during the KNCCI–ODI roundtable in Nairobi, Kenya. In addition, the roundtable participants highlighted that, in order to increase overall intra-African investment and trade, there was 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 (e.g. easing the movement of people, technological adoption, competition policies, among others).

The AfCFTA Investment Protocol may help address these issues as the negotiation process may lead to the establishment of complementary policies at the national level. Provisions would likely entail new generation investment standards (e.g. balancing investor and state rights and obligations towards sustainable investment) that could enhance Kenya’s investment regime.

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