PROTOCOL TO THE AGREEMENT ESTABLISHING THE AFRICAN CONTINENTAL 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;

b. its effects on the local, regional or national environment, the health of the populations, or on the global commons;

c. the sector in which the investor is active;

d. the aim of the measure in question;

e. the regulatory process generally applied in relation to a measure in question; and

f. any other factor directly relating to the investment or investor in relation to the measure in question.

The examination referred to in this paragraph shall not be limited to or biased towards any one of the factors.

Article 13. Exceptions to National Treatment

1. Measures taken by a State Party that are designed and applied to protect or enhance legitimate public policy objectives such as, but not limited to, public morals, public health, prevention of diseases and pests in animals or plants, climate action, essential security interests, safety and the protection of environment shall not be construed as a breach of Article 12.

2. Preferential treatment granted by State Parties to national investments and investors, in accordance with domestic laws and regulations, in order to achieve national development objectives or address the internal needs of designated disadvantaged persons, groups, or regions shall not be construed as a breach of Article 12.

3. Each State Party reserves the right to adopt or maintain certain exceptions to the standard of national treatment provided by Article 12 to investments made by investors of another State Party in its territory if those exceptions fall within one of the sectors or geographical regions that represent strategic importance for the Host State in accordance with its laws and regulations.

4. For greater certainty, discriminatory measures taken by a State Party to comply with its obligations under other regional or international agreements shall not be construed as a breach of Article 12.

Article 14. Most-Favoured Nation 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 investors of any other State Party or Third Parties with respect to the management, conduct, operation, use, expansion and sale or other disposition of their investments.

2. The provisions of paragraph 2 of Article 12 of this Protocol on assessing "in like circumstances" shall apply mutatis mutandis to this Article.

3. For greater certainty, the "treatment" referred to in paragraphs 1 and 2 of this Article does not include dispute settlement procedures, including, but not limited to, those related to admissibility and jurisdiction, provided for in other treaties. Substantive obligations in other investment treaties, do not in themselves constitute "treatment", and cannot give rise to a breach of this Article.

Article 15. Exceptions to Most-Favoured Nation Treatment

1. Measures taken by a State Party that are designed and applied to protect or enhance legitimate public policy objectives, such as, but not limited to, public morals, public health, prevention of diseases and pests in animals or plants, climate action, essential security interests, safety and the protection of environment, shall not be construed as a breach of Article 14.

2. Nothing in Article 14 shall oblige a State Party to extend to the investors and their investments the benefit of any treatment, preference or privilege contained in:

a. any existing or future free trade area, customs union, common market agreement or any similar international agreements or arrangements to which the investor's Home State is not a Party; or

b. any existing or future international agreement or domestic legislation relating wholly or mainly to taxation.

Article 16. Interpretation of Non-Discrimination

Articles 12, 13, 14 and 15 shall govern the definition, scope, application and interpretation of all references to non-discrimination or non-discriminatory measures under this Protocol.

Article 17. Administrative and Judicial Treatment

1. Each State Party shall ensure that, in administrative and judicial matters, investors and investments of another State Party are not subject to treatment which constitutes a fundamental denial of justice in criminal, civil and administrative adjudicative proceedings, an evident denial of due process, a manifest arbitrariness, a discrimination based on gender, race or religious beliefs, or an abusive treatment in administrative and judicial proceedings.

2. For greater certainty, paragraph 1 of this Article shall not be interpreted as equivalent to fair and equitable treatment. For further certainty, paragraph 1 of this Article includes the minimum standard of treatment under customary international law and does not allow for an interpretation and application of such a standard that would go beyond the elements contained in paragraph 1 of this Article.

Article 18. Physical Protection and Security

1. A State Party shall, subject to its capabilities, accord to investors and their investments physical protection and security no less favourable than that which it accords to the investments of its own investors or to the investments of the investors of any other State Party or Third Party.

For greater certainty, the expression "subject to its capabilities" refers to the obligation of due diligence that a State Party shall exercise on its territory in accordance with customary international law and does not allow for an interpretation and application of such a standard that would go beyond the elements contained in this paragraph.

2. Investors of one State Party whose investments in the territory of the other State Party suffer losses as a result of a failure of the Host State to comply with paragraph 1 of this Article, owing to war or other armed conflict, revolution, revolt, insurrection or riot in the territory of the Host State shall, as regards restitution, indemnification, compensation or other settlement, be accorded by the Host State treatment no less favourable than that which the Host State accords to investments of its own natural and legal persons or to investments of investors of any other State Party or Third Party.

Article 19. Expropriation

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. with compensation in accordance with Article 21 and paid within a reasonable period of time. 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.

2. For the purposes of this Protocol:

a. direct expropriation occurs when an investment is nationalised or expropriated directly, through a formal transfer of ownership or outright seizure;

b. indirect expropriation results from a measure or a series of measures having an equivalent effect of direct expropriation without formal transfer of title or outright seizure. The sole fact that a measure or a series of measures has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred; and

c. the determination of whether a measure or a series of measures have an effect equivalent to expropriation requires a case-by-case, fact-based inquiry, that takes into consideration among others:

i. the duration of the measure or series of measures of a State Party; and

ii. the character of the measure or series of measures, notably their object, context and intent.

Article 20. Exceptions to Expropriation

1. Nothing in Article 19 shall prevent the issuance of compulsory licences granted in relation to intellectual property rights, or to the revocation, limitation, or creation of intellectual property rights, in accordance with international obligations and other relevant protocols under the AfCFTA Agreement, where applicable.

2. Non-discriminatory regulatory actions by a State Party designed to protect legitimate public policy objectives, such as public morals, public health, prevention of diseases and pests in animals or plants, climate action, essential security interests, safety and the protection of the environment, labour rights or to comply with other international obligations, shall not constitute indirect expropriation.

Article 21. Compensation for Expropriation

1. Compensation for expropriation shall be fair and adequate, 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 paragraph 2 of this Article. Compensation shall be done in a reasonable period of time, and in accordance with national constitution, 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.

2. The assessment of 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 paragraph 2 of this Article, 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 applicable standard of compensation also applies in case of unlawful expropriation.

4. 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.

Article 22. Transfer of Funds

1. State Parties shall, in accordance with national laws and regulations, permit all transfers relating to an investment to be made freely and without delay in and out of the territory after payment of the respective taxes and duties. Such transfers may include:

a. initial capital and additional amounts to maintain or increase investment;

b. profits, capital gains, dividends, royalties, interests and other current income accruing from an investment;

c. the proceeds from sale of all or any part of or from total or partial liquidation of a covered investment;

d. repayments made pursuant to a loan agreement in direct connection with an investment;

e. license fees in relation to investment;

f. payments in respect of technical services and management fees;

g. payments in connection with contracting projects;

h. earnings, such as wages and salaries, of staff who work in connection with an investment; or

i. payments arising under the dispute settlement mechanism of this Protocol or any compensation paid in relation to an investment.

2. The Host State, subject to the choice of the investor, shall allow transfers to be made in the currency of the host economy, or in a freely convertible currency recognised by the International Monetary Fund (IMF), at the market rate of exchange prevailing on the date of the transfer, in accordance with the laws and regulations of the Host State.

Article 23. Exceptions to Transfer of Funds

1. A State Party may apply non-discriminatory restrictions on transfers of funds relating to investments made in its territory in accordance with its domestic laws and regulations where applicable and in particular, relating to:

a. fulfilment of tax obligations to the Host State;

b. bankruptcy, insolvency, or the protection of the rights of creditors;

c. issuing, trading or dealing in securities, futures, options or derivatives;

d. criminal or penal offences and the recovery of the proceeds of crime;

e. financial reporting or record keeping of transactions when necessary to assist law enforcement or financial regulatory authorities;

f. ensuring compliance with orders or judgments in judicial or administrative proceedings;

g. social security, public retirement or compulsory savings schemes;

h. severance entitlements of employees; or

i. anti-money laundering and financing of terrorism.

2. A State Party may adopt or maintain non-discriminatory measures not conforming with its obligations relating to the free transfer of funds:

a. in the event or threat of serious balance-of-payments deficits or external financial difficulties; or

b. in exceptional circumstances where movements of capital cause or threaten to cause serious economic or financial difficulties in the State Party concerned.

3. Subject to the reservations of each State Party under the IMF Articles of Agreement, nothing in Article 22 shall affect the rights and obligations of a State Party that is a member of the IMF, including the right to apply safeguard measures at the request of the IMF.

4. The State Party applying a safeguard measure contemplated in paragraphs 1 and 2 of this Article shall promptly notify the AfCFTA Secretariat and provide a schedule for its removal within a reasonable period of time. For greater certainty, these safeguard measures shall:

a. avoid unnecessary damage to the economic and financial interests of investors and other State Parties;

b. be proportionate in the circumstances; and

c. be temporary and phased out progressively as the situation necessitating the safeguard measure improves.

Part IV. SUSTAINABLE DEVELOPMENT-RELATED ISSUES

Article 24. Right to Regulate

1. In accordance with customary international law and other general principles of international law, each State Party has the

right to regulate, including to take measures to ensure that investment in its territory is consistent with the goals and principles of sustainable development, and with other national environmental, health, climate action, social and economic policy objectives and essential security interests.

2. For greater certainty, measures taken by a State Party to comply with its international obligations under other relevant treaties shall not constitute a breach of this Protocol.

3. For avoidance of doubt, the exercise of the right to regulate under paragraphs 1 and 2 of this Article cannot give rise to any claim by an investor for compensation.

Article 25. Minimum Standards on the Environment, Labour and Consumer Protection

1. State Parties shall ensure environmental, labour, and consumer protection, taking into account domestic policies, international best standards and relevant international agreements to which they are parties, and shall continue to improve their standards within their domestic laws and regulations.

2. State Parties shall not encourage investment by relaxing or waiving domestic standards, compliance with environment, labour and consumer protection laws and international minimum standards.

Article 26. Investment and Climate Change

In accordance with their domestic climate change policies, the principle of Common but Differentiated Responsibilities, and relevant international climate change instruments, each State Party shall:

a. promote and facilitate investments that support actions to mitigate greenhouse gas emissions and measures to adapt to the negative impacts of climate change;

b. promote and facilitate investments that support initiatives conducive to the financing of regional climate mitigation and adaptation programmes;

c.promote and facilitate investment of relevance for a fair and just transition in sectors such as renewable energy, low carbon technologies, and by adopting policy frameworks conducive to transfer and deployment of climate-friendly technologies and goods and services, taking into account socio-economic constraints, in particular those related to the transition of the workforce;

d. promote, facilitate and encourage new investment regimes, such as low or zero carbon Special Economic Zones;

e. encourage investments that mitigate climate change impacts on exhaustible natural resources such as fresh water and biological diversity; and

f. cooperate with the other State Parties on investment-related aspects of climate change policies and measures.

Article 27. Investment, Public Health and Pandemics

1. Each State Party has the right to determine its public health policies and priorities, to establish its own levels of domestic public health protection, and to adopt or modify its relevant laws and measures in the context of epidemics, pandemics and other public health emergencies in accordance with its international commitments.

2. Each State Party shall, in accordance with national laws and regulations, promote and facilitate investments in the public health sector and the subsectors and related industries, including medical equipment, pharmaceuticals especially for chronic diseases, vaccines and Intensive Care Units requirements.

3. State Parties shall cooperate to identify relevant investment policies and measures to address epidemics, pandemics and other public health emergencies in accordance with the decisions and declarations of the African Union.

Article 28. Pursuit of Development Goals

Pursuant to the objectives set out in this Protocol, State Parties may introduce measures to promote domestic development including local content, taking into account Articles 12, 13, 14 and 15 of this Protocol. Measures covered under this Article include among others:

a. granting of preferential treatment to any enterprise or company qualifying under the domestic law of a State Party in

order to achieve national, sub-regional, or regional development goals;

b. supporting the development of local entrepreneurs and to establish linkages with local firms, supply chains, industries and institutions with a view to strengthening local capabilities;

c. enhancing productive and trade capacity, generating employment, wealth creation, developing human resource capacity and training, research and development;

d. appointing, where appropriate, as executives, managers or members of board of directors, nationals from the State Party where the investment is made;

e. promoting transfer of technology, skills and know-how, innovation and other benefits, a production process or other proprietary knowledge; or

f. addressing economic and development disparities suffered by identifiable ethnic or cultural groups, including historically marginalised groups or geographical regions and localities.

Article 29. Human Resources Development

1. State Parties shall develop national policies to guide investors in developing human capacity of the labour force, including for mid-level and managerial positions. Such policies may include incentives to encourage employers to invest in training, capacity building and knowledge transfer.

2. In developing such policies, State Parties shall pay particular attention to the needs of youth, women, persons with disabilities and vulnerable groups.

3. State Parties are encouraged to develop and enforce mutual recognition agreements on human resource development in collaboration with the AfCFTA Secretariat, in particular on qualification and experience leading to certificates and diplomas.

Article 30. Transfer of Technology

State Parties, in accordance with their domestic laws and regulations and their respective capabilities, shall facilitate the intra-regional and international transfer of technology by various measures, such as:

a. accessing available information regarding description, location and, as far as possible, approximate cost of technology;

b. establishing or strengthening of technology transfer centres;

c. providing training for research, engineering, design and other personnel engaged in the development of national technologies or in the adaptation and use of technologies transferred;

d. providing assistance in the development and implementation of laws and regulations with a view to facilitating the transfer of technology;

e. encouraging the granting credits on preferential terms for financing the acquisition of capital and intermediate goods in the context of approved development projects involving transfer of technology transaction;

f. assisting in the development of technological capabilities of the companies and their personnel;

g. encouraging investors to adopt in the course of their business activities, practices that permit the transfer and rapid diffusion of technologies and know-how, with due regard to the protection of intellectual property rights, on reasonable terms and conditions; and

h. fostering conditions that encourage investors to undertake research and development in a manner that contributes to the national development goals of the Host State.

Part V. INVESTOR OBLIGATIONS

Article 31. Relation to State Party Obligations

1. Notwithstanding the investor obligations set out in this Part, the provisions in this Part are without prejudice to the obligations of the State Parties to promote and enforce, among others:

a. laws and policies to protect investment-related human rights, labour rights and the environment;

b. anti-corruption, anti-money laundering, anti-terrorism financing and anti-bribery measures; or

c. laws and policies to protect the rights of indigenous peoples and local communities.

2. State Parties shall ensure that investors and their investments comply with their domestic laws and regulations and international law.

Article 32. Compliance with National and International Law

Investors and their investments shall carry out their operations in compliance with all relevant domestic laws and regulations, administrative guidelines as well as applicable international law.

Article 33. Business Ethics, Human Rights and Labour Standards

Investors and their investments shall comply with high standards of business ethics, investment-related human rights and labour standards, and in particular shall:

a. support and respect the protection of internationally recognised human rights;

b. ensure that they are not complicit in human rights abuses;

c. comply with the International Labour Organisation (ILO) standards, including the ILO Declaration on Fundamental Principles and Rights at Work, and domestic labour legislations;

d. not use child labour or forced and compulsory labour;

e. eliminate discrimination in respect of employment and occupation;

f. refrain from discriminatory or disciplinary action against employees who submit reports to the company's board or to the competent public authorities about practices that violate domestic laws, this Protocol, or other standards of corporate governance to which the company is subject; and

g. act in accordance with fair business, marketing and advertising practices when dealing with consumers and must ensure the safety and quality of goods and services they provide.

Article 34. Environmental Protection

1. Investors and their investments shall, in carrying out their business activities, respect and protect the environment, and, in particular shall:

a. respect the right to a clean, healthy and sustainable environment, as reflected in Article 24 of the African Charter of Human and Peoples' Rights, and the Resolution of the United Nations General Assembly A/RES/76/300 ("The human right to a clean, healthy and sustainable environment");

b. comply with the principles of prevention and precaution when conducting their business activities to anticipate and prevent any risk of significant harm to the environment;

c. carry out an environmental impact assessment, in accordance with the best international standards and practices and as required by domestic law;

d. apply the precautionary principle to their environmental impact assessment and to decisions taken in relation to a proposed investment, including any necessary mitigating or alternative approaches to the investment, or precluding the investment if necessary; and

e. where their business activities cause or may cause harm to the environment, take steps to mitigate the harm, to restore impacted sites and ensure a clean, healthy and sustainable environment.

2. Investors shall not exploit or use natural resources to the detriment of the rights and interests of the Host State and local communities.

Article 35. Indigenous Peoples and Local Communities

1. Investors and their investments shall respect the rights and dignity of indigenous peoples and local communities in

accordance with relevant domestic laws and regulations, international law, norms and best practices, including the right of indigenous peoples and local communities where applicable, to free, prior and informed consent as well as to participate in the benefit of the investment.

For greater certainty, the reference to the right to free, prior and informed consent of indigenous peoples, does not imply any obligation for investors and their investments to conclude agreements with those groups before conducting or operating their investment in the territory of State Parties which do not recognise indigenous peoples, taking into account applicable and relevant domestic laws and regulations.

2. Investors and their investments shall respect legitimate tenure rights to land, water, fisheries, and forests in accordance with relevant laws and regulations.

3. Investors, in accordance with relevant domestic law and regulations, shall submit their environmental and social impact assessments to the competent authorities and make them available and accessible to local communities and indigenous peoples and to any other stakeholder in the territory of the Host State.

Article 36. Socio-Political Obligations

Investors shall refrain from any interference in the internal affairs of State Parties and in their intergovernmental relations, in particular to influence the appointment of persons to public office, finance political parties or undermine the political stability or security of the Host State or to influence public opinion in a manner contrary to this Article.

Article 37. Anti-Corruption

1. Investors and their investments shall not offer, promise or give any unlawful or undue pecuniary or other advantage or present, whether directly or through intermediaries, to a public official of a State Party, or to a member of an official's family or business associate or other person in order to obtain a favour or for the official or other person to act or refrain from acting in relation to the performance of official duties.

2. Investors shall cooperate with State Parties in preventing and eliminating corruption in public governance and shall not encourage, incite, aid, abet or conspire with any official or another person or any entity to commit or authorise the commission of an act of corruption, taking into account applicable and relevant domestic laws and regulations, the African Union Convention on Preventing and Combatting Corruption, the United Nations Convention against Corruption and other applicable international legal instruments.

3. Notwithstanding relevant international obligations of State Parties regarding anti-corruption, a breach of this Article by an investor is deemed to constitute a breach of the domestic laws and regulations of the Host State concerning the establishment and operation of an investment.

Article 38. Corporate Social Responsibility

1. Investors and their investments shall endeavour to achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of a high degree of socially responsible practices, in accordance with the principles and standards set out in paragraph 2 of this Article.

2. Investors and their investments shall endeavour to:

a. stimulate economic, social and environmental progress, aiming at achieving sustainable development;

b. encourage the strengthening of local capacities through close cooperation with the local community;

c. encourage the development of human capital, especially by creating employment opportunities and facilitating access of workers to professional training;

d. promote gender equality and inclusiveness in their activities;

e. refrain from seeking exemptions that are not established in the legislation of the Host State, relating to environment, health, security, work or financial incentives, or other issues;

f. develop and apply effective self-regulatory practices and management systems that foster a relationship of mutual trust between the companies and the community in which the operations are conducted;

g. promote the knowledge of workers about corporate policies, through appropriate dissemination of these policies,

including programmes for professional training;

h. encourage, whenever possible, the business associates, including service providers and sub-contractors, to apply the principles of corporate social responsibility provided for in this Article; and

i. foster the benefit sharing arising from an investment with the local communities concerned based on mutually agreed terms to facilitate access to an adequate standard of living.

3. State Parties undertake to encourage investors operating within their territories or subject to their jurisdiction to incorporate into their internal policies internationally recognised standards, guidelines and principles of corporate social responsibility including those set out in paragraph 2 of this Article.

Article 39. Corporate Governance

1. Investors and their investments shall meet national, regional and internationally accepted standards of corporate governance, in particular in respect of transparency and accounting practices.

2. Investors and their investments shall, in accordance with domestic laws and regulations:

a. ensure the equitable treatment of all shareholders;

b. encourage active cooperation with their stakeholders to create wealth, jobs, and sustainable financial management;

c. make timely and accurate disclosure on all material matters regarding an enterprise or company, including the financial situation, performance, ownership, and governance of the enterprise or company, risks related to environmental liabilities, and any other matters relating to the enterprise and company in accordance with the relevant and applicable regulations and requirements; and

d. comply with national policies on human resource development and to the extent possible invest in training, capacity building, and knowledge transfer through programmes for human resource development.

3. State Parties are encouraged to improve their regulatory and institutional frameworks for corporate governance in support of the requirements of this Article.

4. State Parties shall put in place measures enhancing transparency in financial reporting, disclosure, accounting, and audit practices in support of the requirements of this Article, in accordance with domestic laws, regulations and applicable international standards and obligations.

Article 40. Taxation and Transfer Pricing

1. Investors and their investments shall:

a. ensure that all transactions with related or affiliated companies are arm's length transactions at fair market price in accordance with the domestic regulations of the Host State and relevant international best practices;

b. conduct their operations in a manner that fully complies with all applicable domestic tax laws and international rules and principles relating to base erosion and profit shifting practices; and

c. provide all information required by the Host State to ensure compliance with the applicable laws relating to taxation.

2. State Parties shall, in accordance with the applicable international legal instruments, cooperate in the detection and prevention of transfer pricing manipulation by investors, including in the provision of information necessary to identify and prevent such practices and providing opportunities for Joint Audits within the framework of mutual administrative assistance in tax matters.

Part VI. INSTITUTIONAL ARRANGEMENTS

Article 41. Committee on Investment

1. The Committee on Investment, as established in accordance with Article 11 of the AfCFTA Agreement, shall carry out such functions as assigned to it by the Council of Ministers to facilitate the implementation of this Protocol and further its objectives.

2. The Committee on Investment may establish such sub-committees and working groups as it considers necessary for the effective discharge of its functions with the approval of the Council of Ministers.

Article 42. Establishment of the Pan-African Trade and Investment Agency

1. The Assembly of Heads of State and Government of the African Union hereby establishes the Pan-African Trade and Investment Agency (the Agency) as a technical institution of the AfCFTA Secretariat.

2. The Council of Ministers shall recommend to the Assembly of Heads of State and Government of the African Union, the adoption of an annex setting out the appropriate governance and administrative structures, functions of the Agency, as well as, rules and procedures for its administration and operation, including the determination of its seat. Upon adoption by the Assembly of Heads of State and Government of the African Union, that annex shall form an integral part of this Protocol.

3. The Agency shall assist State Parties, their investment promotion agencies and the private sector through mobilising financial resources, fostering business development and providing technical and other support for the promotion and facilitation of investment in accordance with the provisions of this Protocol.

4. The Agency shall also assist State Parties in building their capacity in the formulation and implementation of investment policies to foster the expansion of intra-African investments, and especially those that increase exports; as well as facilitating coordination, interaction and dialogue between and among national focal points, investment promotion agencies and other relevant stakeholders to enable the sharing of information with respect to trade, export promotion, investment opportunities, peer learning and good practices.

5. The resources of the Agency's budget shall be derived from the annual budget of the AfCFTA Secretariat. Other sources of budget may be recommended by the Council of Ministers, for the consideration of the Executive Council of the African Union including:

a. fees collected by the Agency in the course of its operations;

b. any grants, donations, bequests or other contributions made to the Agency; and

c. all other payments due to the Agency in respect of any matter incidental to its functions.

6. The AfCFTA Secretariat shall undertake the functions of the Agency, on an interim basis, until its operationalisation.

Article 43. Technical Assistance, Capacity Building and Cooperation

1. State Parties shall support the provision of technical assistance, capacity building and cooperation to promote and facilitate investment under this Protocol.

2. To further the implementation of these provisions, the AfCFTA Secretariat working with the Agency upon its operationalisation, State Parties, Regional Economic Communities and partners shall coordinate the provision of technical assistance and undertake activities to enhance capacity building.

Part VII. MANAGEMENT AND SETTLEMENT OF DISPUTES

Article 44. State-State Dispute Settlement

1. The relevant provisions of the Protocol to the AfCFTA Agreement on Rules and Procedures on the Settlement of Disputes shall apply to consultations and the settlement of disputes between State Parties relating to the interpretation and application of this Protocol.

2. For greater certainty, paragraph 1 of this Article incorporates the right for a State Party to submit a claim on behalf of its nationals through the exercise of diplomatic protection and in accordance with customary international law.

Article 45. Dispute Prevention and Grievance Management

State Parties shall, through their designated competent bodies, facilitate the prevention of disputes and management of grievances by:

a. receiving complaints or grievances from investors in relation to their investments;

b. following-up and undertaking actions for de-escalating potential differences, or disagreements between investors and State Parties; and

c. providing effective assistance in resolving difficulties experienced by investors and their investments in such a manner as to avoid disputes.

Article 46. Dispute Resolution

1. In the event of a dispute between an investor of a State Party and a Host State relating to an alleged breach of this Protocol, the investor and the Host State shall initially seek to resolve amicably the dispute through consultations, negotiations, conciliation, mediation or other amicable dispute resolution mechanisms available in the Host State.

2. Notwithstanding the outcome of the dispute prevention and grievances management process under Article 45, in the event that an investor of a State Party and the Host State are unable to amicably resolve the dispute in accordance with paragraph 1 of this Article, they may seek to resolve such dispute in accordance with the dispute resolution mechanisms to be provided in the Annex referred to in paragraph 3 of this Article.

3. Rules and Procedures governing Dispute Prevention, Management and Resolution of disputes covered by this Protocol, shall be set out in an annex to this Protocol. The Annex shall be negotiated after the adoption of this Protocol by the Assembly of Heads of State and Government of the Africa Union, and finalised within 12 months at the latest from the date of adoption of this Protocol. The annex, upon adoption by the Assembly of Heads of State and Government of the Africa Union, shall form an integral part of this Protocol.

Article 47. Investor Liability

1. Investors and their investments shall, where applicable and in accordance with domestic laws and regulations, be subject to civil actions for liability in the judicial process of their Home State for the acts, decisions or omissions made in the Host State in relation to the investment where such acts, decisions or omissions lead to damage, personal injuries or loss of life in the Host State.

2. State Parties shall develop rules and procedures that allow for, or do not prevent or unduly restrict, the bringing of court actions relating to the civil

2. State Parties shall develop rules and procedures that allow for, or do not prevent or unduly restrict, the bringing of court actions relating to the civil 28liability of investors in the territory of their Home States, taking into account rules governing conflict of laws and the recognition and enforcement of foreign judgments.

3. For greater certainty, this Article does not exclude the possibility to bring civil actions against investors and their investments before the domestic courts of the Host State.

Part VIII. FINAL PROVISIONS

Article 48. Entry Into Force

1. This Protocol shall be open for signature, ratification and accession by the State Parties to the AfCFTA Agreement, in accordance with their respective constitutional procedures.

2. This Protocol shall enter into force in accordance with the provisions of paragraphs 2 and 4 of Article 23 of the AfCFTA Agreement.

Article 49. Relationship with other International Investment Agreements

1. Existing bilateral investment treaties concluded between the State Parties shall be terminated within five (5) years from the entry into force of this Protocol. Upon termination of existing bilateral investment treaties concluded between the State Parties, their survival clauses shall also be terminated.

For the avoidance of doubt, this Protocol shall apply to investments of investors of State Parties that meet the criteria of an investment at the time of the termination of existing bilateral investment treaties concluded between the State Parties.

2. State Parties shall not conclude new bilateral investment treaties among themselves after the adoption of this Protocol.

3. State Parties shall make best endeavours to review and revise relevant existing regional investment agreements adopted by the Regional Economic Communities to achieve alignment with the Protocol within a period between five (5) to ten (10) years from the entry into force of this Protocol.

4. State Parties may take into account the requirements of this Protocol when negotiating international investment agreements and when reviewing existing international investment agreements concluded with Third Parties.

Article 50. Relationship with other Protocols to the AfCFTA Agreement

Upon its adoption, this Protocol, as an integral part of the AfCFTA Agreement, shall not modify rights and obligations under other protocols to the AfCFTA Agreement. In case of conflict between this Protocol and other protocols to the AfCFTA Agreement, in relation to matters specifically governed by the other protocols, the provisions of the latter shall prevail to the extent of the conflict.

Article 51. Notification

1. For the purposes of this Protocol, each State Party shall inform the AfCFTA Secretariat of the identity of its national focal point.

2. Each State Party shall notify the AfCFTA Secretariat of any international and regional agreements pertaining to or affecting investment with other State Parties and Third Parties to which it is signatory prior to or after the entry into force of this Protocol.

3. Each State Party shall notify the AfCFTA Secretariat, as soon as possible and at least annually, of the introduction of any new, or any amendments to existing laws or regulations or any measure which pertain to this Protocol.

4. State Parties shall inform the AfCFTA Secretariat of the complaints or grievance management mechanisms available to investors in their territory.

5. The AfCFTA Secretariat shall promptly circulate the information received under this Article with the State Parties.

Article 52. Application

1. Each State Party shall apply appropriate measures to bring effect to the rules and procedures set out in the provisions of this Protocol. State Parties shall cooperate with each other in complying with the provisions of this Protocol.

2. State Parties shall, within a period of five (5) years from the entry into force of this Protocol, bring their national laws, regulations and policies into alignment with this Protocol.

Article 53. Amendments

Amendments to this Protocol shall be in accordance with Article 29 of the AfCFTA Agreement.

Article 54. Authentic Texts

This Protocol is drawn up in five (5) original texts in the Arabic, English, French, Portuguese and Spanish languages, all of which are equally authentic.

ADOPTED BY THE 36TH ORDINARY SESSION OF THE ASSEMBLY, HELD IN ADDIS ABABA, ETHIOPIA, ON 19 FEBRUARY 2023