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FREE TRADE AREA ON INVESTMENT**

Preamble

We, Member States of the African Union,

RECALLING Decision Ext/Assembly/AU/Dec.1(X) of the Assembly of Heads of State and Government of the African Union (Assembly) adopted during its 10th Extraordinary Session held in Kigali, Rwanda, in March 2018 adopting the Agreement Establishing the African Continental Free Trade Area (AfCFTA Agreement);

DESIRING to strengthen the bonds of friendship and cooperation between African nations;

REAFFIRMING the African Union's vision for Agenda 2063 of an integrated, prosperous, and peaceful Africa driven by its own citizens and representing a dynamic force in the international arena;

PURSUANT to the objectives and principles of the AfCFTA Agreement signed at Kigali, Rwanda in March 2018;

TAKING INTO ACCOUNT Article 7 of the AfCFTA Agreement, which requires State Parties to enter into Phase II negotiations in respect of, among other areas, investment;

MINDFUL of best practices incorporated in the Pan-African Investment Code, the investment instruments of the Regional Economic Communities, bilateral investment treaties concluded by African Union Member States, national investment laws as well as other relevant international investment instruments and agreements;

DETERMINED to establish a balanced, coherent, clear, transparent, predictable and mutually-advantageous continental framework of principles and rules for investment promotion, facilitation and protection;

MINDFUL of the different levels of development of the State Parties and the challenges they may face in the adoption and implementation of this Protocol and other related investment policies;

RECALLING the 2030 Agenda for Sustainable Development, as contained in Resolution A/RES/70/1 of the United Nations General Assembly, and in particular the 17 Sustainable Development Goals;

TAKING INTO ACCOUNT the Investment Policy Framework for Sustainable Development of the United Nations Conference on Trade and Development (UNCTAD) and other relevant UNCTAD instruments that support new generation investment policies for inclusive growth and sustainable development;

COGNISANT of the increasing importance of trade and investment for the inclusive growth and industrial development of Africa, and the role played by the private sector in expanding productive capacity, creating jobs, facilitating transfer of technology as well as building regional, continental and global value chains;

RECOGNISING the significant contribution investment can make to the sustainable development of the State Parties, including

the reduction of poverty, and the furtherance of investment-related human rights and human development while understanding that sustainable development requires the fulfilment of its economic, social and environmental pillars;

MINDFUL of the necessity of retaining, and expanding intra-African investment to increase economic resilience, and enable diversification in achieving sustainable development in Africa;

DESIRING to establish within State Parties an overall attractive investment climate conducive to the development of a more vibrant and dynamic private sector that encourages mutually beneficial partnerships;

SEEKING to create a framework for investment cooperation and facilitation and for the prevention of investment disputes;

AFFIRMING the desire to promote accountability, good governance and responsible business conduct in a fair, transparent and predictable investment environment;

SEEKING to achieve an overall balance of the rights and obligations between State Parties and investors under this Protocol;

REAFFIRMING the inherent right of State Parties to regulate in their territories and to introduce measures in order to achieve their national public policy objectives, promote sustainable development objectives and protect legitimate public welfare objectives, such as public health, national security, the environment, the conservation of living and non-living exhaustible natural resources, labour standards, the integrity and stability of the financial system and public morals;

RECOGNISING the importance of encouraging investment activities that benefit economically disadvantaged areas, small and medium-sized enterprises, local communities, indigenous peoples, and underrepresented groups, including women and youth;

DESIRING to increase the share of African Union Member States in global flows of foreign direct investment and to benefit from it in accordance with the objectives set out in this Protocol;

TAKING INTO ACCOUNT the relevant obligations of State Parties under international law and international agreements to which they are parties;

HAVE AGREED AS FOLLOWS:

Part I. GENERAL PROVISIONS

Article 1. Definitions

For the purpose of this Protocol:

"AfCFTA" means the African Continental Free Trade Area;

"AfCFTA Agreement" means the Agreement Establishing the AfCFTA;

"AfCFTA Secretariat" means the Secretariat of the AfCFTA as established under Article 13 of the AfCFTA Agreement;

"Enterprise or company" means any legal or juridical person duly constituted or otherwise incorporated and operated under the applicable laws and regulations of a State Party;

"Freely Convertible Currency" means a convertible currency as classified by the International Monetary Fund or any currency that is widely traded in international foreign exchange market;

"Home State" means, in relation to:

a. a natural person: the State Party of nationality or citizenship of the investor in accordance with the laws and regulations of that State Party;

b. a legal or juridical person: the State Party of incorporation or registration of the investor in accordance with the laws and regulations of that State Party, and where that legal or juridical person maintains its statutory seat together with substantial business;

"Host State" means the State Party where the investment is made, undertaken or located;

"Investment" means an enterprise or company, as defined in this Article, which is established, acquired or expanded in conformity with the laws and regulations of a Host State by an investor which maintains substantial business in the territory of that Host State. The enterprise or company may possess assets, such as:

- a. shares, stocks, or any other form of participation of the enterprise/company or another enterprise/company;
- b. movable and immovable property including mortgages, liens, pledges, and any other similar rights as defined in conformity with the laws and regulations of the State Party in whose territory the property is situated;
- c. intellectual property rights such as copyrights, patents, trademarks, industrial designs, trade names, know-how and goodwill to the extent they are acquired, maintained and protected under the law of the Host State;
- d. rights conferred by the law of the Host State or under contract, including licences to cultivate, extract or exploit natural resources; or
- e. rights under contracts including turnkey, construction, production, management, concession or other contract;

For greater certainty, the investment must have the following characteristics: commitment of capital or other resources, the expectation of gain or profit, a certain duration, assumption of risk, and a significant contribution to the Host State's sustainable development;

For avoidance of doubt, establishment, acquisition and expansion under this Protocol only apply to the post-establishment phase;

For further avoidance of doubt, only investments that meet the criteria under this Article qualify as eligible investments under this Protocol;

For greater certainty, investment does not include:

- a. debt securities issued by a government or loans to a government or government-owned or controlled enterprise;
- b. portfolio investments, that is, investment that does not give the investor the possibility to exercise effective management or influence in the management of the enterprise;
- 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
- d. claims arising from an order or judgment rendered in any judicial, administrative or arbitral proceeding;

"Investment-related human rights" mean human rights directly related to investment activity, including in particular, environmental, health and core labour rights;

"Investor" means:

- a. a natural person, who is a national of a State Party in accordance with its laws and regulations, who has made an investment in the territory of another State Party. For greater certainty, a natural person who holds dual nationality shall be deemed to be exclusively a national of the country of her or his effective nationality or where she/he ordinarily or permanently resides;
- b. a legal or juridical person, in accordance with the definition of the legal or juridical person of the Home State in this article, that has made an investment in the territory of the Host State;

"Measures" include any regulatory, administrative, legislative, judicial or policy decision that is taken by the Host State, relating to or affecting an investment in the Host State;

"Protocol" means the Protocol to the AfCFTA Agreement on Investment;

"State Party" means a Member State that has ratified or acceded to the Protocol and for which the Protocol is in force;

"Substantial business activity" requires an overall examination of all the circumstances on a case-by-case basis, by a State Party, of all the circumstances, including, among other factors: (i) the nature, size, scope and sector of business, (ii) the amount of investment brought into the territory of a State Party, (iii) the effect of the investment on the local community and (iv) the length

of time the investment has been in operation;

Generally, an investment shall be taken to have substantial business activities in the territory of a State Party where it conducts its core and relevant income generating activities, through the employment of a reasonable number of suitably qualified persons and by having a minimum level of expenditure which is proportionate to its level of the relevant activities in the territory of that State Party;

For greater certainty, the overall assessment on the case-by-case basis shall take into account the specific economic and investment policies of the concerned State Party at the time of the admission of the investment;

"Sustainable Development" embodies, in accordance with relevant United Nations documents and resolutions, the three interdependent and mutually reinforcing pillars that are economic development, social development and environmental protection;

"Third Party" means a State that is not a party to this Protocol.

Article 2. Objectives

The objectives of this Protocol are as follows:

- a. encouraging intra-African investment flows and opportunities and promoting, facilitating, retaining, protecting and expanding investments that foster sustainable development of State Parties;
- b. establishing a balanced, predictable and transparent continental legal and institutional framework for investment, taking into account the interests of State Parties, investors and local communities;
- c. providing a sound legal framework for the prevention, management and settlement of investment disputes;
- d. encouraging the acquisition and transfer of appropriate and relevant technology in Africa; and
- e. promoting, enhancing and consolidating coordinated positions and cooperation on matters related to investment promotion, facilitation and protection within the continent.

Article 3. Scope of Application

1. This Protocol sets out the rights and obligations for State Parties, investors and investments.

2. This Protocol shall apply to:

- a. all investments of investors of State Parties made after the entry into force of this Protocol; and
- b. all investments of investors of State Parties made prior to the entry into force of this Protocol provided that they meet the criteria of an investment under Article 1 of this Protocol and that they are still present on the territory of the Host State at the time of the entry into force of this Protocol.

3. The obligations of a State Party under this Protocol shall apply to measures adopted or maintained by:

- a. its central, regional or local governments or authorities; and
- b. non-governmental bodies when exercising powers delegated by central, regional or local governments or authorities.

For greater certainty, in the implementation of its obligations and commitments defined under this Protocol, each State Party shall take reasonable steps to ensure that regional and local governments and authorities and relevant non-governmental bodies within its territory comply with them.

4. This Protocol shall not apply to:

- a. any investment dispute that arose or any claim that was settled before the entry into force of the Protocol;
- b. government procurement;
- c. subsidies or grants provided by a State Party, including government-supported loans, guarantees and insurance under national development programmes;

- d. investments made with capital or assets of illegal origin in accordance with the applicable laws and regulations of a State Party;
- e. taxation measures taken in accordance with the applicable laws and regulations of a State Party;
- f. any special advantages accorded in the Host State by finance institutions for the purpose of development assistance or the development of small and medium businesses or new industries;
- g. operations of public debt and state enterprise debt restructuring taken by one of the State Parties; and
- h. real estate or other property other than acquired for the purpose of economic benefit or other business purposes.

5. This Protocol shall not apply to any dispute arising solely from an alleged breach of a contract between a State Party and an investor.

6. For greater certainty, and subject to the applicable international law, references to "indigenous people", "local communities" and "underrepresented groups" in this Protocol do not apply on the territory of State Parties which do not recognise those groups under their domestic laws and regulations.

Article 4. Admission of Investment

Each State Party shall admit investments in accordance with its domestic laws and regulations.

Article 5. Denial of Benefits

1. A State Party may at any time deny an investor of another State Party and the investment of such investor the benefits of this Protocol if:

- a. an investment has no substantial business activity in the territory of the Home State;
- b. an investment has been established or restructured with the primary purpose of gaining access to the dispute settlement mechanism under this Protocol;
- c. an investor or investment is engaged in activities prejudicial to the essential and national interests of the Host State;
- d. an investment is owned or controlled, directly or indirectly, by natural or juridical persons of a Third Party with which the denying Party does not maintain a diplomatic relationship or toward which it prohibits transactions;
- e. an investment is owned or controlled, directly or indirectly, by natural or legal persons of the denying Host State;
- f. an investment is owned or controlled, directly or indirectly, by natural or juridical persons of a non-State Party that has no substantial business in the territory of a State Party; or

8 g. an investor or investment has committed a breach of a specific binding obligation under Part V of this Protocol.

2. For the avoidance of doubt, the exercise by a Host State of its right to deny benefits to an investor of another State Party and investment of such investor may be subject of review in accordance with Part VII of this Protocol.

Part II. INVESTMENT PROMOTION AND FACILITATION

Article 6. Investment Promotion

The State Parties shall endeavour to promote and increase awareness of Africa as the preferred investment destination including by:

- a. encouraging investments among the State Parties;
- b. organising joint investment promotion activities between or among State Parties;
- c. promoting business matching events, partnerships, and joint ventures among companies in Africa;
- d. organising and supporting the organisation of various continental or international conferences and seminars on investment

opportunities and on investment laws, regulations, and policies;

e. coordinating with the Pan-African Trade and Investment Agency and Regional Economic Communities to undertake investment promotion activities;

f. conducting information exchanges on other issues of mutual concern relating to investment promotion; or

g. promoting investments that contribute to gender equality, the empowerment of women, youth and people with disabilities.

Article 7. Investment Facilitation

1. State Parties shall, subject to their respective laws and regulations, facilitate investments that contribute to sustainable development.

2. State Parties shall, subject to their respective laws and regulations, facilitate the granting of visas and permits to foreign workers, employees and consultants as designated by the investor.

3. State Parties are encouraged to streamline investment administration procedures and requirements, establish mechanisms for business entry facilitation including setting up One Stop Shops, aftercare services and digitalisation of business facilitation procedures.

4. State Parties are encouraged to establish a framework for cooperation and coordination between relevant and competent national regulatory authorities with a view to facilitating investment flows.

5. State Parties may cooperate on policies and other related issues that encourage and facilitate the use of "special purpose vehicles" to increase the participation of the private sector in development programmes of State Parties.

6. State Parties are encouraged to cooperate in the provision of aftercare services for cross border investments to encourage retention and expansion of investment in the continent.

Article 8 . Incentives for Sustainable Investments

1. State Parties may introduce incentives in order to attract, retain and expand investments that foster sustainable development of State Parties. Such incentives may include among others:

a. financial and fiscal incentives, such as investment insurance, grants or loans at concessionary rates;

b. subsidised infrastructure or services, and market preferences;

c. development-oriented incentives to encourage preferential markets schemes and specific investments in Africa especially in the sectors related to attaining sustainable development;

d. incentives for technology, technical assistance, technology transfer, and research and development;

e. investment guarantees;

f. incentives for low-carbon investments; or

g. incentives to encourage investors' responsible business conduct.

2. State Parties may harmonise incentive policies for investments that are of strategic interest to such State Parties with the assistance of the AfCFTA Secretariat.

Article 9. National Focal Points

1. Each State Party shall designate a national focal point which shall provide support to investors from other State Parties.

2. State Parties shall, through their national focal points, provide relevant information on the legal, policy and institutional frameworks governing investments, including among others:

a. regulatory matters and procedures, administrative practices and legislation on the establishment of companies, joint ventures or other investment-related public policies;

b. requirements and procedures, fees, taxes and charges, financial and fiscal incentives, technical standards, construction permits, capital transfers, procedures for appealing or reviewing decisions on applications for authorisation and indicative timeframes for processing applications; and

c. investment-related government programmes and incentives.

3. Each State Party shall ensure that its national focal point cooperates and liaises with other national focal points in order to carry out their functions under this Article.

Article 10. Publication of Information

1. Each State Party, in accordance with its capabilities, shall publish and make accessible electronically or through other means, in a reasonable period of time, all relevant laws and regulations which pertain to or affect the operation of this Protocol. International and regional agreements pertaining to or affecting bilateral, regional or international investment to which a State Party is a signatory shall also be published.

2. State Parties shall provide adequate information on relevant national laws and policies to enable investors carry out their operations in compliance with such laws and policies.

3. Each State Party shall respond within a period not exceeding six (6) months to all formal requests by any other State Party for specific information on any of its laws, regulations, measures, international and regional agreements pertaining to this Protocol. State Parties to the extent practicable, shall also respond to any question from any other State Party relating to any measure that might substantially affect the operation of this Protocol.

Article 11. Non-Disclosure of Confidential Information

Nothing in this Protocol shall require any State Party to disclose confidential information and data, the disclosure of which would impede law enforcement, prejudice legitimate commercial and strategic interests of particular enterprises or institutions whether public or private or would otherwise be contrary to the public or essential security interests.

Part III. INVESTMENT PROTECTION STANDARDS

Article 12. National Treatment

1. Each State Party shall accord to investors of another State Party and their investments treatment no less favourable than it accords, in like circumstances, to its own investors with respect to the management, conduct, operation, use, expansion and sale or other disposition of their investments.

2. In assessing "in like circumstances" an overall examination is required on a case by-case basis, of all the circumstances of an investment, including, among others:

a. its effects on third persons and the local community;