

# A New Era For African Investment: Assessing The Impact Of The AfCFTA Investment Protocol

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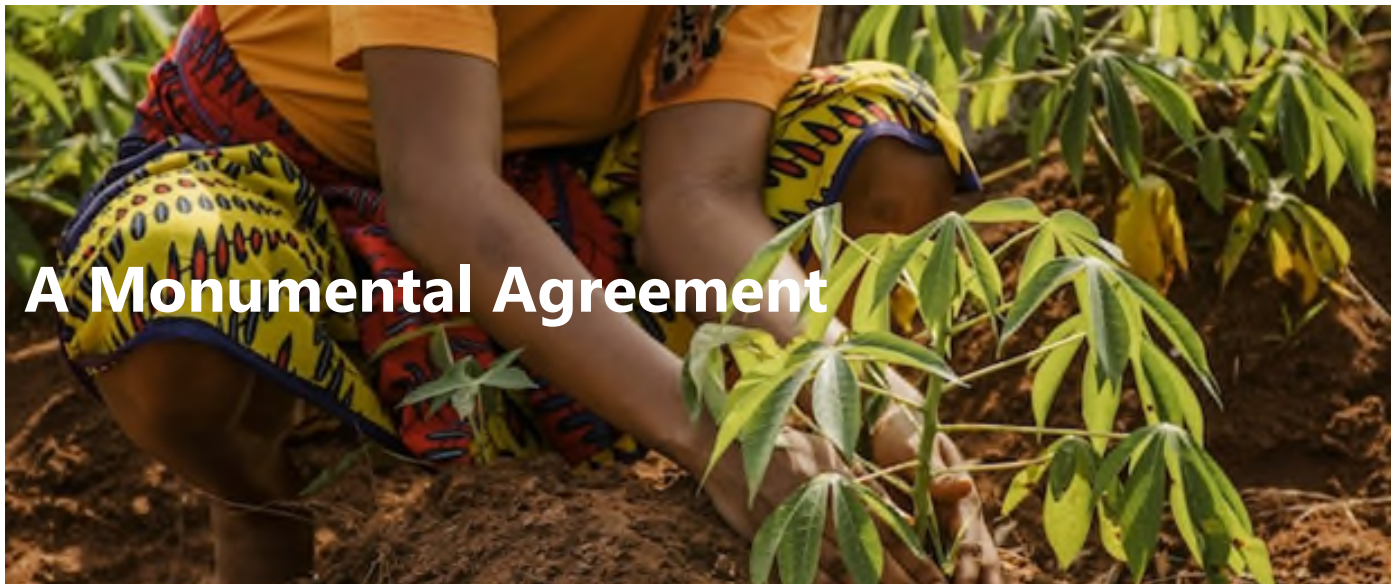


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On 19 February 2023, the *African Union* Heads of State adopted the Protocol on Investment to the *African Continental Free Trade Area Agreement* ("**AfCFTA**").

Although the text of the Protocol on Investment itself is not at present accessible to the public, this overview analyses the provisions of the final draft (referred to as the "**Draft Protocol**").

## Contextual Overview



### A Monumental Agreement

The African Continental Free Trade Area ("**AfCFTA**") Agreement is a monumental agreement signed by **54** of the **55 countries of the African Union (AU)**, and encompassing Africa's **8 Regional Economic Communities (RECs)**.

**Members of AfCFTA\*:**



- Algeria
- Angola
- Arab Republic of Egypt
- Benin
- Botswana
- Burkina Faso
- Burundi
- Cabo Verde
- Cameroon
- Central African Republic
- Chad
- Comoros
- Côte d'Ivoire
- Democratic Republic of the Congo
- Djibouti
- Equatorial Guinea
- Eswatini
- Ethiopia
- Gabon
- Ghana
- Guinea
- Guinea-Bissau
- Kenya
- Lesotho
- Liberia
- Libya
- Madagascar
- Malawi
- Mali
- Mauritania
- Mauritius
- Morocco
- Mozambique
- Namibia
- Niger
- Nigeria
- Republic of Congo
- Rwanda
- São Tomé & Príncipe
- Senegal
- Seychelles
- Sierra Leone
- Somali
- South Africa
- Sudan
- Tanzania
- The Gambia
- Togo
- Tunisia
- Uganda
- Western Sahara
- Zambia
- Zimbabwe

\*As of September 13, 2023



The AfCFTA came into effect in May 2019 and is the world's largest free trade area. The AfCFTA aims to create a single continental market with a population of about **1.3 billion people** and a combined GDP of approximately **US\$ 3.4 trillion**.

As one of the flagship projects of Agenda 2063: The Africa We Want, the AfCFTA is part of the African Union's long-term development strategy to transform the continent into a global powerhouse.



## Promoting Intra-Africa Trade

The main objective of the AfCFTA is to eliminate trade barriers and promote intra-Africa trade, thereby boosting economic growth across the African continent. Member States have endorsed trade protocols that regulate critical elements such as intellectual property rights, competition policy, and investment within this vast free trade area. These protocols play a pivotal role in efforts to provide a well-structured and favourable environment for economic cooperation and growth among the participating nations.

In addition to its economic impact, the AfCFTA is expected to foster industrialization, job creation, and investment in Africa. By advancing trade in value-added production across all service sectors of the African economy, the AfCFTA aims to establish regional value chains and enhance Africa's competitiveness in the global market.



## A Historic Initiative

The AfCFTA represents a historic initiative that holds the potential to ignite economic growth, streamline trade, and encourage investment among African nations, ultimately transforming the continent's economic landscape.

- The AfCFTA entered into force on May 30, 2019, following the deposit of Instruments of Ratification by **24 Member States**, and it was officially launched in July 2019. Trading under the AfCFTA began on January 1, 2021.

- The AfCFTA Secretariat, headed by His Excellency Wamkele Mene as the first elected Secretary-General, is hosted in **Accra, Ghana**.

**54**

**AU Member States have signed the AfCFTA Agreement as of July 2023**

**46**

**The AfCFTA has 46 state parties as of July 2023**

**30M**

**People will potentially be lifted out of extreme poverty**

**\$405B**

**Income boost in Africa by 2023: A 7% gain**



## The Negotiation and Establishment of the Protocol on Investment

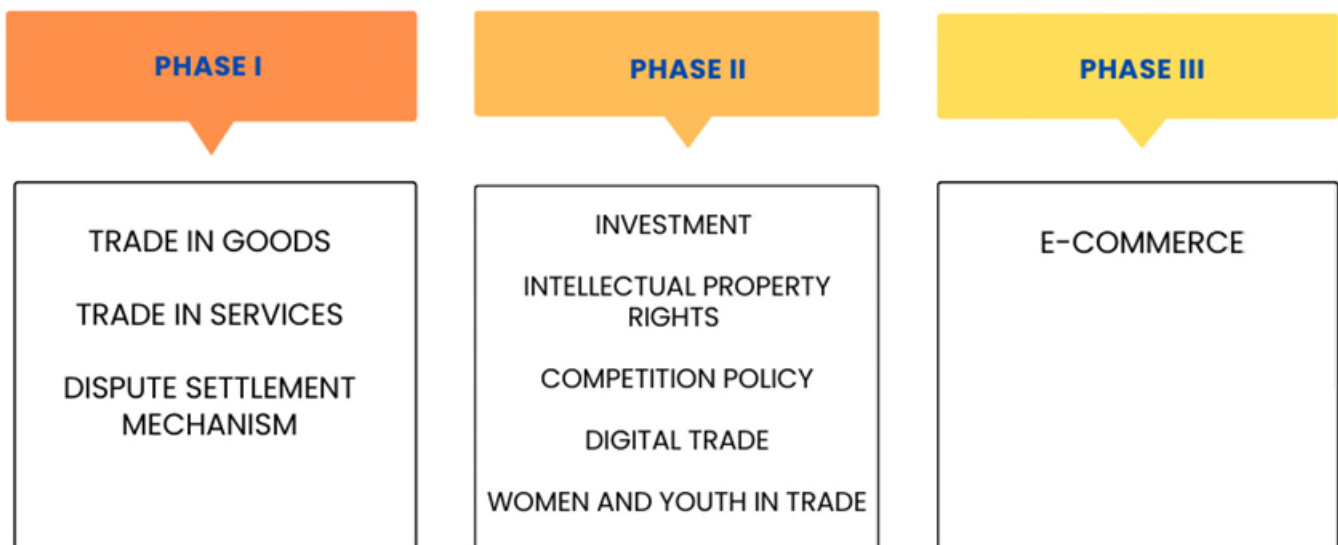
- The AfCFTA is being negotiated in phases. Phase I negotiations, focused on trade in goods and services, have been successfully completed. Phase II, which encompasses the protocols on investment, intellectual property rights and competition, is currently progressing as planned. Phase III will involve negotiations for an e-commerce protocol.
- In the course of Phase II, in December 2021, African negotiators began a year-long process to create the Protocol on Investment, which aims to define the protection, promotion, and facilitation of investments within Africa. This process has now concluded, resulting in a final version of the Protocol on Investment.
- The draft of the Protocol on Investment, which is part of the AfCFTA Agreement, was concluded in October 2022 and subsequently adopted at ministerial level by the AfCFTA Council of Ministers.
- On February 19, 2023, the African Union Heads of State convened for their ordinary session, during which the text of the Protocol on Investment ("**Protocol**") was presented for assessment and officially adopted. This significant milestone signified the continent's achievement of a common African stance on various crucial aspects of investment governance. Although the text of the Protocol itself has not yet been made public, this update analyses the provisions outlined in the final draft (referred to as the "**Draft Protocol**") to provide insights into the anticipated level of protection offered by the Protocol as adopted.

# Objectives and Expectations of AfCFTA

<p><b>1</b></p> <p>Deepen economic integration of Africa through a single market and free movement.</p>	<p><b>2</b></p> <p>Create a liberalized market for goods and services.</p>	<p><b>3</b></p> <p>Facilitate investments and the movement of capital and people.</p>	<p><b>4</b></p> <p>Lay the foundation for a future Continental Customs Union.</p>
<p><b>5</b></p> <p>Promote sustainable development, gender equality, and structural transformation.</p>	<p><b>6</b></p> <p>Enhance competitiveness in global markets for State Parties.</p>	<p><b>7</b></p> <p>Drive industrial development, regional value chains, agriculture, and food security.</p>	<p><b>8</b></p> <p>Address overlapping memberships and expedite integration processes.</p>

## Substantive provisions

The AfCFTA Agreement encompasses a comprehensive set of protocols and their corresponding annexes. The implementation process of this agreement includes the following elements:





## 1. Relationship between the Draft Protocol on Investment and other International Investment Agreements

The Draft Protocol pertains to investments made by investors within a Member State and introduces more specific definitions compared to those commonly contained within bilateral investment treaties. It mandates that investors must uphold significant level of business activity within the Host State and contribute to the sustainable development of the Host State if they are to benefit from its protections (Article 1).

The aim of the Draft Protocol is to promote sustainable development through intra-African investments, establish a transparent legal framework for investments and dispute resolution, foster technology transfer, and strengthen cooperation for investment promotion within Africa (Article 2).

In line with its main objectives, the Draft Protocol seeks to replace regional bilateral investment instruments between Member States (Article 49):

- The Draft Protocol establishes that existing bilateral investment treaties between Member State parties will be terminated within five years of its enactment, including survival clauses.
- The Draft Protocol's provisions will apply to qualifying investments upon termination of these treaties.
- New Bilateral Investment Treaties (**BITs**) between Member State parties are prohibited after the Draft Protocol's adoption.
- Member State parties are encouraged to review and align existing regional investment agreements with the Draft Protocol within five to ten years.
- Additionally, Member State parties can consider the Draft Protocol's requirements during negotiations and reviews of international investment agreements with Third Parties.

The Draft Protocol includes a provision concerning the interaction between its terms and those of the other protocols within the AfCFTA framework. Once adopted, the Draft Protocol becomes an essential component of the Agreement and does not alter the rights and responsibilities outlined in other Agreement protocols. Should any inconsistencies arise between the Draft Protocol and other agreement protocols regarding matters explicitly covered by those protocols, the provisions of the latter protocols will take precedence in the event of a conflict (Article 50).

## 2. Exceptions

The Draft Protocol will govern investments in the free trade area and define the rights and obligations of investors and Member States. The Draft Protocol however provides that it will not apply to certain matters such as (Article 3.4):

- Any investment dispute that arose or any claim that was settled before the entry into force of the Draft Protocol;
- Government procurement;
- Subsidies or grants provided by a state party, including government-supported loans;
- Guarantees and insurance under national development programmes;
- Investments made with capital or assets of illegal origin in accordance with the applicable laws and regulations of a Member State party;
- Taxation measures taken in accordance with the applicable laws and regulations of a Member State party;
- Any special advantages accorded in a host state by financial institutions for the purpose of development assistance, or the development of small and medium businesses or new industries;
- Operations of public debt and state enterprise debt restructuring taken by a Member State party; and
- Real estate or other property other than acquired for the purpose of economic benefit or other business purposes.

## 3. Investor Protections

INVESTORS ARE PROTECTED AGAINST:

- **National Treatment and Most-Favoured Nation Treatment**

Receiving treatment less favourable than investors from the Host State and other Member/Third States (Articles 12 & 14).

- **Administrative and Judicial Treatment**

Arbitrary treatment in administrative matters and judicial proceedings (Article 17).

- **Physical Protection and Security**

Physical and other threats to their Investments in the Host State (Subject to the State party's "capabilities") (Article 18).

- **Expropriation**

Unlawful seizure of investments or assets by the Host State (Article 19).



- **Transfer of Funds**

Measures affecting the free transfer funds related to their investments, subject to exceptions (Article 22).

INVESTOR PROTECTIONS EXCEPTIONS:

- **Transfer of Funds**

Measures affecting the free transfer funds related to their investments, subject to the below exceptions (Article 23):

**1. Non-Discriminatory Restrictions on Investment-Related Fund Transfers:**

States can impose non-discriminatory limitations on the movement of funds tied to investments within their territory, adhering to domestic laws and regulations. These restrictions can be related to various aspects:

- Tax obligations to the host state.
- Bankruptcy, insolvency, or creditor rights protection.
- Activities involving securities, futures, options, or derivatives.
- Addressing criminal or penal offenses and recovering proceeds of crime.
- Ensuring financial reporting or transaction record-keeping for law enforcement or financial regulation.
- Enforcing orders or judgments from judicial or administrative proceedings.
- Managing social security, public retirement, or mandatory savings programs.
- Catering to employee severance entitlements.
- Combating money laundering and terrorism financing.

**2. Non-Conforming Measures in Specific Economic Scenarios:**

States can implement non-discriminatory measures that do not align with their obligations for unrestricted fund transfers under the following conditions:

- In the presence or threat of severe balance-of-payments deficits or external financial difficulties.
- During extraordinary circumstances where capital movements could lead to significant economic or financial problems in the concerned state.

**3. IMF Membership and Safeguard Measures:**

For states that are members of the International Monetary Fund (**IMF**), the Draft Protocol (Article 22) does not impact their rights and responsibilities under the IMF Articles of Agreement. This includes the authority to apply safeguard measures at the request of the IMF, with each state's individual reservations taken into account.

**4. Implementation and Notification of Measures:**

States enforcing measures mentioned in Points 1 and 2 must promptly inform the AfCFTA Secretariat. They should provide a timeline for removing these measures within a reasonable period. These measures need to:

- Minimize undue harm to investors and other states' economic and financial interests.
- Maintain proportionality given the circumstances.
- Be temporary and gradually phased out as the situation necessitating them improves.

▪ **Right to Regulate**

The Draft Protocol safeguards the regulatory authority of the Host State and provides exemptions for actions taken under this authority (Article 24). These exemptions are subject to conditions that protect the expectations and interests of investors. Importantly, certain specific exceptions permit measures aimed at upholding "*legitimate public policy objectives*" such as for instance those pertaining to "*public morals, public health, [...] safety, and environmental protection.*" Nevertheless, it is worth noting that these exceptions do not apply to measures that would otherwise be considered discriminatory (Articles 13 & 15) or expropriatory (Article 20).

Examples of measures taken by state party to protect or enhance legitimate public policy objectives (not limited to):



## 4. Investor Obligations

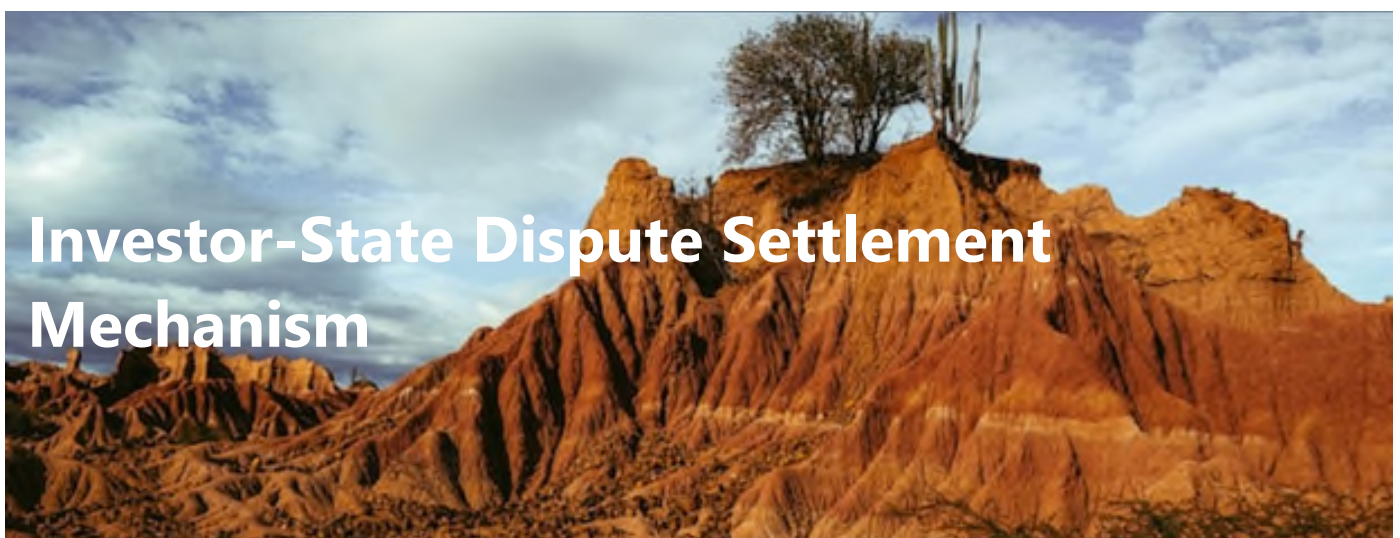
Another notable aspect of the Draft Protocol is its inclusion of obligations imposed on investors. Chapter 5 of the Draft Protocol outlines these obligations, which require investors to comply with business ethics, human rights, and labour standards, including those set by the *International Labor Organization*. Investors must also respect environmental standards, follow best practices in corporate governance, refrain from exploiting local natural resources to the detriment of the Host State and local communities, and avoid interfering with the internal affairs of the Host State.

- Comply with national and international law (Article 32)
- Comply with business ethics, human and labour standards (Article 33)
- Respect and protect the environment (Article 34)
- Respect the rights of indigenous people and communities (Article 35)
- Refrain from interference with the Host State's internal affairs and intergovernmental relations (Article 36)
- Refrain from unlawful and corrupt practices (Article 37)
- Endeavour to achieve "*the highest possible level of contribution*" to the Host State's sustainable development (Article 38)



1. MSMEs face disadvantages compared to larger firms due to limited human and technological resources, putting them at a competitive disadvantage.
2. Insufficient and unreliable electricity supply hampers the operations of MSMEs, increasing their costs and hindering their expansion into other African markets.
3. Limited access to financing options and trade finance for MSMEs can impede their participation in intra-Africa trade.

4. To maximize the benefits of the trade agreement, improvements in air, rail, and road infrastructure between African nations and regions are necessary. Additionally, MSMEs require increased internet access and digital infrastructure to enhance their effectiveness.
5. Local producers may face increased competition from overseas and lose market share to foreign suppliers, particularly if the latter are able to exploit lower tariffs and introduce subpar products to the market.
6. Weak enforcement of patent laws exposes smaller firms to the risk of losing their intellectual property to larger companies.



The Draft Protocol does not currently address dispute resolution, but it outlines the intention to incorporate dispute resolution provisions in an Annex. The Annex is expected to be completed within a year from the Protocol's adoption (**Article 46.3 Draft Protocol**). While the exact details of the Annex have not been publicly released, [a previous version of the Draft Protocol](#) (the "**Zero-Draft**") provides some guidance.

According to Article 46 of the **Draft Protocol**, a Protocol on Rules and Procedures for the Settlement of Disputes will be also created, which is expected to ensure transparency and predictability in AfCFTA's dispute settlement process. It provides that in the event of a dispute between an investor of a State Party and a Host State relating to an alleged breach of the Draft Protocol, the Investor and the Host State will be able to seek amicable resolution of the dispute through consultations, negotiations, conciliation, mediation or other amicable dispute resolution mechanisms available in the Host State (**Article 46.1 Draft Protocol**).

The [Zero-Draft](#) provides more details on the process. Notably, it states that if settlement cannot be achieved, investors would have the option to initiate arbitration proceedings against Host States in a choice of forums and under various arbitration rules.

These forums include arbitration administered by the AfCFTA Secretariat and arbitration under the rules and auspices of African arbitration institutions and dispute resolution centres. Additionally, investors would have

the choice to utilize existing frameworks such as the ICSID Convention or the UNCITRAL Arbitration Rules. Furthermore, the Draft Protocol allows for arbitration under any other arbitration institution or set of rules.



The AfCFTA operates its own dispute settlement system. This system includes Panels and an Appellate Body, and is similar to the Dispute Settlement Understanding of the WTO. However, only State Parties have the right to use this system. Private parties such as exporters, importers, and service providers cannot directly access the AfCFTA dispute resolution mechanism. Rather, a State Party would need to file a claim and prove that the private party's rights had been violated.

Before a dispute can be determined, the parties involved must first engage in consultation. They have the option to resolve the issue through goodwill, confidential conciliation, mediation, or arbitration.

When a Panel or the Appellate Body determines that a measure is in conflict with the AfCFTA legislative instruments, recommendations are issued that the concerned State Party is to bring the measure into compliance. Additionally, the Panel or the Appellate Body may provide suggestions on how the State Party can implement the recommendations (Article 23 of the *AfCFTA Dispute Settlement Protocol*).

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