

In cooperation with



Report for the Capacity Building Workshops for Investment to Support East African Community Partner States in Implementation of the AfCFTA Protocol on Investment and Negotiation of the Annex on Dispute Settlement

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1. Background to the Workshop and Context

In order to effectively implement various obligations from the AfCFTA Protocol on Investment and also negotiate the Annex on Dispute Management and Settlement, the East African Community (EAC) Partner States as well as the EAC Secretariat, with support through GIZ organized a four-days capacity building workshop that focused on implementation of the AfCFTA Investment Protocol as well as negotiating the Annex on Management of Investment Disputes.

The workshop which was facilitated by GOPA through James Ngwira, was aimed at building capacity of officials from the EAC Partner States so that they become well equipped with knowledge and expertise for negotiation of the Annex on Dispute Settlement as well as implementation of the AfCFTA Protocol on Investment in a beneficial manner.

As shown in subsequent sections of this report, the workshop was positively rated by the 22 participants that attended it and majority of them recommended that a similar workshop be conducted for Judges of the East African Court of Justice.

2. Workshop Opening and Participants.

The workshop was officially opened by Officials from the Host State, Kenya and an official from the EAC Secretariat.

On behalf of the Host State, Ms. Lynda Ouma, Senior Trade Development Officer from State Department for Trade, Republic of Kenya, welcomed the participants to the Republic of Kenya and thanked the EAC Secretariat for organizing the workshop that will allow delegates to gain knowledge and carry out meaningful discussions on the implementation of the AfCFTA protocol on which is anticipated to facilitate the protection of investments, foster sustainable development, provide security and predictability to intra-African investment, and ultimately enhance trade and investment in Africa.

She highlighted that Article 46 (3) of the AfCFTA Investment Protocol requires State Parties to negotiate an annex on the Rules and Procedures governing Dispute Prevention, Management and Resolution of disputes. An annex, which upon adoption by the Assembly of Heads of State and Government of the Africa Union, shall form an integral part of the Protocol on Investment. It was therefore necessary for State Parties to gain a comprehensive understanding of the provisions outlined in the adopted Protocol on investment as well as the zero draft Annex. She observed that this



understanding will enable the EAC Partner States to make thorough preparation and make informed submissions leading to a more effective outcome.

Further, Ms. Ouma highlighted that the four (4)-days' workshop would equip Partner States with necessary knowledge and information to guide them on implementation of the Protocol. She concluded her remarks by wishing the workshop fruitful, focused discussion and urged the delegates to explore Nairobi and enjoy the hospitality of Kenya.

On the other hand, opening remarks from the EAC Secretariat were made on behalf of the EAC Secretary General by Mr. Deogratius Mbarara, an Investment Expert from the EAC's Investment and Private Sector Promotion. Mr Mbarara welcomed the participants to the Workshop and appreciated the Republic of Kenya for hosting the meeting. He also thanked GIZ for facilitating the Workshop and for being a Partner of the Secretariat through their support in developing capacity of Partner States in the negotiations of the AfCFTA instruments and coming up with position/inputs that have been shared with the AfCFTA Secretariat.

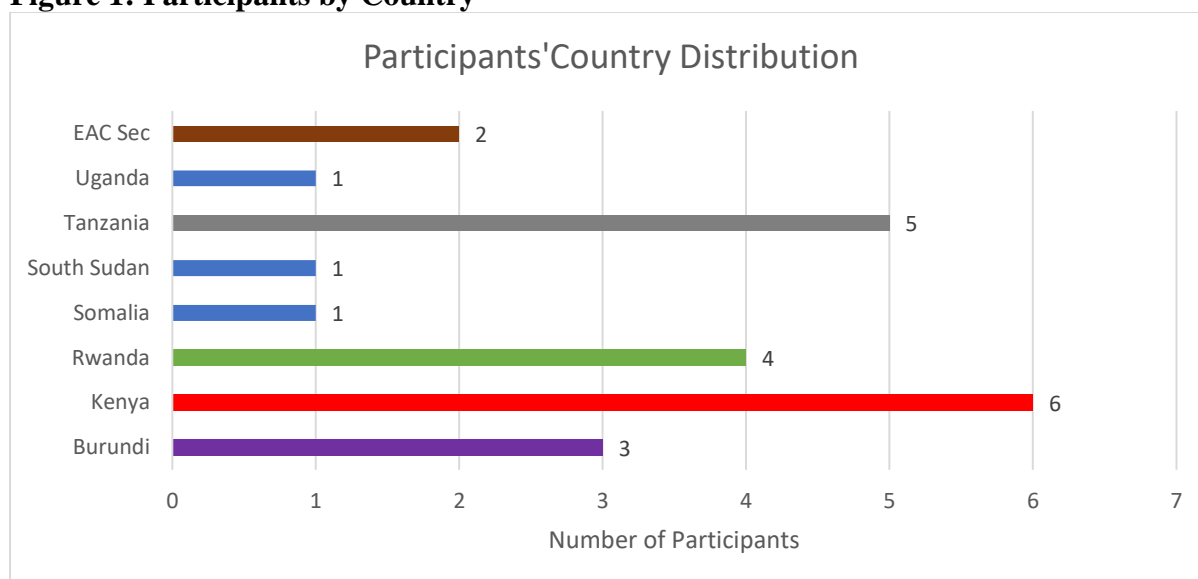
Regarding the workshop, Mr Mbarara observed that the four-days' workshop had been organised to facilitate Partner States effectively implement the AfCFTA Investment Protocol, and also negotiate the Annex on Dispute Management from an informed perspective. Mr Mbarara reiterated that given the fines or costs that African Countries including some from the EAC have paid to investors in arbitration cases due to Bilateral Investment Treaties that the countries have signed, it was necessary that a balance between investment attraction objectives and policy space for countries be exercised so as to limit the exposure for countries to investor-state arbitrations. He noted that the Annex seeks to provide that balance, however there was need for Partner States to ensure that the Annex reflect their development aspirations.

In his final remarks, Mr Mbarara highlighted that with Giz support, GOPA had undertaken a regional study to identify the gaps in Partner States legal and regulatory frameworks in line with the commitments that the Partner States would be required to implement pursuant to the AfCFTA Investment Protocol. He therefore urged the delegates to provide inputs into their country specific chapters of the draft report that had been shared so that the report can be finalized and submitted for Council's adoption.

In attendance were 22 participants representing seven of the eight EAC Partner States. The chart below presents an overview of the participants categorized by country.



Figure 1: Participants by Country



A full list of the participants is attached to this report as annex 5.1

3. Topics Covered and Evaluation by Participants

This section presents the topics that were part of the workshop especially on the aspect of capacity building and this is followed by the views of the participants regarding how the workshop was conducted.

3.1 Topics Covered

In line with the Terms of Reference for the assignment as well as the discussions with the EAC Secretariat, the workshop focused on the following topics:

- Landscape of investment treaties in Africa and overview of multilateral agreements
- Assessment of:
 - typical provisions and definitions in Investment Treaties
 - Standards of treatment;
 - Investment protection & dispute settlement
- Modern investment provisions in Investment Treaties and Investment Facilitation Overview & architecture of BITs
- Interactive Assessment of Provisions of the AfCFTA Investment Protocol
- Case Studies on Investment Dispute Management and Resolution
 - Arab Investment Court
 - UNCITRAL Proposed World Investment Court
- Consideration of the Draft Annex on Prevention, Management and Resolution of Investment Disputes



- Interactive assessment of each provision of the Draft Annex on Prevention, Management and Resolution of Investment Disputes

The presentations that were used to cover the topics above are hereto attached as annex 5.2.

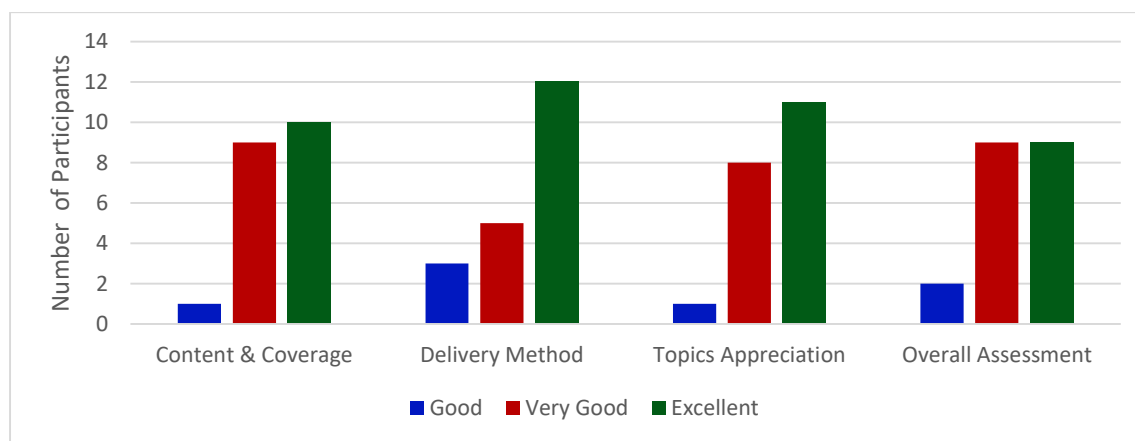
3.2 Workshop Evaluation

To assess the effectiveness and utility of the workshop as regards their ability to effectively negotiate the Annex and also implement the provisions of the AfCFTA Protocol on investment, participants were requested to assess the workshop by focusing on the following aspects using a Likert scale:

- Content and coverage of the workshop;
- Method of delivery utilized;
- Appreciation of topics covered;
- Overall impression of the workshop.

The graph below presents an overview of how the participants rated the workshop on each of the four elements above.

Figure 2: Impressions of Participants



The participants were generally of the view that the workshop was very good to excellent. Regarding delivery method, some of the participants were of the opinion sufficient time was not allocated to the workshop to enable them to explore the topic areas fully, especially those who were interacting with the issues covered for the first time. Related to this, the participants expressed the view that there will be need for the Secretariat to work together with Giz or other funding partners to organize a similar training for judges of the East African Court of Justice to prepare them for future handling of investment related disputes.



In addition to the assessment above, participants were also requested to respond to the following reflective questions:

- Provide an assessment of the quality of the presentations and the discussions.
- Assess the relevance of the topic areas covered in the course.
- Assess the relevance of the course to their current responsibilities.
- Ways they are going to use the knowledge acquired in this course?
- Whether there will be need for further training? If yes, in which areas?

The reflections of the participants on the highlighted reflective questions are presented below:

- *Assessment of the quality of the presentations and the discussions*

Participants generally observed that the quality of the presentations was generally excellent which enabled them to clearly understand the controversial provisions in investment treaties. In particular, they observed that the presentation facilitated lively and interactive discussions on how obligations from various provisions of the investment Protocol can be implemented in a manner beneficial to the EAC Partner States.

- *Relevance of the topic areas covered in the course*

Under this part, participants observed that the covered topic areas were critical for:

- effective implementation of the positive provisions contained in the Protocol on Investment;
- understanding the need for amending existing policies and regulations on investment existing in most of the Partner States;
- understanding how investment treaties can be utilized to contribute towards sustainable development;
- understanding the importance of appropriate regulatory frameworks as well as management of investment incentives and performance requirements, which are key for substantive benefits to flow from investments.
- understanding how best investment related disputes can be managed so as to minimize the challenges emanating from adhoc investment arbitration.

- *Relevance of the course to Participants' current responsibilities*

Most of the participants indicated that the workshop focus was relevant to their current responsibilities in their respective countries and institutions. Some of the participants indicated that the course had enhanced their skills to effectively participate in drafting and implementing investment treaties and also be part of their country's investment negotiation teams.



- *Ways knowledge acquired in this course will be used*

Most of the participants, especially those from relevant line Ministries indicated that they would immediately deploy the knowledge acquired in:

- effectively championing revisions to their investment regulatory framework
- negotiations with investors to ensure that terms that may facilitate sustainable development are incorporated in instruments signed with them;

- *Whether there will be need for further training*

Participants indicated that for newly acceding countries, there will be need for training of their officials so that they can be on same page with the other five EAC Partner States.

Further, participants observed that a similar training should be arranged for the judges of the East African Court of Justice.

4. Gap Analysis Presentation and Partner States' Positions

The final sessions of the workshop focused on the gap analysis undertaken examining investment related laws for each country to assess what will be required of each State in order to implement the AfCFTA Protocol on Investment in a beneficial manner. An overview was presented on the structure of the report, the approach taken as well as what each country is expected to do to facilitate addressing any gaps in the analysis.

Participants observed that the workshop coverage had enabled them to appreciate some of the immediate gaps in their laws as highlighted in the gap analysis report. However, they requested to be given time so that they can do internal consultations in their respective countries as that was critical for enriching the study report. Regarding the size of the report, participants observed that to make the report slightly shorter, there may be need to reduce the text in chapter three.

The meeting consequently agreed that once comments from each country are put together, the same will be sent to GOPA through the EAC Secretariat preferably by October 2024. This will then be followed up by a validation meeting to be arranged by the secretariat.

5. Conclusion

It is clear from the foregoing narrative that the capacity building workshop was positively rated by participants, who also appreciated the support from GIZ which made the training possible.



At the end of the workshop participants made the following recommendations, so of which may be ideal for the Giz to consider:

- Partner States to conclude internal consultations on the position to take on the Dispute Settlement Annex and have this shared with the Secretariat for consolidation
- Partner States to consolidate comments from line institutions in their countries, pertaining to their respective chapter of the Gap Analysis Report and have them presented to the Secretariat for onward transmission to GOPA.
- The Secretariat to arrange for a validation meeting of the Gap Analysis Report once all the comments have been submitted to GOPA and reflected in the Gap Analysis Report.
- The Secretariat to arrange for training of Judges of the EACJ on investment treaties so as to prepare them to handle investment related cases.

5. Annex

- 5.1 List of Participants
- 5.2 Training Presentations



5.1 List of Participants

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5.2 Presentations for the Sessions