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**Meeting of Experts on the consideration of the Pan African Investment Code,  
30 November to 2 December 2015, Kampala, Uganda**

## **I. Introduction**

1. The meeting of the Experts from Member States on the Pan African Investment Code was held from 30 November to 02 December 2015, at the Speke Resort Munyonyo, in Kampala, Uganda.

## **II. Attendance**

2. The meeting was attended by representatives from the following Member States: Republic of Burundi, Burkina Faso, Republic of Chad, Union of the Comoros, Republic of the Congo, Arab Republic of Egypt, State of Eritrea, Republic of Gabon, Republic of Ghana, Republic of Guinea, Republic of Cote d'Ivoire, Republic of Kenya, Republic of Liberia , Republic of Madagascar, Republic of Mauritania, Republic of Mozambique, Republic of Namibia, Republic of Niger, Federal Republic of Nigeria, Republic Arab Saharawi Democratic, Republic of Seychelles, Republic of Sierra Leone, Republic of South Africa, Republic of the Sudan, Republic of the Gambia, Republic of Togo, Republic of Uganda and Republic of Zimbabwe
3. The meeting was also attended by representatives from the following Regional Economic Communities (RECs); Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC), Economic Community of Central African States (ECCAS); and Inter Governmental Authority and Development (IGAD). The list of participants is attached.

## **III. Adoption of the Agenda**

4. The meeting adopted the following Agenda items:
  - i. Opening Remarks;
  - ii. Presentation of the Pan African Investment Code;
  - iii. Presentation of the Private Sector development Strategy; and
  - iv. Closing Remarks.

## **IV. Opening Session**

### **Opening remarks by the representative of the AUC**

5. Mr. Djamel Ghrib, Head of Private sector, investment and Resource mobilisation division at the African Union Commission, delivered an opening remarks, on behalf of H.E Dr. Anthony Mothae Maruping, Commissioner for Economic Affairs.
6. He recalled that the present PAIC Continental Meeting emanated from decision of the Third Conference of African Ministers of Integration (COMAI

III) held in Abidjan (Côte d'Ivoire) from 22 to 23 May 2008 requesting the African Union Commission (AUC) to "develop a comprehensive investment code for Africa with a view to promoting private sector participation." The decision was subsequently endorsed by the Heads of State and Government of the AU at Sharm El Sheikh Summit, Egypt in 2008.

7. He informed the meeting that following this mandate, the AUC has chosen to opt for a participatory consultative approach in developing the code. Thus, a draft concept note and Terms of Reference (TOR) were presented and discussed at a workshop held in September 2012 in Addis Ababa (Ethiopia), attended by experts from the RECs as well as Member States. The meeting requested the AU Commission to set up a continental working group with the necessary expertise and appropriate skills to further reflect on the issue and accelerate the development of a Pan-African investment Code.
8. In addition, he recalled that the ninth meeting of the Coordinating Committee AU-RECs-ECA-AfDB held on 25 January 2012 in Addis Ababa (Ethiopia) also requested the AUC to "undertake a study with a view to establishing an African investment code". The main objective of the study is to create a favourable environment to attract more investment flows in Africa and facilitate intra-African border investments that are essential to the success of economic integration of the continent.
9. To achieve the above-mentioned mandate, a team of African experts composed of an expert in promotion and investment facilitation (team leader) and an expert in legal affairs and international trade services, was contracted in August 2013 to undertake the study on the development of the PAIC and the PAIC first draft. The draft PAIC was considered by governmental and independent African experts on investment law at a series of consultations at regional and continental levels. They have made a thorough analysis of the Code and proposed amendments that have been incorporated and reflected in the final version of the Code.
10. He pointed out that the development of the PAIC is based on the idea that national, regional and continental dimensions must be taken into consideration in order to propose a conducive legal environment to promote the flow of investments in Africa and facilitate intra-African trade and promote cross-border investment.
11. The development of the PAIC forms part of a broader continental framework, namely Agenda 2063, based on a coherent strategic framework for development whose foundation is the promotion of a more inclusive and sustainable growth, the engine of structural transformation on the continent.
12. He made reference to the AUC's strategy for private sector development which is built on three coherent and operational pillars (i) improving the business climate and investment; (ii) Building productive capacities of the private sector and (iii) Private sector involvement as a development actor. The strategy identifies the private sector as an economic transformation catalyst for inclusive and sustainable growth and engine of the economic emergence

at continental scale. This strategic approach is based on the strong belief that a transformed Africa at the horizon 2063 must make use of the transformative potential of its own private sector.

13. He finally thanked participants for their presence which shows their commitment to Africa's development and called upon them to improve the code on a consensual basis and validate it in order to be submitted to African Ministers of economy, finance and integration at their next conference to be held end March 2016 for adoption.

#### **Welcoming Remarks by representative of the Host Country (Uganda)**

14. The representative of Uganda, Ms. Mukyala Samalie, welcomed the delegates to the meeting on reviewing and considering the Pan African Investment Code and wished the meeting fruitful discussion and deliberations.

#### **V. PROCEEDINGS**

15. The meeting was chaired by Ms. Mukyala Samalie from the Uganda Investment Authority.

##### **A. PRESENTATION OF THE PAN AFRICAN INVESTMENT CODE**

16. The Legal Consultant informed the meeting on the genesis, rationale and objective of the PAIC. He went to highlighting the importance of this meeting in finalizing the code that went through in-depth series of revisions and amendments.

17. The participants started by making general observations on the code and discussed the PAIC Article by Article.

#### **General observations**

18. The participants discussed the legal nature of the PAIC and whether it should be binding or serve as a guiding instrument/model code. In this regard, the Consultant explained that what is the binding language of the PAIC gives the real value addition of the Code. He also recalled many investment codes and/or models that were already existing in Africa such as the regional codes in SADC, EAC and ECOWAS and therefore there was no value addition for elaborating a new model code. He added that the final decision on the legal nature of the code will be taken by the Ministers of Economy, finance and integration, who initially requested the elaboration of the code. Some participants raised concerns on the potential impact of a binding code on the ongoing negotiation processes of the Continental Free Trade Area (CFTA) and the Tripartite Free Trade Area (TFTA).

19. The meeting could not reach an agreement on the legal nature of the code and therefore the participants made the following options to be considered by the African Ministers regarding the legal nature of the code:

- The PAIC should be binding ( superseding national investment laws)
- The PAIC should be binding on the long term perspective
- The PAIC should be binding with giving the flexibility to MS to make reservations
- Flexibility and discretion should be given to Member States to adopt the PAIC or not using the ratification process of the code
- The PAIC should be non-binding and only used as guiding code
- The PAIC should be a model law to be used by MS on the long term perspective when amending their respective national investment laws

***Recommendations:***

20. The meeting recommended the following:

- i. Urge Member States to embark on national consultations of the PAIC before the upcoming Conference of African Ministers of Economy, Finance and Integration; and
- ii. Submit the various proposed options formulated by the participants on the legal nature of the code to the consideration of the African Ministers of Economy, finance and integration.

**Preamble**

21. The meeting discussed the preamble and noted some contradictions between the different articles of the code and the preamble and raised concern about its length. Some participants were of the view that the content of preamble is more important than its length.

***Recommendations:***

22. The meeting recommended the following:

- i. Refer at the beginning of the paragraph on the need to add a comprehensive instrument. The word Agreement be deleted and replaced with instrument.
- ii. Begin the preamble with the reference to the Abuja Treaty and the African Union (AU) Agenda 2063
- iii. Streamline the preamble taking into account the necessity to avoid inconsistencies and contradictions between the different articles of the code and the preamble and bring more coherence to the text;
- iv. Need to include the Sustainable Development Goals (SDGs) dimension in the preamble and make reference to the UNCTAD policy framework on investment for sustainable Development;
- v. Highlight the important role of women and Youth in the sustainable development; and

- vi. Put in place Member States drafting committee to include the above mentioned recommendations, amendments and inputs into the preamble.

## **Chapter I**

Article 1: Under this article, Participants observed that the Term “Code” has got different meaning and interpretation across different Countries/jurisdictions.

- It was therefore recommended that a generally accepted term be agreed up based on the decision on the legal nature of the PAIC to be taken by the March 2016 ministerial meeting
- It was also recommended that amendments be made to the article to reflect promotion, facilitation and protection of investment as Objective of the code

Article 3: In the ensuing discussion regarding the relationship of the Code with other investment agreements, the meeting recommended that;

- This code does not affect the existing Member States investment agreements.
- It was also observed that Member States may agree to replace the intra African BIT or investment chapters in intra African trade agreements after a period determined by the Member States.

Article 4: the meeting recommended

- Keep the enterprise based approach definition of investment as one of the novelty of the PAIC.
- Opt for using the post establishment rights to investors to be covered under the PAIC

## **Chapter II**

Article 7: the meeting recommended:

- Paragraph (3a). The third persons need clarification because according to the definition it is a state
- Paragraph (4) of the Article 7 was moved Article 8

Article 11: Paragraph 3: This Article shall not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with applicable international agreements on intellectual property.

Article 12: the meeting recommended:

- Compensation shall normally be assessed in relation to the fair market value of the expropriated investment 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. In no event shall the valuation date be moved to any future date.
- The computation of the fair market value of the property shall exclude any consequential or exemplary losses or speculative or windfall profits claimed by the Investor, including those relating to moral damages or loss of goodwill. However, 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

Article 13, paragraph 1 a: Add after currency as determined by the Central Bank of the Member State

Article 14: the meeting recommended

- Need to look into how countries could handle compensation
- Replace other Member States with concerned Member States
- Add on the title Natural Disaster. The title would read War, civil disturbance and Natural Disaster.

Article 16, paragraph 2: This paragraph be moved to Article 17 which talks about Exceptions to the transfer of funds

Article 17, paragraph 4b: This article should be redrafted 17 in order to make it clearer.

### **CHAPTER III**

Article 18, paragraph 1: the meeting recommended

- Use mandatory language indicating that MS should support the development of local, regional and continental industries and promote the creation
- Include the issue of instructing the MS of promoting the creation of value chains at national, regional and Continental levels
- Include measures to reduce the level of tax evasion

Article 18, paragraph 3 f: avoid the possible contradiction between the provisions of the PAIC and those existing in the WTO agreements on restriction of the sale of goods and services in MS

Article 19: Include a provision on the amendment procedure of list of scheduled sectors that brings

#### **CHAPTER IV**

Article 21: Include the obligation on Investors to respect the right of workers and trade union in line with national legislation

Article 22: Include the obligation on Investors to respect national legislation on corruption issues

#### **CHAPTER V**

Article 26, paragraph 1: Include reference to Member States rights and obligation under the TRIPS agreement and other relevant international agreements while enforcing intellectual property rights within its territory.

Article 26, paragraph 3: change folklore by traditional cultural expression

Article 27: include reference to national laws and regulations guiding the negotiation and implementation of State contracts

Article 31: The meeting suggested adding a paragraph on carbon emission.

Article 35: the meeting recommended

- Take on board issues related to minimum wages and advantages to host states nationals in the context of regional integration.
- Have a paragraph on gender mainstreaming as women are usually under-represented in business in Africa.

Article 36: The meeting recommended that issues related to granting of visas to foreign investors be in coherence with the integration strategy.

Article 38: The meeting suggested strengthening the provision on environmental issues to effectively address the challenges of environmental destruction through adoption of environmental proofing investments and environmental friendly technologies. The meeting agreed that there is a need to support the development of policies that can address additional environmental related risks as well as strengthen legal and regulatory reforms to create an enabling environment for the implementation of environmental risk management and adaptation.

Articles 39 to 41: No amendments were made under these articles.



## **Chapter VI**

Article 42: The meeting suggested modifications in Article 42 and having an additional paragraph 2 on arbitration for dispute settlement between States. If no agreement is found, State could seize the African Court of Justice according to AU Rules and Regulations.

Article 43: The meeting recommended bracketing the article and discussing it during the future meeting.

Articles 44 and 45: The meeting proposed to bracket Articles 44 and 45 as they are related to dispute settlement for further discussions.

## **Chapter VII**

Article 46: The meeting recommended some formulation amendments.

Article 47 to 50: No amendments were made under these articles.

Article 51: The meeting suggested the Title "Application Structure".

Article 52: The meeting recommended to bracket paragraph 1 of Article 52 and suggested that its exact wording be submitted to the approval of African Ministers.

Articles 53 and 54: No amendments were made under these articles.

### **B. PRESENTATION OF THE PRIVATE SECTOR DEVELOPMENT STRATEGY**

23. Mr. Patrick NDZANA OLOMO, Policy Officer Investment and Resource Mobilization of the AUC gave a comprehensive presentation of the 2016-2020 Private Sector Development Strategy of the Commission. He presented the rationale and context behind the drafting of the PSD Strategy and stressed that the Commission, under its New Strategic Direction Agenda 2063 would like to work closely with AU Member States to help them develop and implement policies in support of private sector development.
24. He further noted that the Strategy provides an opportunity across a wide range of activities, including regulatory reforms (Pillar I), capacity-building and the provision of business development services (Pillar II), with a particular focus on strengthening local micro, small and medium-sized enterprises and a stronger engagement of the Private Sector in achieving inclusive and sustainable growth in Africa's (Pillar III) to shift labour from lower to higher productivity sector during the next decade and beyond.
25. He finally underlined that, as part of its support to micro, small and medium-sized enterprises and the creation of an enabling environment for their development, the Commission will give particular attention to female entrepreneurship and employment. Through the Strategy, the Commission will

push for gender-sensitive business regulation, and will address the specific training and support needs of women as entrepreneurs and workers to ensure that recent improvements in girls' education are translated into real economic opportunities for women. The Commission will also support MSMSE access to wider and diversified set of financial services to unlock the potential of the private sector with interventions ranging from capacity strengthening of financial intermediaries to the support for provision of capital to local banks for the financing of micro, small and medium-sized enterprises.

## **VI. Closing Remarks**

26. In his closing statement Dr. René N'Guettia Kouassi,, Director for Economic Affairs , AUC, underlined the importance of the PAIC towards achieving the AU Vision of ““An Integrated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in the global arena”. He stressed the usefulness of the PAIC in the process of developing a sound and competitive private sector in Africa coherent with the transformative Agenda of the Continent under the global framework of Agenda 2063.
  
27. He expressed the appreciation of the AUC to the Member States for their positive contributions and inputs in improving the Draft Pan African Investment Code .He invited all Member States to remain committed to the Code and share it with their Ministries for their awareness. He Urged Member States for their unwavering support prior to the adoption by the AU Heads of State and Government.