Draft Pan-African Investment Code

Preamble The Member States,

RECALLING the Abuja Treaty establishing the African Economic Community and the adoption of Agenda 2063 by the African Union Heads of State and Government;

RECOGNIZING the need for a comprehensive guiding instrument on investment for all African Union Member States;

RECOGNIZING the growing importance of trade and investments for the growth and development of Africa;

AFFIRMING the desire of Member States to promote an attractive investment climate and expand trade and investments for long-term development;

CONSIDERING the African Union objectives stated in the Constitutive Act aimed at fast- tracking the political and socio-economic integration of the continent;

RECOGNIZING that the vision for regional integration and development is to strengthen the regional market, create wealth in Africa, and enhance competitiveness through increased production, trade and investment flows in African countries;

MINDFUL of the increasing importance of the development and strengthening of financial and capital markets, and the role played by investment and the private sector in productive capacity, increased economic growth and sustainable development;

DESIRING to promote within Member States an environment conducive to the development of a more vibrant and dynamic private sector that facilitates job creation, promotes technology transfer, supports long-term economic growth and contributes effectively to the fight against poverty;

RECOGNIZING that investment and trade based activities represent one of the major avenues for illicit financial flows from Member States and that corrupt practices underpin these outflows, and AFFIRMING their desire to promote corruption free investment and trade regimes and improved laws and regulations that promote transparency and accountability in governance;

RECOGNIZING their right to regulate all the aspects relating to investments within their territories with a view to meeting national policy objectives and to promoting sustainable development objectives;

SEEKING to achieve an overall balance of the rights and obligations between Member States and the investors under this Code;

MINDFUL of the crucial role played by women and youth in the development of Africa;

RECALLING that the free movement of people is a fundamental pillar of African integration;

RECOGNIZING the role played by the New Economic Partnership for African Development (NEPAD)and the complementary existing regional and international initiatives relating to a transformational economic agenda for Africa;

DESIROUS of the need to ensure national and continental coherence in investment policymaking;

TAKING into account the various regional arrangements on investment across the continent; TAKING into account the Sustainable Development Goals (SDGs) and the Investment Policy

Framework for Sustainable Development of the United Nations Conference on Trade and Development (UNCTAD);

TAKING into account obligations of some of the Member States under relevant international instruments;

DETERMINED therefore to use the Pan-African Investment Code (hereinafter, the Code) as a guiding instrument

THE MEMBER STATES HAVE AGREED AS FOLLOWS:

Chapter 1. GENERAL PROVISIONS

Article 1. Objective

The objective of this Code is to promote, facilitate and protect investments that foster the sustainable development of each Member State, and in particular, the Member State where the investment is located.

Article 2. Scope

1. This Code shall apply as a guiding instrument to Member States as well as investors and their investments in the territory of Member States as defined by this Code.

2. This Code defines the rights and obligations of Member States as well as investors, and principles prescribed therein.

Article 3. Relationship with other Investment Agreements

1. This Code does not affect rights and obligations of Member States deriving from any existing investment agreement.

2. Notwithstanding Paragraph 1, Member States may agree that this Code could be reviewed to become a binding instrument and to replace the intra-African bilateral investment treaties (BITs) or investment chapters in intra-African trade agreements after a period of time determined by the Member States or after the termination period as set in the existing BITs and investment chapters in the trade agreements.

3. Member States and Regional Economic Communities (RECs) shall take into account as far as possible the provisions of this Code when entering into any new agreement with a third country in order to avoid any conflict between their present or future obligations under this Code and their obligations in other agreements.

Article 4. Definitions

In this Code, unless the context otherwise requires:

1. "enterprise or company" means any entity duly constituted or otherwise incorporated, under the applicable laws and regulations of a Member State provided that it maintains substantial business activity in the Member State in which it is located. Substantial business activity requires an overall examination, on a case-by-case basis, of all the circumstances, including, inter alia: (i) the amount of investment to be brought into the host State, (ii) the number of jobs to be created , (iii) its effect on the local community , and (iv) the length of time the business has been in operation ;

2. "home State" means a Member State from where the investment or the investor originates;

3. "host State" is the Member State where the investment is located;

4. "investment" means an enterprise or a company, as defined under Paragraph 1, which is established, acquired or expanded by an investor, including through the constitution, maintenance or acquisition of shares, debentures or other ownership instruments of such an enterprise, provided that the enterprise or company is established or acquired in accordance with the laws of the host State; An enterprise or company may possess assets such as:

a. shares, stocks, debentures and other equity instruments of the enterprise or another enterprise;

b. a debt security of another enterprise;

c. loans to an enterprise;

d. movable or immovable property and other property rights such as mortgages, liens or pledges;

e. claims to money or to any performance under contract having a financial value;

f. copyrights, know-how, goodwill and industrial property rights such as patents, trademarks, industrial designs and trade names, to the extent they are recognized under the law of the host State.

For greater certainty, investment does not include:

i. debt securities issued by a government or loans to a government;

ii. portfolio investments;

iii. 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 Member State to an enterprise in the territory of another Member State, or the extension of credit in connection with a commercial transaction, or any other claims to money that do not involve the kind of interests set out in subparagraphs (a) through (f) above;

iv. investments of a speculative nature;

v. investments in any sector sensitive to its development or which would have an adverse impact on its economy;

vi. commercial activities.

In order to qualify as an investment under this Code, the investment must have the following characteristics: the substantial business activity according to Paragraph 1, commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and a significant contribution to the host State's economic development.

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

5. "investor" means any national, company or enterprise of a Member State or a national, company or enterprise from any other country that has invested or has made investments in a Member State;

6. "list of scheduled investment sectors" means schedules of excluded sectors of Member States or any other list submitted by Member States where applicable;

7. "Member State" means a Member State as defined in the Constitutive Act of the African Union;

8. "measures" include any legal, administrative, legislative, judicial or policy decision that is taken by the host State, relating to and affecting an investment in the host State;

9. "national" means a natural person who is a citizen of any Member State;

10. "portfolio investment" refers to any investment where the investor owns less than 10 per cent of shares in a company or through stock exchange, or otherwise does not give the portfolio investor the possibility to exercise effective management or influence on the management of the investment;

11. "public official" means any persons appointed or elected who performs public functions on a permanent or temporary basis. This includes persons who work for an organ of the State or an organ of the central Government or an organ of a territorial unit of the State at the national, regional or local levels;

12. "State contract" means a contract entered into between Government of a Member State or a territorial unit, on one hand, and an investor on the other hand;

13. "third country" means a State which is not a Member of the African Union.

Chapter 2. STANDARDS OF TREATMENT OF INVESTORS AND INVESTMENTS

Article 5. Admission and Establishment

1. Each Member State shall promote, encourage and facilitate investments in its territory, and admit such investments in accordance with its laws and regulations.

2. Each Member State shall accord investors rights of entry and establishment, in accordance with its laws and regulations with the aim of promoting free flows of investment within the region.

Article 6. Encouragement and Support of Investments

1. Member States may introduce incentives in order to attract investments. Such incentives may include inter alia:

a. financial incentives in the forms of investment insurance, grants or loans at concessionary rates;

b. fiscal incentives such as tax holidays, pioneer status and reduced tax rates;

c. subsidized infrastructure or services, market preferences;

d. development-oriented incentives, to encourage preferential markets schemes and specific investors within the region;

e. incentives for technical assistance, technology transfer requirements; and

f. investment guarantees.

2. Member States may harmonize incentives for investments that are of strategic interest to the Member States or as prescribed by relevant African Union bodies. Member States may harmonize incentives in accordance with standards to be prescribed from time to time by relevant African Union bodies.

Article 7. Most-Favored-Nation Treatment

1. Each Member State shall accord to investors of another Member State treatment no less favorable than it accords, in like circumstances, to investors of any other Member State or of a third country with respect to the management, conduct, operation, expansion, sale or other disposition of investment.

2. Each Member State shall accord to investments made by investors of another Member State treatment no less favorable than it accords, in like circumstances, to investments made by investors of any other Member State or of a third country with respect to the management, conduct, operation, expansion, sale or other disposition of investments.

3. The concept of "in like circumstances" requires an overall examination, 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;

f. company size; and

g. other factors 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 be biased towards any one factor.

4. For greater certainty, the "treatment", referred to in Paragraphs 1 and 2, does not include dispute settlement procedures provided for in other treaties. Substantive obligations in other treaties, do not in themselves constitute "treatment," and thus cannot give rise to a breach of this Article.

Article 8. Exceptions to Most-Favored-Nation Treatment

1. Member States may adopt measures that derogate from the Most-Favored-Nation principle.

2. Any regulatory measure taken by a Member State that is designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, does not constitute a breach of the Most-Favored-Nation principle.

3. The measures taken by reason of national security, public interest, public health or public morals are not considered as a "less favorable treatment", in the meaning of Article 7.

4. The Most-Favored-Nation principle shall not apply to sectors excluded in a Member State's List of scheduled investment sectors.

5. The Most-Favored-Nation principle does not oblige a Member State to extend to the investors of another Member State or of a third country the benefit of any treatment, preference or privilege contained in:

a. the existing or future free trade area, customs union, common market agreement or any international arrangement to which the investor's home State is not a Party, or

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

Article 9. National Treatment

1. A Member State shall accord to investors of another Member State treatment no less favorable than it accords, in like circumstances, to its own investors with respect to the management, conduct, operation, and sale or other disposition of investments.

2. A Member State shall accord to investments from another Member State treatment no less favorable than it accords, in like circumstances, to investments of its own investors with respect to the management, conduct, operation, and sale or other disposition of investments.

3. The concept of "in like circumstances" requires an overall examination, 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;

f. company size; and

g. other factors 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 be biased towards any one of the factors.

Article 10. Exceptions to National Treatment

1. Member States may adopt measures that derogate from the National Treatment principle provided such measures are not arbitrary.

2. Any regulatory measure taken by a Member State that is designed and applied to protect or enhance legitimate public welfare objectives, such as national interests, public health, safety and the environment, does not constitute a breach of the National Treatment principle.

3. Member States may, in accordance with their respective domestic legislation, grant preferential treatment to qualifying investments and investors in order to achieve national development objectives.

4. A Member State reserves the right to deny an investor the benefits of this Code, and to grant special and differential treatment to any investor and investment in such cases, though not limited to instances where:

a. the investor does not have substantial business activities in the Member State; or

b. the investor is engaged in activities inimical to the economic interest of Member States.

5. A Member State may deny national treatment if advantages available within the Member State's economy are made for the exclusive benefit of its own nationals within the framework of its national development programs or its List of scheduled investment sectors where applicable.

6. The National Treatment principle does not apply:

a. to subsidies or grants provided to a government or a State enterprise, including government-supported loans, guarantees and insurance; or

b. to taxation measures aimed at ensuring the effective collection of taxes, except where this results in arbitrary discrimination.

7. In accordance with national laws and regulations, Member States may accord more favorable treatment to address the internal needs of designated disadvantaged persons, groups or regions.

8. The implementation of these exceptions shall not entitle any investor to compensation for any competitive disadvantages

they may suffer.

Article 11. Expropriation and Compensation

1. Investments in Member States shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation except if the following conditions are met in a cumulative manner:

a. a public purpose related to the internal needs of that Member State;

b. on a non-discriminatory basis;

c. against adequate compensation; and

d. under due process of law.

2. The investor affected shall have the right, under the laws of the Member State expropriating, to prompt review, by a judicial or other independent authority of that Member State, of its case and of the valuation of its investment in accordance with the procedure established by the laws of the Member State.

3. A non-discriminatory measure of a Member State that is designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, does not constitute an indirect expropriation under this Code.

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

Article 12. Determination of the Value of Compensation

1. Adequate compensation shall normally be assessed in relation to the fair market value of the expropriated investment immediately before the date of expropriation and shall not reflect any change in value occurring because the intended expropriation had become known earlier. In no event shall the valuation date be moved to any future date. The computation of the fair market value of the property shall exclude any consequential or exemplary losses or speculative or windfall profits claimed by the investor, including those relating to moral damages or loss of goodwill.

2. Where appropriate, the assessment of adequate compensation shall be based on an equitable balance between the public interest and interest of the investor affected, having regard to all relevant circumstances and taking into account the current and past use of the property, the history of its acquisition, the extent of previous profit made by the foreign investor through the investment, and the duration of the investment.

3. If the compensation is not paid within six months from the date of its determination, it shall after that date attract simple interests at the normal commercial rate where applicable at the national level of the host State.

4. Any payment shall be made in a freely convertible currency.

Article 13. War and Civil Disturbance

Investors who suffer within the territory of a Member State damage in relation to their investments owing to the outbreak of hostilities or a state of national emergency such as, revolt, insurrection or riot, shall be accorded treatment no less favorable than that accorded to investors of such a Member State or to investors of any third country, as regards to any measure to be taken by the concerned Member State including restitution, compensation or other valuable consideration.

Article 14. General Exceptions

1. This Code shall not prevent any Member State from adopting or enforcing measures relating to the protection of human, animal or plant life or health, or to the maintenance of international peace and security, or to the protection of its national security interests, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between investors in like circumstances or a disguised restriction on investment flows.

2. Member States shall not be required to change nor relax their appropriate level of protection of human, animal or plant life or health in pursuit or attraction of investments.

3. Any interested Member State may request information on the reasons for the measures taken under Paragraph 1. The Member State taking such measures shall respond to the request for information within three months.

Article 15. Transfer of Funds

Member States shall, subject to national laws, permit all transfers relating to an investment to be made freely and without delay. Such transfers may include:

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

b. the proceeds of the total or partial liquidation of an investment;

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

d. license fees in relation to investment;

e. payments in respect of technical assistance, technical service and management fees;

f. payments in connection with contracting projects;

g. earnings of nationals of a Member State who work in connection with an investment in the territory of the other Member State; and

h. compensation, restitution, indemnification or other settlement pursuant to the investments.

Article 16. Exceptions to the Transfer of Funds

1. A Member State shall apply restrictions on international transfers of funds and payments for current transactions relating to investments made in its territory in accordance with its taxation as well as financial laws and regulations.

2. Exceptions to the transfer of funds are permitted under the following conditions:

a. capital can only be transferred after a period of five years after full operation of the investment in a Member State unless its national legislation provides for more favorable treatment; or

b. proceeds of the investment can be transferred one year after the investment entered the territory of a Member State unless its national legislation provides for more favorable treatment.

3. A Member State may prevent a transfer in a non-discriminatory manner and in accordance with its laws relating to:

a. bankruptcy, insolvency or other legal proceedings to protect the rights of creditors;

b. criminal or administrative violations; or

c. ensuring the satisfaction of judgments in adjudicatory proceedings.

4. A Member State may adopt or maintain measures not conforming with its obligations relating to cross-border capital transactions:

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

b. in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies.

5. Measures under paragraph 4 shall be made public, be temporary and be eliminated as soon as conditions permit.

Chapter 3. DEVELOPMENT RELATED ISSUES

Article 17. Performance Requirements

1. Member States may support the development of local, regional and continental industries that provide, inter alia, up-stream and down-stream linkages and have a favorable impact on attracting investments and generating increased employment in Member States.

2. Member States may introduce performance requirements to promote domestic investments and local content. Measures

covered by this Paragraph include, inter alia:

a. measures to grant preferential treatment to any enterprise so qualifying under the domestic law of a Member State in order to achieve national or sub-national regional development goals;

b. measures to support the development of local entrepreneurs;

c. measures to enhance productive capacity, increase employment, increase human resource capacity and training, research and development including of new technologies, technology transfer, innovation and other benefits of investment through the use of specified requirements on investors; and

d. measures to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups prior to the adoption of this Code.

Article 18. Lists of Scheduled Investment Sectors

1. The process of harmonizing the investment regimes among Member States takes place with due respect for national policy objectives and the level of development of individual Members States. There shall be appropriate flexibility for Member States to prescribe their national List of scheduled investment sectors open for liberalization, in line with their development situation.

2. Any Member State may also, within its List of scheduled investment sectors, use further classification into subsectors and/or decide segments of sectors to better inform on the scope of its commitments under this Code.

3. Any Member State may submit a List of scheduled investment sectors that are excluded from the National Treatment principle where applicable.

4. The Lists of scheduled investment sectors form integral part of this Code; and Member States agree to respect them.

Chapter 4. INVESTORS OBLIGATIONS

Article 19. Framework for Corporate Governance

1. Investments shall meet national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and accounting practices.

2. In this regard, Member States, public bodies and companies are encouraged to improve the legal, institutional and regulatory framework for corporate governance and any other issues such as environmental or ethical concerns.

3. Investors shall:

a. ensure the equitable treatment of all shareholders, in accordance with national laws;

b. encourage active co-operation between corporations and stakeholders in creating wealth, jobs and the sustainability of financially sound enterprises;

c. ensure that timely and accurate disclosure is made on all material matters regarding a corporation, including the financial situation, performance, ownership, and governance of the company, risks related to environmental liabilities, and any other matters in accordance with the relevant regulations and requirements; and

d. provide information relating to human resource policies, such as programs for human resource development.

Article 20. Socio-political Obligations

1. Investors shall adhere to socio-political obligations including, but not exclusively, the following:

a. respect for national sovereignty and observance of domestic laws, regulations and administrative practices;

b. respect for socio-cultural values;

c. non-interference in internal political affairs;

d. non-interference in intergovernmental relations; and

e. respect for labor rights.

2. Investors shall not influence the appointment of persons to public office or finance political patties.

3. Investors shall refrain from exercising restrictive practices and from trying to achieve gains through unlawful means.

Article 21. Bribery

1. Investors 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 Member State, or to a member of an official's family or business associate or other person in order that the official or other person act or refrain from acting in relation to the performance of official duties.

2. Investors shall also not aid or abet a conspiracy to commit or authorize acts of bribery.

Article 22. Corporate Social Responsibility

1. Investors shall abide by the laws, regulations, administrative guidelines and policies of the host State.

2. Investors shall, in pursuit of their economic objectives, ensure that they do not conflict with the social and economic development objectives of host States and shall be sensitive to such objectives.

3. Investors shall contribute to the economic, social and environmental progress with a view to achieving sustainable development of the host State.

Article 23. Obligations as to the Use of Natural Resources

1. Investors shall not exploit or use local natural resources to the detriment of the rights and interests of the host State.

2. Investors shall respect rights of local populations, and avoid land grabbing practices vis-a-vis local communities.

Article 24. Business Ethics and Human Rights

The following principles should govern compliance by investors with business ethics and human rights: a. support and respect the protection of internationally recognized human rights; b. ensure that they are not complicit in human rights abuses; eliminate all forms of forced and compulsory labor, including the effective abolition of child labor; d. eliminate discrimination in respect of employment and occupation; and ensure equitable sharing of wealth derived from investments.

Chapter 5. INVESTMENT RELATED ISSUES

Article 25. Intellectual Property Rights and Traditional Knowledge

1. Each Member State shall ensure the enforcement of intellectual property rights within its territory and in accordance with the rights and obligations under the Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement and other relevant international instruments.

2. Member States may provide exceptions to the exclusive rights conferred by an intellectual property right, and allow for its use without the authorization of the right holder, including use by the government or third parties authorized by the government.

3. Member States and investors shall, in accordance with generally accepted international legal standards and best practices, protect traditional knowledge systems and expressions of culture as well as genetic resources that are sought, used or exploited by investors, or are otherwise relevant to their contracts, practices and other operations in such Member States.

4. Member States shall provide, within national laws, principles for the patenting of biological materials or of traditional knowledge systems and expressions of culture for the protection of local communities in such Member States.

Article 26. State Contracts

1. State contracts should be negotiated and implemented, subject to national laws and regulations, in a mutually supportive

manner with due respect to and taking into consideration the legitimate development objectives of Member States as set out in their investment policies, while giving due consideration to the rights and interests of investors.

2. Member States may set thresholds in the amount of tenders and procurements, as well as sectors and subsectors limited to the exclusive benefit of local suppliers, especially the small and medium size enterprises, provided that such measures are not applied in sucha manner as to nullify or impair the benefits accruing to any Member State under this Code.

Article 27. Public Private Partnership

Member States may cooperate on policies and other related issues that encourage and facilitate the use of Public Private Partnership to ensure development in Member States.

Article 28. Competition Law and Policy

Member States shall:

a. promote, maintain and encourage competition to enhance economic efficiency in investment at the national and regional levels;

b. prohibit any anti-competitive investment conduct that prevents, restricts or distorts competition at the national and regional levels;

c. adopt and implement clear and transparent rules on competition to increase the ability of the regional economy to attract investment and to maximize the benefits of such investment.

Article 29. Transfer of Technology

1. Member States shall put in place policies for the purpose of promoting and encouraging the transfer and acquisition of appropriate technology.

2. Investors are encouraged 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 in a manner that contributes to the research and development goals of the host State.

3. Member States undertake to cooperate and facilitate the international transfer of technology by various measures such as:

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

b. establishing or strengthening of technology transfer centers;

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 administration of laws and regulations with a view to facilitating the transfer of technology;

e. 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; and

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

Article 30. Environment and Technologies

1. Member States and investors should take all practicable steps to promote, facilitate, and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how, based on the relevant international instruments, without prejudice to their rights and obligations, where applicable, under these texts. The access and transfer of those technologies by the investors shall take place under fair and most favorable terms, including on concessional and/or preferential terms where mutually agreed, based on international and local standards for the transfer of environmentally sound technologies.

2. Investors are encouraged to provide adequate financial resources, including for the transfer of technology, needed for

implementing measures to assist the Member States that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to, or mitigation of those adverse effects.

Article 31. Banking Law and Policy

In order to facilitate investment flows, Member States are encouraged to establish a framework for co-operation and co-ordination between National Central Banks on banking regulatory and supervisory matters with the view to:

a. promoting the identification, measurement and management of banking risks, including systemic risks;

b. integrating the payment systems; and

c. sharing information regarding depositor protection, anti-money laundering compliance, co-operation in cyber tracking and criminality, and combating the financing of terrorism.

Article 32. Foreign Exchange Controls

1. Investors shall have free access to foreign exchange subject to the applicable laws, regulations and monetary policies in Member States.

2. Each Member State shall permit transfers to be made in a convertible currency at the market rate of exchange prevailing on the date of transfer.

3. Unless otherwise agreed by the investor, transfers shall be made in any convertible currency at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force.

Article 33. Prudential Measures

In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member State may adopt or maintain restrictions on investments under the provisions of this Code. These measures shall be temporary and be phased out progressively as there are changes in the initial circumstances surrounding the use of the measures.

Article 34. Labor Issues

1. Member States shall not encourage investment by relaxing domestic labor legislation. Accordingly, each Member State shall ensure that it does not waive or derogate from such legislation as an encouragement for the establishment, maintenance or expansion of an investment in its territory.

2. In this regard, investors may:

a. consult with the host State authorities and national employers' and workers' organizations in order to keep manpower plans in harmony with national social development policies, making optimal use of labor available locally and within the sub region to provide substantial employment or reduce unemployment;

b. ensure the employment and promotion of the host State nationals;

c. use technologies that specifically generate employment; and

d. promote employment in the Member States by entering into supply contracts with local enterprises and by prioritizing, to the full extent possible, the use and processing of local raw materials.

3. Investors shall comply with international conventions and existing labor policies and, in particular, not use child labor and shall support efforts for the elimination of all sort of child labor, including forced or compulsory labor within Member States.

Article 35. Foreign Workers and Visa Requirements

1. Member States may facilitate the granting of visas and permits to foreign workers, employees and consultants as designated by the investor in order to assist in the management of the enterprise or company and provide services to the investor in accordance with applicable national laws and regulations. Each such foreign worker, employee and consultant shall not be exempted from income taxes and social security obligations as per the conditions set forth in the national laws and procedures, if applicable, in Member States.

2. In relation to the management and operation of the investment in the host State, investors and business community members may enjoy the benefit of fast-track visa applications and smooth process in the issuance of such visas.

Article 36. Human Resources Development

1. Member States may develop national policies to guide investors in developing human capacity of the labor force. Such policies may include incentives to encourage employers to invest in training, capacity building and knowledge transfer.

2. Member States should develop national policies that pay particular attention to the special needs for youth, women and other vulnerable groups.

3. Member States should develop policies for the mutual recognition for certificates and diplomas.

Article 37. Environment

1. Member States shall ensure that their laws and regulations provide for environmental protection.

2. In this regard, Member States shall not encourage investment by relaxing or waiving compliance with domestic environmental legislation. If a Member State considers that another Member State has encouraged such relaxation or non-compliance, it may request consultations with the other Member State and the two Member States shall consult with a view to avoiding any such encouragement.

3. Investors shall, in performing their activities, protect the environment and where such activities cause damages to the environment, take reasonable steps to restore it as far as possible.

4. Member States and investors shall carry out Environmental Impact Assessment (EIA) in relation to investments.

Article 38. Cultural Diversity

Member States may adopt policies on cultural and linguistic diversity in promotion of investments.

Article 39. Taxation

1. This Code shall not affect the rights and obligations of a Member State under Double Taxation Agreements.

2. Member States are encouraged to put in place measures for transparency, streamlining due process and good governance in their fiscal legislations and regulations.

3. Member States, with a view to encouraging the movement of investment, may conclude between themselves Double Tax Avoidance Agreements.

4. Regional Economic Communities may establish a comprehensive network of Double Tax Avoidance Agreements.

Article 40. Consumer Protection

1. Member States and investors shall take measures to protect the health, safety and economic interests of consumers and their right to information, education and to organize themselves in order to safeguard their interests.

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

Chapter 6. DISPUTE SETTLEMENT

Article 41. State-State

Member States are encouraged to resolve any disputes regarding the interpretation and application of this code initially through consultations, negotiations or mediation.

1. Where Member States agree to arbitration, the arbitration shall be conducted at any established African public or African alternative dispute resolution center.

2. Where Member States are unable to resolve any dispute regarding the interpretation and application of this Code,

through any of the methods under Paragraph 1 of this Article, within six months, any of the disputing Member State may refer the matter to the African Court of Justice whose decision shall be final and binding.

Article 42. Investor-State

1. Member States may, in line with their domestic policies, agree to utilize the Investor-State dispute settlement mechanism. In the event that the Investor-State dispute settlement mechanism is agreed upon, the process below shall apply;

a. Disputes arising between investors and Members States under the specific agreements that govern their relations shall be resolved under those agreements;

b. In the event of an investment dispute between an investor and a Member State pursuant to this Code, the investor and the Member State should initially seek to resolve the dispute within six months at the latest, through consultations and negotiations, which may include the use of non-binding third-party mediation or other mechanisms;

c. If consultations fail, the dispute may be resolved through arbitration, subject to the applicable laws of the host State and/or the mutual agreement of the disputing parties, and subject to exhaustion of local remedies; and

d. Where recourse is made to arbitration under Paragraph 3, the arbitration may be conducted at any established African public or African private alternative dispute resolution center. Arbitration shall be governed by the United Nations Commission on International Trade Law (UNCITRAL) rules.

2. Once recourse is made to a particular forum of dispute settlement, the forum chosen shall be used to the exclusion of the other. Decisions of this particular forum shall be final.

Article 43. Counterclaims by Member States

1. Where an investor or its investment is alleged by a Member State party in a dispute settlement proceeding under this Code to have failed to comply with its obligations under this Code or other relevant rules and principles of domestic and international law, the competent body hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or on any damages awarded in the event of such award.

2. A Member State may initiate a counterclaim against the investor before any competent body dealing with a dispute under this Code for damages or other relief resulting from an alleged breach of the Code.

Article 44. Applicable Law In Disputes

Any claim or dispute arising from this Code shall be decided in accordance with the provisions of this Code as well as any other national, regional or international laws, rules or principles.

Chapter 7. PROCEDURAL ISSUES AND INSTITUTIONAL ARRANGEMENTS

Article 45. Application

1. Member States shall endeavour to adopt appropriate measures to apply the rules contained in this Code.

2. Member States shall co-operate with each other in addressing any impediment to the application of the rules contained in this Code.

3. Member States shall publish all relevant measures of general application, which pertain to, or affect the application of the rules contained in this Code.

4. Member States are encouraged to respond promptly to all requests by other Member States for specific information on measures related to investments under this Code.

5. In order to ensure the participation of all Member States in the implementation of this Code, there will be a transition period to provide Member States the necessary flexibility to address developmental needs and other economic concerns that they face to reduce disparities in the effect of implementation of this Code.

Article 46. Co-operation and Technical Assistance

Member States may, in order to facilitate the implementation of this Code, co-operate to provide technical assistance.

Article 47. Role of the African Union Commission and the Regional Economic Communities

1. The African Union Commission and the Regional Economic Communities shall co- operate on investment and other related matters.

2. The African Union Commission and the Regional Economic Communities shall design and develop programs to assist Member States, in the promotion and facilitation of investment.

Article 48. Non-retroactiyity

This Code does not create retroactive obligations or responsibilities for Member States or investors.

Article 49. Amendments and Revisions

1. Member States may submit proposals for the amendment or revision of this Code.

2. Any such amendment or revision shall be governed by the internal rules and procedures of the African Union Commission.

Article 50. Implementation Structure

The African Union Commission shall identify and establish the relevant mechanisms for the purpose of assisting Member States in the adoption of the rules contained in this Code within their national legislation and international investment agreements

Article 51. Adoption and Publication

1. This Code shall come into effect upon adoption by the Assembly of Heads of State and Goverment of the African Union.

2. This Code shall be published by the African Union Commission, in accordance with its relevant internal rules and procedures.

3. This Code shall be published in the African Union official languages: Arabic, English, French and Portuguese.

Article 52. Authentic Text

1. The original text of this Code is English.

2. This Code is drawn up in four (4) texts in the Arabic, English, French and Portuguese languages, all four (4) being equally authentic.