The Protocol on Investment (Protocol) to the Agreement Establishing the African Continental Free Trade Area (AfCFTA) was adopted by the Assembly of the Heads of State and Government of the African Union (AU) during its Thirty-Sixth (36th) Ordinary Session held in Addis Ababa, Ethiopia from 18 to 19 February 2023.

During the adoption of the Protocol, the AU Assembly requested the Council of Ministers responsible for Trade “to review Articles 19 and 21 of the Protocol on Investment to ensure alignment with domestic legal and constitutional requirements, taking into account historical factors of some of the Member States and submit these two Articles to the Assembly....”[1]

Articles 19 and 21 deal with expropriation and compensation for expropriation, respectively. The original Article 19 (Expropriation) provided:

1. State Parties shall not, directly or indirectly, expropriate or nationalise 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;
   c. in a non-discriminatory manner; and
   d. against a fair and adequate compensation paid within a reasonable period of time in accordance with Article 21, and taking into account that the assessment of the reasonable period of time shall be made on a case-by-case basis in accordance with the domestic laws and regulations of the State Party and on a non-discriminatory basis.

Article 19(2) defines expropriation (i.e. when an investment is nationalised or expropriated directly), and indirect expropriation (i.e. measures with an equivalent effect of direct expropriation yet without formal transfer of title or outright seizure).

The original Article 21 (Compensation for Expropriation) provided:
1. Fair and adequate compensation shall be assessed on a case-by-case basis in relation to the fair market value of the expropriated investment, and in a reasonable period of time, in accordance with domestic laws and regulations.

2. The assessment of fair and adequate compensation shall be based on an equitable balance between the public interest and the interest of those affected, having regard for all relevant circumstances and taking account of the current and past use of the investment, 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, the previous behaviour of the investor, and the duration of the investment.

3. Compensation shall be assessed based on the fair market value of the expropriated investment at the date immediately before the expropriation took place (“date of expropriation”) or before the measure became publicly known, whichever is earlier. For greater certainty, the fair and adequate compensation standard also applies in case of unlawful expropriation.

4. The computation of the fair market value of the expropriated property shall exclude any consequential losses or speculative or windfall profits claimed by the investor.

5. Any payment of compensation according to this Article shall be made in a freely convertible currency. Payment shall include simple interest at the applicable commercial rate in the Host State from the date of expropriation until the date of actual payment. On payment, compensation shall be freely transferable.

Articles 19 and 21 were reviewed because some Member States contended that the Articles restrain Member States from addressing historical injustices. It was therefore requested that the Articles be aligned with domestic legal and constitutional requirements of Member States seeking to address historical factors.

Article 19(1) was reviewed, and the following changes (in bold) were made:

1. State Parties shall not, directly or indirectly, expropriate or nationalise investments in their territory except:
   a. for a public purpose or in the public interest;
   b. in accordance with due process pursuant to the procedure established by the laws of the State Party;
   c. in a non-discriminatory manner. This notwithstanding, State Parties may take measures in accordance with domestic laws, to address the circumstances of persons or categories of persons who have been the subject of legal provisions enabling racial discrimination when provided for in the constitution of a State Party; and
   d. against a fair and adequate compensation in accordance with Article 21 and paid within a reasonable period of time. in accordance with Article 21, and taking into account that The assessment of the reasonable period of time shall be made on a case-by-case basis in accordance with the domestic laws and regulations of the State Party and on a non-discriminatory basis.
Article 21 was reviewed, and the following changes (in bold) were made:

1. **Compensation for expropriation shall be fair and adequate, compensation and shall be assessed on a case-by-case basis in relation to the fair market value of the expropriated investment and in line with criteria set in Article 21.**

   Compensation shall be done in a reasonable period of time, and in accordance with national constitution, domestic laws and regulations. For greater certainty, the standard of fair and adequate compensation shall not exclude the applicability of a standard of just and equitable compensation where required under the national constitution, laws and regulations of a State Party.

2. **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 investment, 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, the previous behaviour of the investor and the duration of the investment.**

3. **In accordance with Article 21(2) above, compensation shall be assessed based on the fair market value of the expropriated investment shall be assessed at the date immediately before the expropriation took place (“date of expropriation”) or before the measure became publicly known, whichever is earlier and shall exclude any consequential losses or speculative or windfall profits claimed by the investor.** For greater certainty, the fair and adequate the applicable standard of compensation standard also applies in case of unlawful expropriation.

4. **The computation of the fair market value of the expropriated property shall exclude any consequential losses or speculative or windfall profits claimed by the investor.**

The reviewed Articles 19 and 21 were adopted by the AU Assembly during its Thirty-Seventh (37th) Ordinary Session held in Addis Ababa, Ethiopia from 17 to 18 February 2024. When adopting the reviewed Articles 19 and 21, the AU Assembly directed the Council of Ministers responsible for Trade “to conclude the outstanding work on the development of the Annexes to the AfCFTA Protocol on Investment.”[1]

Three Annexes to the Protocol are to be concluded: i) Annex on Dispute Settlement, ii) Annex on the Rules and Procedures Governing Dispute Prevention, Management and Resolution of Disputes, iii) Annex on the Rules and Procedures for the Administration and Operation of the Pan-African Trade and Investment Agency. The development of these Annexes is ongoing and expected to be finalised this year in order to submit Annexes for adoption by the AU Assembly during its Thirty-Eight (38th) Ordinary Session – early 2025.

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