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Creating One African Market

**Keynote Speech on IIA Reform: Taking Stock and Moving Forward,
Monday 9th October 2017**

**Treasure Thembisile Maphanga, Director , Trade and Industry, African
Union Commission**

Protocol is observed.

On behalf of Mr. Albert Muchanga, Commissioner for Trade and Industry, I wish to thank UNCTAD for inviting the African Union Commission to be part of this high level panel on International Investment Agreements: Taking Stock and Moving Forward. I convey his apologies for not being present in person due to a prior engagement. He is looking forward to receiving the outcomes of this Conference.

Distinguished Ladies and Gentlemen

Since the Eighth Ordinary Session of the African Union Conference of Ministers of Trade, held in Addis Ababa in October 2013, African Ministers and the African Union Commission have been working on the possibility of an Africa-wide investment agreement. The initial step was to undertake some policy research work in order to develop an African approach to investment policy reforms. We have a continent with diverse arrangements but we also recognise it when we have common challenges which can be overcome when we speak with one voice and act in unison. Investment is one such area.

This initiative was always intended to build on the existing investment agreement landscape in Africa, the existence of a plethora of bilateral trade agreements (BITs), other international investment agreements such as the TRIMs under the WTO and the investment provisions under various Regional Economic Communities. As you are aware, there are over 840 BITs concluded by African countries (approximately 490 ratified BITs and 350 unratified BITs); 155 of which are intra-African treaties. At the regional level we have the SADC Protocol on Finance and Investment, COMESA investment Agreement, the EAC Model Investment Code and the ECOWAS Common Investment. SADC went further to develop a Model BIT to promote a balanced approach to addressing investors and member states interests.

The past decade has seen Africa become an important investment destination for intra-African investment and FDI from third countries. A rising middle class and important structural and economic reforms have helped galvanise such investment decisions, as well as the usual lure of natural resource acquisition.

Nevertheless Africa still plays catch up with other developing regions in attracting inward investment and FDI from third countries. The need to attract increased levels of FDI has always been the rationale for entering into BITs and international investment agreements. Nevertheless there has been no conclusive evidence that the existence of BITs actually results in real economic and social development in Africa.

Indeed there is growing consensus that such BITs should be substantially reformed or modernized in order to balance the rights and obligations of the host country and the investor, with particular emphasis on the dispute settlement mechanism provisions. At present, the worrying situation is that the majority of the 840 BITs still include provisions that allow foreign investors to bypass domestic courts and bring international arbitration proceedings that may negatively impact African countries' right to regulate key public policies such as health, environment and social policies. Changing course in this area is particularly challenging with some of the sunset clauses that were included in the first generation of BITs and a valuable part of the exchange of experiences lies in this area.

Distinguished Ladies and Gentlemen,

It is well recognised that investment, whether it is domestic inward investment or foreign direct investment (FDI), targeted at specific strategic sectors, has the potential to enable Africa to leapfrog the development ladder and catch up with some other developing and emerging market economies. Deepening regional integration is also an important aspect of enhancing the attractiveness of Africa as an investment destination – the challenges of small markets and heterogeneous regulatory environments are well known – as well as harmonising payment systems, capital markets and addressing

trade barriers are all important elements that have been identified as critical in moving forward.

Let us reflect on the actions that our continent has already embarked on in order to consolidate the existing agreements and adopt a more comprehensive approach to developing and agreeing on investment agreements for Africa. The development of the Pan African Investment Code is one such step forward.

Nearly a decade ago, the 3rd Conference of African Ministers in charge of Integration (COMAI III) held in Abidjan, Côte d'Ivoire, on 22-23 May 2008 decided there was a need, *“to develop a comprehensive investment Code for Africa with a view to promoting private sector participation”*.

Further, the ninth Meeting of AU-RECs-ECA-AfDB Coordination Committee, held on 25 January 2012, in Addis-Ababa, Ethiopia recommended that it was necessary *“to carry out a study with a view to establishing a Pan-African Investment Code”*.

All these actions have borne fruit, finally culminating in the draft Pan African Investment Code that is being coordinated by the Department of Economic Affairs in the African Union Commission. The PAIC is a general guide, it is not binding on Member States. For instance, Article 2 of the PAIC stipulates that the code is a *“guiding instrument”*. That said, the PAIC seeks to incorporate substantially all the provisions of the new generation of investment agreements. These include clauses on MFN, national treatment, expropriation, regulation in the public interest, corporate social responsibility, environment and labour standards, transparency, fair and equitable treatment of investors, etc. However, the PAIC has some shortcomings in that it has certain exclusions to national treatment, such as the right of the state to pursue its own development goals. It does not include clauses on fair and equitable treatment and significantly it omits to have a clause on investor-state dispute settlement.

The PAIC, despite its shortcomings is a solid foundation on which to build the new investment agreement under the CFTA. Article 3 of the PAIC specifically states “*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*”.

Distinguished Ladies and Gentlemen;

Allow me to recall that the 25th Ordinary Session of the Assembly of Heads of State and Government launched the CFTA negotiations through adoption of Decision (Assembly/AU/Dec 569 (XXV)). That Decision envisaged the development of an overall investment agreement in the second phase of negotiations for the CFTA inter alia.

Notably, the most important feature of the CFTA investment agreement would be that it would be legally binding on parties to it. It will also be a product of negotiation by the CFTA Negotiating Institutions guided by the adopted negotiating principles. Since one would expect it to build on the *acquis* of the best practices amongst the RECs as well as the PAIC, the CFTA Investment Agreement would be compatible with the multilateral commitments of the member states, including those under the TRIMs. Our approach to investment in Africa therefore needs to take into consideration the realities of the existence of BITs, Double Taxation Treaties, the new generation investment agreements and the aspirations of the PAIC, *without compromising the development and transformation imperatives of our member states*. The current situation requires us to reflect on the linkages between BITs and DTTs for greater policy coherence and preserving policy space.

As the continent prepares for the CFTA negotiations on Investment in the second phase of negotiations, there are some important issues to consider which will be discussed in more detail during the lunchtime side event organised by UNECA tomorrow.

As part of the Trade in Services Protocol, some of the issues are already on the table during the first phase which will conclude in December 2017. The CFTA Agreement is expected to be adopted by the AU Assembly of Heads of State and Government in January 2018.

As I conclude, I believe that even as we push for the reform of the BITs and dispute settlement mechanisms in various investment agreements, Africa will continue to work expeditiously on its own framework investment agreement under the CFTA. Before negotiations commence, we see an important role for technical partners such as UNCTAD that has well respected expertise in this area. There is a solid track record of UNCTAD support to AU member states in their investment policy reform processes including the Annual World Investment Report which is a useful resource for policymakers. Since the opening of the UNCTAD office in Addis Ababa, I can attest to the broader scope of cooperation we have developed with this organisation – including valued technical support for the CFTA negotiations process which the Department of Trade and Industry is facilitating – effectively driven by the 55 AU Member States. It is therefore natural that in the context of preparations for the next phase of negotiations and in response to the directives we received from AU Ministers of Trade in November 2016 that AUC and UNCTAD move forward to define a joint work programme in this area amongst other equally important areas such as competition policy. Regulatory Reform and harmonisation is a key priority in Africa and scaling up capacity building at national, regional and continental levels is timely, welcome and will be greatly appreciated.

I have appreciated the insightful statements from distinguished fellow panellists, and look forward to the plenary debate that will ensue as the African Union Commission is keen to learn from best practices in Africa and across the globe and I equally call on all our partners to lend an ear to Africa's voice on these matters – not as a taker of rules but as an equal partner at the table defining rules collectively in furtherance of UN Sustainable Development Goals 2030, which are aligned to the AU Agenda 2063: moving forward from the world we have to the world we want.

I thank you for your kind attention.