



**Creating One African Market**

**Protocol on Investment  
to the  
Agreement Establishing  
the  
African Continental Free Trade Area**

**ZERO DRAFT**

**Accra, November 2021**

## **Preamble**

**We, the State Parties to the Agreement Establishing the African Continental Free Trade Area,**

**REAFFIRMING** the African Union's vision for Agenda 2063 of an integrated, prosperous, and peaceful Africa driven by its own citizens and representing a dynamic force in international arena;

**HAVING IN MIND** the objectives of the Agreement Establishing the African Continental Free Trade Area signed at Kigali, Rwanda on 21 March 2018;

**TAKING INTO ACCOUNT** Article 7 of the Agreement Establishing the African Continental Free Trade Area which requires State Parties to enter into Phase II negotiations in respect of, among other areas, investment;

**DETERMINED** to establish a clear, transparent, predictable and mutually-advantageous continental framework of principles and rules for investment through a comprehensive binding instrument on investment;

**RECALLING** Agenda 2030 for Sustainable Development, as contained in Resolution A/RES/70/1 of the United Nations General Assembly, and in particular the 17 Sustainable Development Goals;

**TAKING INTO ACCOUNT** the Investment Policy Framework for Sustainable Development of the United Nations Conference on Trade and Development (UNCTAD) and other relevant UNCTAD instruments that support new generation investment policies for inclusive growth and sustainable development;

**MINDFUL** of best practices incorporated in agreements and other legal instruments on investment adopted by the Regional Economic Communities as well as bilateral investment treaties concluded by African States and national investment laws;

**COGNISANT** of the increasing importance of trade and investment for the growth and development of Africa, and the role played by the private sector in productive capacity, regional, continental and global value chains, increased economic growth and sustainable development;

**RECOGNISING** the important contribution investment can make to the sustainable development of the State Parties, including the reduction of poverty, increase of productive capacity, economic growth, the transfer of technology, and the furtherance of human rights and human development while understanding that sustainable development requires the fulfilment of the economic, social and environmental pillars that are embedded within the concept;

**DESIRING** to promote within State Parties an overall attractive investment climate conducive to the development of a more vibrant and dynamic private sector that encourages mutual beneficial partnerships, facilitates job creation, promotes technology transfer, supports long-term economic growth and contributes effectively to social development and the fight against poverty;

**AFFIRMING** the desire to promote transparency, accountability, good governance and responsible business conduct in the investment environment;

**SEEKING** to achieve an overall balance of the rights and obligations between State Parties and investors under this Protocol;

**REAFFIRMING** the right of State Parties to regulate within their territories and to introduce new measures with a view to meeting national public policy objectives and to promoting sustainable development objectives;

**REAFFIRMING** the importance of encouraging investment activities that benefit underrepresented groups, including women, youth and small and medium enterprises;

**TAKING INTO ACCOUNT** the relevant obligations of State Parties under international law and applicable international agreements;

**HAVE AGREED AS FOLLOWS:**



## CHAPTER 1

### GENERAL PROVISIONS

#### Article 1

##### Definitions

For the purpose of this Protocol,

“**AfCFTA**” means the African Continental Free Trade Area.

“**AfCFTA Secretariat**” means the Secretariat of the African Continental Free Trade Area.

“**Agreement**” means the Agreement Establishing the African Continental Free Trade Area.

“**Enterprise or company**” means any legal or juridical person duly constituted or otherwise incorporated and operated under the applicable laws and regulations of a State Party provided that it maintains substantial business in the territory of the State Party in which it is located.

“**Home State**” means, in relation to

- a. a natural person, the State Party of nationality or citizenship of the investor in accordance with the laws and regulations of that State Party;
- b. a legal or juridical person, the State Party of incorporation or registration of the investor in accordance with the laws and regulations of that State Party.

“**Host State**” means the State Party where the investment is made, undertaken or located.

“**ICSID**” means the International Centre for Settlement of Investment Disputes as established by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

**“Investment”** means an enterprise or company, as defined in this Article, which is established, acquired or expanded in conformity with the laws and regulations of a host State Party by an investor for the purposes of creating lasting economic relations in the territory of that State Party. The enterprise or company may possess assets, such as:

- a. shares, stocks, or any other form of participation of the enterprise/company or another enterprise/company;
- b. movable and immovable property including mortgages, liens, pledges, and any other similar rights as defined in conformity with the laws and regulations of the State Party in whose territory the property is situated;
- c. intellectual property rights such as copyrights, patents, trademarks, industrial designs, trade names, know-how and goodwill to the extent they are acquired, maintained and protected under the law of the Host State;
- d. rights conferred by law or under contract, including licences to cultivate, extract or exploit natural resources; or
- e. rights under contracts including turnkey, construction, production, management, concession or other contracts.

For greater certainty, investment does not include:

- a. debt securities issued by a government or loans to a government;
- b. portfolio investments, that is, investment that constitutes less than 10 per cent of the shares of the enterprise or otherwise does not give the portfolio investor the possibility to exercise effective management or influence in the management of the enterprise; or
- c. claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a State Party to an enterprise in the territory of another State Party, or the extension of credit in connection with a commercial transaction;

To qualify as an investment under this Protocol, the investment must have the following characteristics: substantial business as defined in this Article, commitment of capital or other resources, the expectation of gain or profit,

assumption of risk, and a significant contribution to the Host State's sustainable development.

For avoidance of doubt, establishment, acquisition and expansion under this Protocol only apply to the post-establishment phase.

**"Investor"** means:

- a. a natural person, who is a national or citizen of a State Party in accordance with its laws and regulations, who has made an investment in the territory of another State Party;
- b. an enterprise or company as defined in this Article, which has made an investment in the territory of another State Party.

**"Substantial business"** are activities of a commercial character which have the potential to contribute significantly to the Host State's economy due to their nature, size and scope. The determination of substantial business requires an overall assessment of all the circumstances on a case-by-case basis and taking into account, among other factors:

- i. the nature and scope of business;
- ii. number and type of clients and contracts;
- iii. amount of sales;
- iv. turnover from tax returns;
- v. payment of profit tax under local/domestic law;
- vi. years of establishment;
- vii. the number of employees, share of employees having permanent residence in or nationality of the home country.

**"UNCITRAL"** means the United Nations Commission on International Trade Law.

## **Article 2**

### **Objective**

The principal objective of this Protocol is to support the objectives of the AfCFTA as set out in Articles 3 and 4 of the Agreement, with a view to:

- a. promoting, facilitating and protecting investments that foster sustainable development of State Parties;
- b. establishing a transparent and sound continental legal framework on investment, taking into account the interests of State Parties, investors and local communities;
- c. providing security and predictability in the prevention and management of investment disputes;
- d. creating a level playing field for African investors; or
- e. promoting and enhancing common positions and cooperation on matters related to investment promotion, facilitation and protection.

## **Article 3**

### **Scope of Application**

1. This Protocol defines the rights and obligations of State Parties and investors.
2. This Protocol shall apply:
  - a. to State Parties, as defined in Article 1(v) of the Agreement, and to investors and investments as defined in Article 1 of this Protocol;
  - b. to all investments made prior to or after the entry into force of the Protocol but shall not apply to any investment dispute that arose or any claim that was settled before the entry into force of the Protocol.
3. This Protocol shall not apply to:
  - a. government procurement;
  - b. subsidies or grants provided by a State Party, including government-supported loans, guarantees and insurance;
  - c. investments made with capital or assets of illegal origin;

- d. investments of State-Owned Enterprises;
  - e. taxation measures taken in accordance with the applicable laws and regulations of a State Party; and
  - f. any special advantages accorded in the Host State by development finance institutions established for the purpose of development assistance or the development of small and medium businesses or new industries.
4. This Protocol shall not apply to any dispute arising solely from an alleged breach of a contract between a State Party and an investor. Such disputes shall be resolved only in accordance with the dispute resolution provisions set out in the relevant contract or by the domestic courts or in any other manner mutually agreed.

#### **Article 4**

##### **Denial of Benefits**

1. A State Party may at any time deny an investor the benefits of this Protocol if:
- a. an investment is owned or controlled, directly or indirectly, by persons of a non-State Party;
  - b. an investment that is an enterprise or company has no substantial business in the territory of the State Party under whose law it is constituted or incorporated; or
  - c. an investment has been established or restructured with the primary purpose of gaining access to the dispute settlement mechanism provided in the Annex to this Protocol.
1. The breach of any provision of Chapter 4 of this Protocol by an investor or its investment shall deprive the investor of the benefits of this Protocol.

#### **Article 5**

##### **Relationship to International Investment Agreements**

1. Existing bilateral investment treaties between the State Parties are terminated upon the entry into force of this Protocol. For greater certainty, this provision

constitutes consent of all the State Parties to the termination of the relevant bilateral investment treaties including their survival clauses.

2. State Parties shall make best endeavours to review and revise existing regional investment agreements adopted by the Regional Economic Communities to achieve alignment with the Protocol within (5) years from the entry into force of the Agreement.

## **CHAPTER 2**

### **INVESTMENT PROMOTION, FACILITATION AND PROTECTION STANDARDS**

#### **Article 6**

##### **Admission and establishment**

Each State Party shall admit investments in accordance with its laws and regulations.

#### **Article 7**

##### **Investment Promotion and Facilitation**

1. Each State Party shall, subject to its respective laws and regulations, facilitate investments that contribute to sustainable development.
2. State Parties shall, subject to their respective laws and regulations, facilitate the granting of visas and permits to foreign workers, employees and consultants as designated by the investor.
3. State Parties shall establish a framework for cooperation and coordination between relevant and competent national regulatory authorities with a view to facilitating investment flows.
4. States Parties commit to promote investments that contribute to gender equality and the empowerment of women.

#### **Article 8**

## **National Focal Points**

1. Each State Party shall designate a National Focal Point which shall provide support for investors from other State Parties.
2. State Parties shall, through their National Focal Points, provide relevant information on the legal and policy framework governing investments, including among others:
  - a. regulatory matters and administrative practices;
  - b. governmental programmes and investment incentives;
  - c. legal framework for investment, including legislation on the establishment of companies and joint ventures and other public policies and legal frameworks that may affect investment; and
  - d. prevent and manage disputes between investors and Host States through complaints and grievance mechanisms.

## **Article 9**

### **Publication of Information**

1. Each State Party shall publish promptly, and except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Protocol. International and regional agreements pertaining to or affecting bilateral, regional or international investment to which a State Party is a signatory shall also be published.
2. State Parties shall provide sufficient and adequate information on all national laws and policies to enable investors carry out their operations in compliance with such laws and policies.
3. Each State Party shall respond promptly to all requests by any other State Party for specific information on any of its measures or international and/or regional agreements pertaining to this Protocol. State Parties shall also respond to any question from any other State Party relating to an actual or proposed measure that might substantially affect the operation of this Protocol.

4. Each State Party shall designate the relevant enquiry points to provide other State Parties with specific information, upon request, on all such matters related to this Protocol.

## **Article 10**

### **Disclosure of Confidential Information**

Nothing in this Protocol shall require any State Party to disclose confidential information and data, the disclosure of which would impede law enforcement, prejudice legitimate commercial interests of particular enterprises, public or private or would otherwise be contrary to the public interest.

## **Article 11**

### **National Treatment**

1. Each State Party shall accord to investors of another State Party and their investments treatment no less favourable than it accords, in like circumstances, to its own investors with respect to the management, conduct, operation, use, expansion and sale or other disposition of investments.
2. In assessing "in like circumstances" an overall examination is required on a case by-case basis, of all the circumstances of an investment, including, among others:
  - a. its effects on third persons and the local community;
  - b. its effects on the local, regional or national environment, the health of the populations, or on the global commons;
  - c. the sector in which the investor is active;
  - d. the aim of the measure in question;
  - e. the regulatory process generally applied in relation to a measure in question; and
  - f. any other factor directly relating to the investment or investor in relation to the measure in question.

The examination referred to in this Paragraph shall not be limited to or biased towards any one of the factors.

## **Article 12**

### **Exceptions to National Treatment**

1. Regulatory and other measures taken by a State Party that are designed and applied to protect or enhance legitimate public policy objectives such as public morals, public health, safety and the protection of environment shall not be construed as a breach of Article 11.
2. Preferential treatment granted by State Parties to qualifying investments and investors, in accordance with domestic laws and regulations, in order to achieve national development objectives or address the internal needs of designated disadvantaged persons, groups, or regions shall not be construed as a breach of Article 11.
3. For greater certainty, discriminatory measures taken by a State Party to comply with its international obligations under other international agreements shall not be construed as a breach of Article 11.

## **Article 13**

### **Most-Favoured-Nation Treatment**

1. Each State Party shall accord to investors of another State Party and their investments treatment no less favourable than it accords, in like circumstances, to investors of any other State Party with respect to the management, conduct, operation, use, expansion and sale or other disposition of investments.
2. In assessing "in like circumstances", an overall examination is required on a case by-case basis, of all the circumstances of an investment, including, among others:

- a. its effects on third persons and the local community;
- b. its effects on the local, regional or national environment, the health of the populations, or on the global commons;
- c. the sector in which the investor is active;
- d. the aim of the measure in question;
- e. the regulatory process generally applied in relation to a measure in question; and
- f. any other factor directly relating to the investment or investor in relation to the measure in question.

The examination referred to in this Paragraph shall not be limited to or biased towards any one factor.

3. For greater certainty, the “treatment”, referred to in Paragraphs 1 and 2, does not include dispute settlement procedures, including, but not limited to, those related to admissibility and jurisdiction, provided for in other treaties. Substantive obligations in other treaties, do not in themselves constitute “treatment,” and cannot give rise to a breach of this Article.

## **Article 14**

### **Exceptions to Most-Favoured-Nation Treatment**

1. Regulatory and other measures taken by a State Party that are designed and applied to protect or enhance legitimate public policy objectives, such as public morals, public health, safety and the protection of environment, shall not be construed as a breach of Article 13.
2. Nothing in Article 13 shall oblige a State Party to extend to the investors and their investments the benefit of any treatment, preference or privilege contained in:
  - a. any existing or future free trade area, customs union, common market agreement or any similar international agreements or arrangements to which the investor's home State is not a Party; or
  - b. any existing or future international agreement or domestic legislation relating wholly or mainly to taxation.

## **Article 15**

### **Administrative and Judicial Treatment**

1. Each State Party shall ensure that, in administrative and judicial matters, investors and investments of another State Party are not subject to treatment which constitutes a fundamental denial of justice in criminal, civil and administrative adjudicative proceedings, an evident denial of due process in administrative and judicial proceedings, or manifest arbitrariness.
2. For greater certainty, Paragraph 1 shall not be interpreted as equivalent to fair and equitable treatment.

## **Article 16**

### **Physical Protection and Security**

1. A State Party shall, subject to its capabilities, accord investors and their investments physical protection and security no less favourable than that which it accords to investments of its own natural and legal persons or to investments of investors of any other State Party or third party as defined in the Agreement.
2. Investors of one State Party whose investments in the territory of the other State Party suffer losses as a result of a breach of paragraph 1, in particular owing to war or other armed conflict, revolution, revolt, insurrection or riot in the territory of the Host State shall, as regards restitution, indemnification, compensation or other settlement, be accorded by the Host State treatment no less favourable than that which the Host State accords to investments of its own natural and legal persons or to investments of investors of any other State Party or third party as defined in the Agreement.

## **Article 17**

### **Expropriation and Compensation**

1. State Parties shall not, directly or indirectly, expropriate investments in their territory except:

- a. for a public purpose;
  - b. in accordance with due process pursuant to the procedure established by the laws of the State Party; and
  - c. against a fair and adequate compensation paid within a reasonable period of time in accordance with paragraphs 3 and 4.
2. Fair and adequate compensation shall be assessed in relation to the fair market value of the expropriated investment.
3. Where appropriate, the assessment of fair and adequate compensation shall be based on an equitable balance between the public interest and interest of those affected, having regard for all relevant circumstances and taking account of the current and past use of the property, the history of its acquisition, the fair market value of the investment, the purpose of the expropriation, the extent of previous profit made by the investor through the investment, and the duration of the investment.
4. Compensation shall be assessed at the date immediately before the expropriation took place (“date of expropriation”) and shall not reflect any change in value occurring because the intended expropriation had become known earlier. For greater certainty, the fair and adequate compensation standard also applies in case of unlawful expropriation.
5. The compensation standard set out in this Article, shall apply, *mutatis mutandis*, to the breach of other provisions of the Protocol under Chapter 2 (Investment Promotion, Facilitation and Protection Standards).
6. Any payment shall be made in a freely convertible currency. Payment shall include simple interest at the LIBOR rate from the date of expropriation until the date of actual payment. On payment, compensation shall be freely transferable.

## **Article 18**

### **Exceptions to Expropriation and Compensation**

1. Nothing in Article 17 shall prevent the issuance of compulsory licences granted in relation to intellectual property rights, or to the revocation, limitation, or creation of intellectual property rights, in accordance with international obligations and the AfCFTA Protocol on Intellectual Property Rights, where applicable.

2. Non-discriminatory regulatory actions by a State Party designed to protect legitimate public policy objectives, such as public morals, public health, safety and the protection of the environment shall not constitute indirect expropriation.

## **Article 19**

### **Transfer of Funds**

1. State Parties shall, subject to national laws and regulations, permit all transfers relating to an investment to be made freely and without unreasonable delay in and out of the territory after payment of the respective taxes and duties. Such transfers may include:
  - a. initial capital and additional amounts to maintain or increase investment;
  - b. profits, capital gains, dividends, royalties, interests, management fees, technical fees and other current income accruing from an investment;
  - c. the proceeds from sale of all or any part of or from total or partial liquidation of a covered investment;
  - d. repayments made pursuant to a loan agreement in direct connection with an investment;
  - e. license fees in relation to investment;
  - f. payments in respect of technical assistance, technical services, and management fees;
  - g. payments in connection with contracting projects;
  - h. earnings, such as wages and salaries, of nationals of a State Party who work in connection with an investment in the territory of the other State Party; and
  - i. payments arising under the dispute settlement mechanism of this Protocol.

2. The Host State, subject to the preference of the investor, shall allow transfers to be made in the currency of the host economy or in a freely convertible currency at the market rate of exchange prevailing on the date of the transfer in accordance with the domestic laws and regulations of the host country.

## **Article 20**

### **Exceptions to Transfer of Funds**

1. A State Party may apply non-discriminatory restrictions on transfers of funds relating to investments made in its territory in accordance with its domestic laws and regulations.
2. A State Party may adopt or maintain non-discriminatory measures not conforming with its obligations relating to the free transfer of funds:
  - a. in the event or threat of serious balance-of-payments deficits or external financial difficulties; or
  - b. in exceptional circumstances where movements of capital cause or threaten to cause serious economic or financial disturbance in the State Party concerned.
3. Nothing in this Article shall affect the rights and obligations of a State Party that is a member of the International Monetary Fund (IMF) under the IMF Articles of Agreement, including the right to apply a safeguard measure at the request of the IMF.
4. The State Party applying a safeguard measure contemplated in paragraphs 1 and 2 shall inform the Investment Committee, through the AfCFTA Secretariat, as soon as possible and provide a schedule for its removal within a reasonable period of time. For greater certainty, these safeguard measures shall:

- a. avoid unnecessary damage to the economic and financial interests of other State Parties;
  - b. be proportionate in the circumstances; and
  - c. be temporary and phased out progressively as the situation necessitating the safeguard measure improves.
5. Nothing in Article 19 shall prevent a State Party from delaying or restricting a transfer in a non-discriminatory manner and in good faith application of its laws relating to:
- a. fulfilment of tax obligations to the Host State;
  - b. bankruptcy, insolvency, or the protection of the rights of creditors;
  - c. issuing, trading or dealing in securities, futures, options or derivatives;
  - d. criminal or penal offences and the recovery of the proceeds of crime;
  - e. financial reporting or record keeping of transactions when necessary to assist law enforcement or financial regulatory authorities;
  - f. ensuring compliance with orders or judgments in judicial or administrative proceedings;
  - g. social security, public retirement or compulsory savings schemes; or
  - h. severance entitlements of employees.

### **CHAPTER 3**

#### **DEVELOPMENT-RELATED ISSUES**

##### **Article 21**

###### **Right to Regulate**

1. In accordance with customary international law and other general principles of international law, each State Party has the right to regulate, including to take regulatory or other measures to ensure that investment in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives.
2. For greater certainty, non-discriminatory regulatory measures taken by a State Party to comply with its international obligations under other treaties shall not constitute a breach of this Protocol.

## **Article 22**

### **Minimum Standards on the Environment, Labour and Consumer Protection**

1. State Parties shall ensure high levels of environmental, labour, and consumer protection taking into account internationally accepted standards and the international agreements to which they are parties, and shall continue to improve their standards within their domestic laws and regulations.
2. State Parties shall not encourage investment by relaxing or waiving domestic standards or compliance with environment, labour and consumer protection laws and internationally accepted standards.

## **Article 23**

### **Pursuit of Development Goals**

Notwithstanding the provisions of this Protocol, State Parties may introduce measures to promote domestic development and local content. Measures covered by this paragraph include among others:

- a. measures to grant preferential treatment to any enterprise or company qualifying under the domestic law of a State Party in order to achieve national, sub-national, or regional development goals;
- b. measures to support the development of local entrepreneurs and to establish linkages with local firms, industries and institutions towards assisting the development of local capabilities;
- c. measures to train or employ local workers in positions where shortages have been demonstrated, except through due authorization, and to facilitate the movement of labour from foreign affiliates to local firms and through the creation of linkages between parent and local companies;
- d. measures to appoint as executives, managers or members of board of directors, nationals from State Party where the investment is made;
- e. measures to enhance productive capacity, increase employment, develop human resource capacity and training, research and development;

- f. measures to promote transfer technology, skills and know-how transfer, innovation and other benefits, a production process or other proprietary knowledge;
- g. measures to address historically-based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures, including marginalization against such groups prior to the adoption of this Protocol.

## **Article 24**

### **Encouragement and Support of Investments**

1. State Parties may introduce incentives in order to attract investments. Such incentives may include among others:
  - a. financial incentives in the forms of investment insurance, grants or loans at concessionary rates;
  - b. subsidised infrastructure or services, market preferences;
  - c. development-oriented incentives to encourage preferential markets schemes and specific investors within the region;
  - d. incentives for technical assistance, technology transfer requirements; and
  - e. investment guarantees.
2. State Parties may harmonise incentives for investments that are of strategic interest to the State Parties in consultation with the AfCFTA Secretariat.

## **Article 25**

### **Human Resources Development**

1. State Parties shall develop national policies to guide investors in developing human capacity of the labour force. Such policies may include incentives to encourage employers to invest in training, capacity building and knowledge transfer.
2. In developing such policies, State Parties shall pay particular attention to the needs of youth, women and vulnerable groups.
3. State Parties are encouraged to develop and enforce mutual recognition agreements on human resource development in collaboration with Regional Economic Communities, and in particular on qualification and experience leading to certificates and diplomas.

## **Article 26**

### **Transfer of Technology**

State Parties shall facilitate the international transfer of technology by various measures, such as:

- a. accessing available information regarding description, location and, as far as possible, approximate cost of technology;
- b. establishing or strengthening of technology transfer centres;
- c. providing training for research, engineering, design and other personnel engaged in the development of national technologies or in the adaptation and use of technologies transferred;
- d. providing assistance in the development and administration of laws and regulations with a view to facilitating the transfer of technology;
- e. granting credits on preferential terms for financing the acquisition of capital and intermediate goods in the context of approved development projects involving transfer of technology transaction; or

- f. assisting in the development of technological capabilities of the companies and their personnel.

## **CHAPTER 4**

### **INVESTOR OBLIGATIONS**

#### **Article 27**

##### **Relation to State Party obligations**

1. The provisions in this Chapter are without prejudice to the obligations of the State Parties to promote and enforce, among others:
  - a. laws and policies to protect human rights, labour rights and the environment;
  - b. anti-corruption and anti-bribery measures; or
  - c. laws and policies to protect the rights of indigenous peoples.
2. State Parties shall ensure that investors and their investments comply with the highest standards provided for in domestic regulation and international law.

#### **Article 28**

##### **Compliance with National and International Law**

Investors and their investments shall carry out their operations in compliance with both domestic laws and regulations and international law.

#### **Article 29**

##### **Business Ethics, Human Rights and Labour Standards**

Investors shall comply with standards of business ethics, human rights and labour standards, and in particular shall:

- a. support and respect the protection of internationally recognized human rights;
- b. ensure that they are not complicit in human rights abuses;

- c. comply with the International Labour Organisation (ILO) standards, including the ILO Fundamental Principles and Rights at Work;
- d. not use child labour or forced and compulsory labour; and
- e. eliminate discrimination in respect of employment and occupation.

## **Article 30**

### **Environmental Protection**

1. Investors and their investments shall, in carrying out their business activities, respect and protect the environment, and, in particular shall:
  - a. respect the right to a clean, healthy and sustainable environment, as reflected in Article 24 of the African Charter of Human and Peoples' Rights;
  - b. comply with the principles of prevention and precaution when conducting their business activities to anticipate and prevent any risk of significant harm to the environment;
  - c. carry out an environmental impact assessment, in accordance with the best international standards and practices and as required by domestic law; and
  - d. where their business activities cause harm to the environment, take steps to mitigate the harm and to restore a clean environment as far as possible.
2. Investors shall not exploit or use local natural resources to the detriment of the rights and interests of the Host State and local communities.

## **Article 31**

### **Indigenous Peoples and Local Communities**

1. Investors and their investments shall respect the rights of indigenous peoples and local communities in accordance with international law, norms and best practices, including the right of indigenous peoples to free, prior and informed consent.

2. Investors and their investments shall respect legitimate tenure rights to land, fisheries, and forests.
3. Investors shall make their environmental and social impact assessments available to the general public and accessible to local communities and indigenous peoples and to any other affected interests in the territory of the Host State.

## **Article 32**

### **Socio-Political Obligations**

Investors shall refrain from any interference in the internal affairs of State Parties and in their intergovernmental relations, in particular to influence the appointment of persons to public office, finance political parties or undermine the political stability of the Host State.

## **Article 33**

### **Anti-Corruption**

1. Investors shall not offer, promise or give any unlawful or undue pecuniary or other advantage or present, whether directly or through intermediaries, to a public official of a State Party, or to a member of an official's family or business associate or other person in order that the official or other person act or refrain from acting in relation to the performance of official duties.
2. Investors shall cooperate with State Parties in eliminating corruption in public governance and shall not encourage, incite, aid, abet or conspire with any official or another person or any entity to commit or authorise the commission of an act of corruption, taking into account the African Union Convention on Preventing and Combatting Corruption and other applicable international legal instruments.

## **Article 34**

### **Corporate Social Responsibility**

1. Investors and their 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, in accordance with the principles and standards set out in paragraph 2 of this Article.
2. Investors and their investments shall use their best efforts to:
  - a. stimulate economic, social and environmental progress, aiming at achieving sustainable development;
  - b. encourage the strengthening of local capacities through close cooperation with the local community;
  - c. encourage the development of human capital, especially by creating employment opportunities and facilitating access of workers to professional training;
  - d. strive to promote gender equality and inclusiveness in their activities;
  - e. 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, or other issues;
  - f. develop and apply effective self-regulatory practices and management systems that foster a relationship of mutual trust between the companies and the society in which the operations are conducted;
  - g. promote the knowledge of workers about corporate policies, through appropriate dissemination of these policies, including programmes for professional training;
  - h. refrain from discriminatory or disciplinary action against employees who submit reports to the company's board or to the competent public authorities about practices that violate domestic laws, this Protocol, or other standards of corporate governance to which the company is subject;
  - i. encourage, whenever possible, the business associates, including service providers and sub-contractors, to apply the principles of corporate social responsibility provided for in this Article; and
  - j. respect local political activities and processes.

3. State Parties reaffirm the importance of encouraging investors operating within their territories or subject to their jurisdiction to incorporate into their internal policies internationally recognised standards, guidelines and principles of corporate social responsibility.

## **Article 35**

### **Corporate Governance**

1. Investors and their investments shall meet or exceed national and internationally accepted standards of corporate governance, in particular in respect of transparency and accounting practices.
2. Investors and their investments shall, in accordance with domestic laws and regulations:
  - a. ensure the equitable treatment of all shareholders;
  - b. encourage active cooperation with their stakeholders to create wealth, jobs, and sustainable financial management;
  - c. make timely and accurate disclosure on all material matters regarding an enterprise or company, including the financial situation, performance, ownership, and governance of the enterprise or company, risks related to environmental liabilities, and any other matters in accordance with the relevant regulations and requirements; and
  - d. comply with national policies on human resource development and to the extent possible invest in training, capacity building, and knowledge transfer through programmes for human resource development.
3. State Parties shall improve their regulatory and institutional framework for corporate governance in support of the requirements of this Article.
4. State Parties shall put in place measures enhancing transparency in financial reporting, disclosure, accounting, and audit practices in accordance with international standards and best practices.

## **Article 36**

### **Taxation and Transfer Pricing**

1. Investors and their investments shall:
  - a. ensure that all transactions with related or affiliated companies are arm's length transactions at fair market price in accordance with the domestic regulations of the Host State and relevant international transfer pricing standards;
  - b. conduct their operations in a manner that fully complies with all applicable tax laws and international standards relating to ensuring that tax benefits are not reduced through base erosion and profit shifting practices; and
  - c. provide the financial information required by the Host State to ensure compliance with the applicable laws relating to taxation.
2. State Parties shall cooperate in the detection and prevention of transfer pricing manipulation by investors, including in the provision of information necessary to identify and prevent such practices and providing opportunities for joint tax audit.

## **Article 37**

### **Investor Liability**

1. Investors and their investments shall be subject to civil actions for liability in the judicial process of their Home State for the acts, decisions or omissions made in the Host State in relation to the investment where such acts, decisions or omissions lead to significant damage, personal injuries or loss of life in the Host State.
2. Home States shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before domestic courts relating to the civil liability of investors and their investments for damages resulting from alleged acts, decisions or omissions made by investors in relation to their investments in the territory of the Host State.

## **CHAPTER 5**

## **INSTITUTIONAL ARRANGEMENTS**

### **Article 38**

#### **Committee on Investment**

The Council of Ministers in accordance with Article 11 of the AfCFTA Agreement shall establish the Committee on Investment, which shall carry out such functions as may be assigned to it by the Council of Ministers to facilitate the implementation of this Protocol and further its objectives. The Committee may establish such subsidiary bodies as it considers appropriate for the effective discharge of its functions.

### **Article 39**

#### **Pan-African Investment Agency**

1. The Pan-African Investment Agency is hereby established to assist State Parties, their investment promotion agencies and their private sectors through mobilising financial resources, fostering business development and providing technical and other support for the promotion and facilitation of investment in accordance with the provisions of this Protocol.
2. The Agency shall mobilise resources, and provide technical and other support to State Parties with a view to:
  - a. implementing measures in support of the domestic efforts of State Parties;
  - b. strengthening their capacity in investment promotion and facilitation of the technical, managerial and financial capacities of their investors;
  - c. improving the ability of investment promotion agencies to gather and analyse information on investment flows;
  - d. improving the ability of investors to meet investment regulations and standards at international, continental, regional and national levels;
  - e. supporting the collection and management of statistical data on investment;
  - f. supporting State Parties in the negotiation or renegotiation of investment agreements, contracts and other investment-related instruments;

- g. facilitating coordination, interaction and dialogue between and among investment promotion agencies and investors to enable the sharing of information with respect to investment opportunities, peer learning and best practices;
  - h. addressing quality and standards needs in investment under this Protocol to support the development and adoption of continental standards;
  - i. fostering business development through initiatives aimed at building capacity in private sector enterprises, in particular small and medium enterprises, and promoting cross-border investments; and
  - j. facilitating, upon request by the Committee on Investment, the implementation and attainment of the objectives of this Protocol.
3. The Agency shall be provided with appropriate administrative and technical support as it requires.

#### **Article 40**

##### **Transparency and Notification**

1. Each State Party shall inform the Committee on Investment of the identity of its National Focal Point.
2. Each State Party shall notify the Committee on Investment of any international and regional agreements pertaining to or affecting investment with other State Parties and third parties to which they are signatory prior to or after the entry into force of this Protocol.
3. Each State Party shall promptly and at least annually notify the Committee on Investment of the introduction of any new, or any changes to existing laws, regulations or administrative guidelines which pertain to this Protocol.

#### **Article 41**

##### **Technical Assistance, Capacity Building and Cooperation**

1. State Parties recognise the importance of technical assistance, capacity building and cooperation to promote and facilitate investment under this Protocol.

2. To further the implementation of these provisions, the AfCFTA Secretariat working with the Pan-African Investment Agency, State Parties, Regional Economic Communities and partners shall coordinate the provision of technical assistance and undertake activities to enhance capacity building.

## **Article 42**

### **Responsibilities of the AfCFTA Secretariat**

1. The AfCFTA Secretariat shall have the responsibility of assisting State Parties in the implementation of this Protocol.
2. The AfCFTA Secretariat shall be responsible for all notifications to and from the Committee on Investment and State Parties.

## **CHAPTER 6**

### **FINAL PROVISIONS**

## **Article 43**

### **Application**

1. Each State Party shall apply appropriate measures to bring effect to the rules and procedures set out in the provisions of this Protocol. State Parties shall cooperate with each other in complying with the provisions of this Protocol and shall avoid the application of measures in an inconsistent manner that may cause an impediment to the operation of the Protocol.
2. To ensure the flexibility necessary to address developmental needs and other economic concerns in the implementation of this Protocol, State Parties shall,

within a period of five years from the entry into force of this Protocol, bring their national laws and regulations into compliance with this Protocol.

#### **Article 44**

#### **Dispute Settlement**

Disputes arising under this Protocol shall be managed and settled in accordance with the rules and procedures set forth in Annex 1 to this Protocol.

#### **Article 45**

#### **Amendment**

Amendment to this Protocol shall be in accordance with Article 29 of the Agreement.

## **ANNEX 1**

### **RULES AND PROCEDURES GOVERNING THE MANAGEMENT AND SETTLEMENT OF DISPUTES UNDER THE PROTOCOL ON INVESTMENT TO THE AGREEMENT ESTABLISHING THE AfCFTA**

#### **I. STATE-STATE AND ALTERNATIVE MEANS OF DISPUTE SETTLEMENT**

##### **Article 1**

###### **State-to-State Dispute Settlement**

The relevant provisions of the Protocol on the Rules and Procedures on the Settlement of Disputes shall apply to consultations and the settlement of disputes between State Parties under this Protocol.

##### **Article 2**

###### **Dispute Prevention and Management**

1. State Parties shall, through their National Focal Points, assist, to the extent possible, investors of any other State Party and their investments to amicably resolve complaints or grievances which have arisen in connection with their investment activities by:
  - a. receiving and, where appropriate, giving due consideration to complaints or grievances raised by investors; and
  - b. providing assistance in resolving difficulties experienced by the investors in relation to their investments and de-escalating potential disputes.
2. State Parties shall inform the Committee on Investment of the complaints or grievance mechanisms available to investors in their territory.

### **Article 3**

#### **Amicable Resolution of Disputes**

In the event of an investment dispute between an investor or its investment and a Host State pursuant to this Protocol, the investor and the Host State shall initially seek to resolve the dispute through consultations, conciliation, third-party mediation or other mechanisms.

### **Article 4**

#### **Mediation of Disputes**

1. The investor and the Host State may agree at any time to have recourse to mediation under:
  - a. any Mediation Rules adopted by African institutions;
  - b. the ICSID Mediation Rules; or
  - c. any other Mediation Rules agreed by the parties.
2. Unless the parties agree otherwise:
  - a. the fees and expenses of the mediator(s) and the fees and costs of the administering institution shall be borne equally by the parties to the mediation; and
  - b. each party shall bear any other costs it incurs in connection with the mediation.

## **II. INVESTOR-STATE ARBITRATION**

### **Article 5**

#### **Notice of Intent**

1. Where an amicable resolution is not achieved through mediation or other means an investor may deliver to the Host State a written notice of its intention to submit the claim to arbitration (“Notice of Intent”).

2. The Notice of Intent shall be delivered at least six months before submitting any claim to arbitration under this Article and shall specify:
  - a. the name and address of the investor;
  - b. the place and date of mediation;
  - b. for each claim, the provision of this Protocol alleged to have been breached;
  - c. the legal and factual basis for each claim, including the measures at issue; and
  - d. the relief sought and the approximate amount of damages claimed.

## **Article 6**

### **Choice of Arbitration Forum**

1. An investor may submit an arbitration claim:
  - a. in accordance, *mutatis mutandis*, with the provisions of Article 27 of the Protocol on Rules and Procedures for the Settlement of Disputes;
  - b. under any arbitration rules adopted by African institutions or Dispute Resolution Centres;
  - c. under the ICSID Convention and the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, provided that both the Host State and the State Party of which the investor is a national are parties to the ICSID Convention;
  - b. under the ICSID Additional Facility Rules, provided that either the Host State or the State Party of which the investor is a national of a party to the ICSID Convention;
  - c. under the UNCITRAL Arbitration Rules; or
  - e. under any other arbitration institution or under any other arbitration rules.

## **Article 7**

### **Notice of Arbitration**

1. A claim shall be deemed submitted to arbitration when the investor's notice of arbitration or request for arbitration ("Notice of Arbitration") has been referred to:
  - a. the concerned State Party in accordance with the provisions of Article 27 of the Protocol on Rules and Procedures for the Settlement of Disputes;
  - b. an African institution or Dispute Resolution Centre in accordance with the applicable arbitral rules;
  - c. the Secretary-General of ICSID under Article 36(1) of the ICSID Convention;
  - d. the Secretary-General of ICSID under Article 2 of Schedule C of the ICSID Additional Facility Rules; or
  - e. the respondent under Article 3 of the UNCITRAL Arbitration Rules.
  
2. The claimant shall provide with the Notice of Arbitration:
  - a. the name of the arbitrator that the claimant appoints, or
  - b. the claimant's written in accordance with the applicable arbitration rules.
  
3. An investor may only submit a claim to arbitration pursuant to this Annex, provided that:
  - a. the investor has provided a clear and unequivocal waiver of any right to pursue and/or to continue any claim relating to the measures underlying the claim made pursuant to this Protocol, on behalf of both the investor and the investment, before local courts in the Host State or in any other dispute settlement forum;
  - b. no more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the breach alleged in the Notice of Arbitration and knowledge that the investor has incurred loss or damage.

## **Article 8**

## **Seat of Arbitration**

1. The place of arbitration shall be determined by agreement of the disputing parties to the arbitration or, in the absence of such agreement, by the tribunal in accordance with the applicable arbitration rules.
2. Unless the disputing parties otherwise agree, hearings and meetings shall be held in the territory of a State Party, either in the facilities of a mediation or arbitration institution or other facilities as appropriate.
3. After consulting with the disputing parties, the tribunal may decide that the hearing(s) shall be held virtually. In preparing for and organising a virtual hearing, the tribunal, the disputing parties and the administering institution may be guided by the provisions of the Africa Arbitration Academy Protocol on Virtual Hearings in Africa and other relevant protocols or guidelines.

## **Article 9**

### **Consent to Arbitration**

Consent to arbitration shall be provided as follows:

- a. each State Party consents to the submission of a claim to arbitration under this Article in accordance with this Annex; and
- b. by submitting a claim to arbitration, the investor also consents to counterclaims by the Host State for an alleged breach of the Protocol.

## **Article 10**

### **Counterclaims**

A Host State may initiate a counterclaim against the investor before any competent body dealing with a dispute under this Protocol for damages or other relief resulting from an alleged breach of the Protocol.

## **Article 11**

### **Establishment and Composition of the Tribunal**

1. The tribunal shall be established as follows:
  - a. Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties. The disputing parties endeavour to respect gender equality in the appointment of arbitrators.
  - b. The presiding arbitrator shall be a national of an African State other than the State Party to the dispute or the State Party of which the investor is a national.
  - c. Arbitrators shall be impartial and independent, shall avoid direct or indirect conflicts of interest and respect the confidentiality of the arbitral proceedings. They shall have demonstrated expertise and experience in general international law, international investment law, and dispute settlement under international law.
  - d. Arbitrators may be drawn from a Roster of Eligible Arbitrators established by the AfCFTA Secretariat. State Parties may nominate two individuals to the AfCFTA Secretariat for the inclusion in the Roster taking into account gender balance.
  - e. If a tribunal has not been constituted within ninety days from the date that a claim is submitted to arbitration, the Secretary-General of the AfCFTA Secretariat, the Secretary-General of the ICSID or any other competent appointing authority, on the request of a disputing party, shall appoint the arbitrator(s) not yet appointed.

## **Article 12**

### **Code of Conduct of Arbitrators**

The arbitrators shall be bound at all times during the arbitration by the Code of Conduct for Adjudicators in Investor-State Dispute Settlement adopted by the UNCITRAL and ICSID. For greater certainty, no arbitrator can act concurrently as counsel in another actual or potential treaty-based arbitration involving an investor and a State.

### **Article 13**

#### **Experts**

Without prejudice to the appointment of other kinds of experts under the applicable arbitration rules, where a tribunal wishes to consult one or more experts on any factual issue concerning environmental, health, safety or other scientific or technical matters raised in a proceeding, the tribunal:

- a. may appoint such expert(s) subject to any terms and conditions determined by the disputing parties; and
- b. may not appoint an expert if the disputing parties agree that the tribunal may not do so. The disputing parties are encouraged to provide the tribunal with the reasons for such agreement.

### **Article 14**

#### **Non-Disputing Parties**

1. A State Party that is not party to the dispute (non-disputing State Party) may make oral and written submissions to the tribunal regarding the interpretation of the Protocol and be present at the oral hearings.
2. The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party.

### **Article 15**

#### **Transparency**

Disputing parties and the tribunal are encouraged to apply rules on transparency contained in the United Nations Convention on Transparency in Treaty-Based Investor State Arbitration (Mauritius Convention on Transparency).

## **Article 16**

### **Third-Party Funding**

A disputing party shall file a written notice disclosing the name and address of any non-party from which the disputing party, directly or indirectly, has received funds for the pursuit or defence of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding.

## **Article 17**

### **Awards**

1. Where a tribunal makes a final award against a Host State or against an investor in the light of a counterclaim by a State Party, the tribunal may award, separately or in combination, only:
  - a. monetary damages and any applicable interest; or
  - b. restitution of property, in which case the award shall provide that the Host State or investor, as the case may be, may pay monetary damages and any applicable interest in lieu of restitution.
2. A tribunal shall issue an award for costs and legal representation fees for any arbitration where the jurisdiction of the tribunal is denied to the investor, and may, unless there is good reason not to do so, issue an award for costs and legal representation to the disputing party that prevails in the final award.
3. A tribunal may not award punitive damages.
4. An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.

5. A disputing party may only seek enforcement of a final award in accordance with the applicable rules governing the arbitration. Each State Party shall provide for the enforcement of an award in its territory.

## **Article 18**

### **Appeals**

1. Where an arbitration is conducted pursuant to the provisions of Article 27 of the Protocol on Rules and Procedures for the Settlement of Disputes, the disputing parties may agree to submit, through the AfCFTA Secretariat, any interim or final award to review by the Appellate Body.
2. For the purposes of this review, the Appellate Body shall limit itself to issues of law and legal interpretation covered in the award and shall apply its Working Procedures, *mutatis mutandis*, taking into account the nature, object and purpose of investor-state arbitration.
3. The report of the Appellate Body shall have no binding force except between the disputing parties and in respect of the particular case.

## **Article 19**

### **Governing Law**

When a claim is submitted to a tribunal, it shall be decided in accordance with the Protocol and applicable rules of international law. The governing law for the interpretation of this Protocol shall be the Protocol and the general principles of international law relating to the interpretation of treaties. For matters related to domestic law, the national law of the Host State shall be resorted to as the governing law.

## **Article 20**

### **Administration of Arbitration Proceedings**

The AfCFTA Secretariat shall conclude the necessary arrangements with ICSID for the proper administration of arbitration proceedings.

## **Article 21**

### **Technical Cooperation and Capacity-Building**

The AfCFTA Secretariat, in collaboration with ICSID and other partnering mediation/conciliation/arbitration institutions in Africa, shall organise training and other activities on a regular basis, whether in-person or virtually, on investment dispute resolution with a view to achieving the objectives of the Protocol as stated in the Preamble and Article 2.