

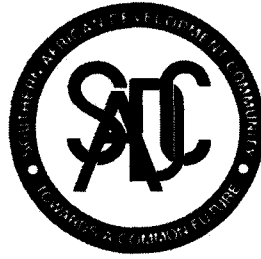
AGREEMENT

AMENDING

ANNEX 1 (CO-OPERATION ON INVESTMENT)

OF

THE PROTOCOL ON FINANCE AND INVESTMENT



**AGREEMENT AMENDING ANNEX 1 (CO-OPERATION ON INVESTMENT) OF
THE PROTOCOL ON FINANCE AND INVESTMENT**

We the Heads of State or Government of:

The Republic of Angola
The Republic of Botswana
The Democratic Republic of Congo
The Kingdom of Lesotho
The Republic of Madagascar
The Republic of Malawi
The Republic of Mauritius
The Republic of Mozambique
The Republic of Namibia
The Republic of Seychelles
The Republic of South Africa
The Kingdom of Swaziland
The United Republic of Tanzania
The Republic of Zambia
The Republic of Zimbabwe

PREAMBLE

AWARE that the Protocol on Finance and Investment came into force on 16 April 2010;

NOTING that as currently drafted, some provisions of Annex 1 (Cooperation on Investment) to the Protocol on Finance and Investment may have unintended consequences for SADC Member States;

FURTHER NOTING that some other provisions of the same Annex also fail to adequately balance investor protection and development policy space for host States;

RECOGNIZING that there is need to amend Annex 1 (Cooperation on Investment) to the Protocol on Finance and Investment with a view to address its shortcomings;

HEREBY AGREE as follows:

ARTICLE 1 DEFINITIONS

In this Agreement, the terms and expressions defined in Article 1 of the Protocol on Finance and Investment shall bear the same meaning unless the context otherwise requires.

ARTICLE 2 AMENDMENT OF ANNEX 1 TO THE PROTOCOL ON FINANCE AND INVESTMENT

Annex1 of the Protocol on Finance and Investment is repealed and replaced by the text which is in the Appendix to this Agreement

ARTICLE 3 ENTRY INTO FORCE

This Agreement shall enter into force on the date of its adoption by three-quarters of the Member States that are Parties to the Protocol.

ARTICLE 4 DEPOSITARY

1. The original texts of this Agreement shall be deposited with the Executive Secretary of SADC, who shall transmit certified copies to all Member States.
2. The Executive Secretary shall register this Agreement with the Secretariat of the United Nations Organisation and the Commission of the African Union.

IN WITNESS WHEREOF, WE, the Heads of State or Government of SADC Member States, or our duly authorised representatives, have signed this Protocol.

Done at the Kingdom of Swaziland, this 31st day of August, 2016, in three (3) original texts in the English, French and Portuguese languages, all texts being equally authentic.

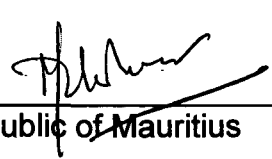


Republic of Angola



Democratic Republic of Congo

Republic of Madagascar




Republic of Mauritius

Republic of Namibia

Republic of South Africa

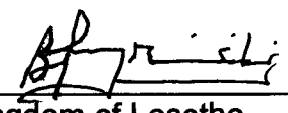


United Republic of Tanzania



Republic of Zimbabwe

Republic of Botswana



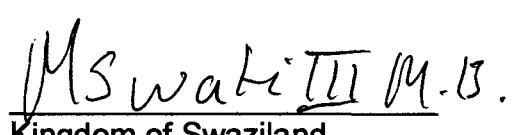
Kingdom of Lesotho

Republic of Malawi



Republic of Mozambique

Republic of Seychelles



Kingdom of Swaziland

Republic of Zambia

APPENDIX

ANNEX 1

CO-OPERATION ON INVESTMENT

PREAMBLE

We, the Heads of State or Government of,

The Republic of Angola
The Republic of Botswana
The Democratic Republic of Congo
The Kingdom of Lesotho
The Republic of Madagascar
The Republic of Malawi
The Republic of Mauritius
The Republic of Mozambique
The Republic of Namibia
The Republic of Seychelles
The Republic of South Africa
The Kingdom of Swaziland
The United Republic of Tanzania
The Republic of Zambia
The Republic of Zimbabwe

COMMITTED to achieving the broad objectives of the SADC as set out in the Treaty and specifically to achieving economic growth and sustainable development through regional integration and working through Investment Promotion Agencies in the Region;

RECOGNISING the increasing importance of the role played by investment to advance productive capacity and increase economic growth and sustainable development and the importance of the link between investment and trade;

CONCERNED with the low levels of investment into the SADC, even though a number of measures have been taken to improve the investment environment;

AIMING to create new employment opportunities and improve living standards in our territories;

ACKNOWLEDGING that there is a need for greater regional cooperation among Investment Promotion Agencies in the Region in order to enhance the attractiveness of the Region as an investment destination;

CONSCIOUS that without effective policies on investment protection and promotion, the Region will continue to be marginalised in terms of investment inflows and sustainable economic development; and

WISHING to be guided by the ideals, objectives and spirit of the Protocol in the facilitation and stimulation of investment flows and technology transfer and innovation into the Region,

UNDERSTANDING that the guarantees in **this** Annex are to be interpreted in such a manner that ensures an overall balance of rights and obligations between investors, host states and home states;

HEREBY AGREE as follows:

ARTICLE 1 DEFINITIONS

1. In this Annex, terms and expressions defined in Article 1 of the Protocol shall bear the same meaning unless the context otherwise requires.
2. In this Annex, unless the context otherwise requires:

“bond” means a debt instrument in terms of which the issuer thereof is obliged to re-pay, to the bondholder on a specified maturity date, the principal amount of a loan (and, ordinarily, interest thereon) made by the bondholder to the issuer;

“enterprise” means any entity constituted or organised under the applicable laws of any State, whether or not for profit, and whether privately or governmentally owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association, or other such organisation;

“Host Government” means the government of the State Party in whose territory an investment is made or located;

“Host State” means the State Party in whose territory an investment is made or located;

“ICSID Convention” means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington, March 18, 1965;

“investment” means an enterprise within the territory of one State Party established, acquired or expanded by an investor of the other State Party, including through the constitution, maintenance or acquisition of a juridical person or the acquisition of shares, debentures or other ownership instruments of such an enterprise, provided that the enterprise is established or acquired in accordance with the laws of the Host State and registered in accordance with the legal requirements of the Host State. The enterprise may possess assets such as:

- (a) shares, stocks, debentures and other equity instruments of the enterprise or another enterprise;
- (b) a debt security of another enterprise;
- (c) loans to an enterprise;
- (d) movable or immovable property and other property rights such as mortgages, liens or pledges;
- (e) claims to money or to any performance under contract having a financial value;
- (f) copyrights, know-how, goodwill and industrial property rights such as patents, trademarks, industrial designs and trade names, to the extent they are recognized under the law of the Host State; and
- (g) rights conferred by law or under contract, including licences to cultivate, extract or exploit natural resources.

Investment shall not include:

- (a) debt securities issued by a government or loans to a government;
- (b) portfolio investments;
- (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, or any other claims to money that do not involve the kind of interests set out in subparagraphs (a) through (g) above.

**“Investment
Promotion Agencies
(IPAs)”**

means the investment promotion agencies of State Parties that:

- (a) actively promote and facilitate investments;
- (b) proactively identify business opportunities for investments;
- (c) encourage expansion of existing investments;
- (d) develop a favourable investment environment of their countries;
- (e) make recommendations for improvements of their countries as investment destinations;

- (f) keep track of all investors entering and leaving the country for the purpose of analysis in terms of investment performance; or
- (g) play the role of advising investors upon request on the availability, choice or sustainability of partners in joint venture projects.

investor means a natural or a juridical person of a State Party making an investment in another State Party , in accordance with the laws and regulations of the State Party in which the investment is made.

“least-developed countries” means, those State Parties classified as such by the United Nations;

“MIGA” means the Multilateral Investment Guarantee Agency;

“MIGA Convention” means the Convention Establishing the Multilateral Investment Guarantee Agency;

“New York Convention” means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards;

“person” means a natural person or a juridical person;

“PPP” means Public Private Partnership;

“Protocol” means the SADC Protocol of Finance and Investment

“returns” means the amounts yielded by an investment and in particular, though not exclusively, includes profits, interest, capital gains, dividends, royalties and fees;

“SMME” means Small Micro and Medium Enterprises, as defined by each State Party in its relevant legislation as qualifying for such status;

“territory” means, in relation to a State Party, the total land area of that State Party and, in relation to a coastal State Party, includes, in addition, the territorial sea and any maritime area situated beyond the territorial sea of that coastal State Party which has been, or might in the future be, designated under the national law of that coastal State Party, in accordance with international law, as an area within which that coastal State Party may exercise rights with regard to the sea-bed, subsoil and natural resources; and

“Third State” means any state that is not a State Party.

**ARTICLE 2
PROMOTION AND ADMISSION OF INVESTMENTS**

1. Each State Party shall promote investments in its territory, and admit such investments in accordance with its laws and regulations.
2. The Host State shall facilitate and create favourable conditions to attract investments in its territory through suitable administrative measures and in particular in the matter of expeditious clearance of authorisations in accordance with its laws and regulations.

**ARTICLE 3
PROMOTION OF LOCAL AND REGIONAL ENTREPRENEURS**

1. State Parties shall support the development of local and regional entrepreneurs and enhance regional productive capacity within the Region through, *inter alia*:
 - (a) skills development and enhancement programmes;
 - (b) SMME development;
 - (c) appropriate investments into supporting infrastructure; and
 - (d) other supply-side measures and policies necessary to enhance global competitiveness.
2. In providing support described in paragraph 1 of this Article, State Parties may place emphasis on industries that provide up-stream and down-stream linkages and have a favourable effect on attracting foreign direct investment and generating increased employment.

**ARTICLE 4
PUBLIC PRIVATE PARTNERSHIPS**

State Parties shall co-operate on policies and other related issues that will encourage and facilitate the use of PPPs to ensure development in the Region.

**ARTICLE 5
INVESTMENT PROTECTION**

1. Investments shall not be nationalised or expropriated in the territory of any State Party except for a public purpose, under due process of law, on a non-discriminatory basis and subject to the payment of fair and adequate compensation.

2. Fair and adequate compensation shall 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. 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, having regard to all relevant circumstances and taking account of:
 - (a) the current and past use of the property;
 - (b) the history of its acquisition;
 - (c) the fair market value of the investment;
 - (c) the purpose of the expropriation;
 - (e) the extent of previous profit made by the foreign investor through the investment; and
 - (f) the duration of the investment.
3. Any payment shall be made in a freely convertible currency. On payment, compensation shall be freely transferable in accordance with applicable legislation in the Host State.
4. Payments that are significantly burdensome on a Host State may be paid yearly over a three-year period or such other period as agreed between the Host State and the investor, subject to payment of interest at the rate established by agreement of the Host State and the investor.
5. This Article shall not apply to the issuance of compulsory licences 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.
6. A measure of general application shall not be considered an expropriation of a debt security or loan solely on the ground that the measure imposes costs on the debtor that causes it to default on the debt.
7. A measure of general application by a State Party that is designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation.
8. The investor affected by the expropriation shall have a right under the law of the State Party making the expropriation to a review by a judicial or other independent authority of that State Party of the investor's case and the valuation of the investment in accordance with the principles set out in this Article.

ARTICLE 6 NON-DISCRIMINATION

1. A State Party shall accord to investors and their investments treatment no less favourable than the treatment it accords, in like circumstances, to its own investors and their investments with respect to the management, operation and disposition of investments in its territory.
2. For greater certainty, references to "like circumstances" in paragraph 1 requires an overall examination on a case-by-case basis of all the circumstances of an investment including, inter alia:
 - (a) its effects on third persons and the local community;
 - (b) its effects on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment;
 - (c) the sector the investor is in;
 - (d) the aim of the measure concerned;
 - (e) the regulatory process generally applied in relation to the measure concerned; and
 - (f) other factors directly relating to the investment or investor in relation to the measure concerned.
3. Notwithstanding the provisions of paragraph 1, State Parties may, in accordance with their respective, domestic legislation grant preferential treatment to domestic investments and investors in order to achieve national development objectives.

ARTICLE 7 TRANSPARENCY

1. State Parties shall promote and establish predictability, confidence, trust and integrity by adhering to and enforcing open and transparent policies, practices, regulations and procedures as they relate to investment.
2. State Parties that introduce new regulations that affect the provisions of this Annex shall notify the Secretariat for information purposes within a period of three (3) months of introducing such regulations.

**ARTICLE 8
INVESTOR RESPONSIBILITY**

Investors and their investments shall abide by the laws, regulations, administrative guidelines and policies of the Host State for the full life cycle of those investments.

**ARTICLE 9
SOURCING OF REQUISITE SKILLS**

State Parties shall, subject to their national laws and regulations, permit investors to engage key personnel and other necessary human resources of their choice, regardless of nationality under the following circumstances:

- (a) where the skills do not exist in the Host State and the Region;
- (b) where State Parties are satisfied that the sourcing of such skills will be in compliance with regional policies; and
- (c) where such sourcing would enhance the development of local capacity through skills transfer.

**ARTICLE 10
OPTIMAL USE OF NATURAL RESOURCES**

State Parties shall promote the use of their natural resources in a sustainable and an environmentally friendly manner.

**ARTICLE 11
DOMESTIC HEALTH, SAFETY AND ENVIRONMENTAL MEASURES**

State Parties recognise that it is inappropriate to encourage investment by relaxing domestic health, safety and environmental measures and agree not to waive or otherwise derogate from, international treaties they have ratified, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in their territories, of an investment.

**ARTICLE 12
RIGHT OF A STATE PARTY TO REGULATE**

1. In accordance with customary international law and other general principles of international law, the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives.

2. Except where the rights of a Host State are expressly stated as an exception to the obligations of this Annex, a Host State's pursuit of its rights to regulate shall be understood as embodied within a balance of the rights and obligations of investors and investments and Host States, as set out in this Annex.
3. Non-discriminatory measures taken by a State Party to comply with its international obligations under other treaties shall not constitute a breach of this Annex.

ARTICLE 13 CAPITAL MOVEMENTS

1. Each State Party shall ensure that investors are allowed facilities in relation to repatriation of investments, compensation and returns in accordance with the rules and regulations stipulated by the Host State.
2. Notwithstanding the provisions of paragraph 1, State Parties may regulate repatriation of investments and returns subject to their domestic laws and regulations, when necessitated by economic constraints that include but are not limited to:
 - (a) difficulties for balance of payment purposes;
 - (b) external financial difficulties; or
 - (c) difficulties for macroeconomic management including monetary policy or exchange rate policy.

ARTICLE 14 COMPETITION POLICY

State Parties undertake, through co-operation, to advance a competition policy in the Region.

ARTICLE 15 INTRA-REGIONAL AND EXTRA-REGIONAL AGREEMENTS FOR THE AVOIDANCE OF DOUBLE TAXATION

1. State Parties undertake to conclude between themselves agreements for the avoidance of double taxation in line with their undertakings as set out in Annex 3 of the Protocol, with a view to encouraging the movement of capital within the Region, particularly to the least-developed countries.

2. State Parties agree, in line with their undertakings as set out in the Annex 3 of the Protocol, to approach their negotiations for agreements for the avoidance of double taxation with countries outside the region on the basis of mutually agreed principles.

**ARTICLE 16
TRADE, INVESTMENT AND INDUSTRIAL POLICY**

In recognizing the importance of the link between trade and investment, State Parties agree to pursue trade openness and intra-regional industrial policies and to reduce barriers to intra-regional trade in pursuance of the principles of the SADC Protocol on Trade and any other relevant SADC instruments.

**ARTICLE 17
HARMONISATION OF POLICIES AND LAWS**

State Parties shall pursue harmonisation with the objective of developing the region into a SADC investment zone, which shall, among others, include the harmonisation of investment regimes including policies, laws and practices in accordance with the best practices within the overall strategy towards regional integration.

**ARTICLE 18
CONDITIONS FAVOURING LEAST DEVELOPED COUNTRIES**

1. State Parties shall establish conditions favouring the participation of least-developed countries of SADC in the economic integration process, based on the principles of non-reciprocity and mutual benefit.
2. For the purpose of ensuring that least-developed countries of SADC receive effective preferential treatment, State Parties shall investigate the establishment of market openings as well as the setting up of programmes and other specific forms of cooperation including in relation to derogations in respect of investment incentives.

**ARTICLE 19
ADHERENCE TO INTERNATIONAL CONVENTIONS AND PRACTICES**

State Parties may consider acceding to multilateral agreements on investment designed to promote or protect investments, including but not limited to:

- (a) the ICSID Convention of 1965;
- (b) the MIGA Convention, 1985; and
- (c) the New York Convention, 1958.

**ARTICLE 20
REGIONAL COOPERATION ON INVESTMENT**

State Parties shall through their relevant institutions promote regional cooperation in the area of investment, including PPPs, to ensure development in the Region.

**ARTICLE 21
INVESTMENT PROMOTION AGENCIES**

State Parties shall ensure that their IPAs:

- (a) carry out their investment promotion activities, in line with their national and regional development priorities;
- (b) advise the Government of that State Party, the private sector and other stakeholders in the formulation and review of policies and procedures that affect investment and trade; and
- (c) increase awareness of their investment incentives, opportunities, legislation, practices, major events affecting investments and other relevant activities through regular exchange of information.

**ARTICLE 22
THE ROLE OF THE SECRETARIAT**

The Secretariat shall ensure close collaboration with State Parties and all relevant institutions on investment and other related matters in the Region.

**ARTICLE 23
RELATIONSHIP WITH OTHER ORGANISATIONS**

State Parties shall pursue and promote policies that will increase cooperation with other regional and international organisations on issues relating to investment.

**ARTICLE 24
BILATERAL INVESTMENT TREATIES**

State Parties may conclude bilateral investment treaties with third States.

**ARTICLE 25
ACCESS TO COURTS AND TRIBUNALS**

State Parties shall ensure that investors have the right of access to the courts, judicial and administrative tribunals, and other authorities competent under the laws of the Host State for redress of their grievances in relation to any matter concerning

their investment including but not limited to the right for judicial review of measures relating to expropriation or nationalization and determination of compensation in the event of expropriation or nationalisation.

ARTICLE 26

SETTLEMENT OF INVESTMENT DISPUTES

Any dispute between State Parties to this Annex shall be resolved in the manner provided under the Protocol on the Tribunal.