

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.