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Annex V

DRAFT DECLARATION ON THE RISK OF INVESTOR-STATE DISPUTE SETTLEMENT WITH RESPECT TO COVID-19 PANDEMIC RELATED MEASURES

1. WE, the Ministers of Trade of the African Union Member States, meeting at the 14th meeting of the African Union Ministers for Trade (AMOT) on 24th November 2020;
2. DEEPLY CONCERNED that the COVID-19 Pandemic poses significant challenges to the already strained health and lives of our citizens, management of the economy and the protection of workers in Africa;
3. REAFFIRMING the importance that Member States attach to the role of investment in achieving Agenda 2063 and the Sustainable Development Goals (SDGs) and the need to maintain the right and ability to regulate such investments in the public interest;
4. TAKING INTO ACCOUNT the United Nations General Assembly resolution 74/270 of April 2, 2020, recognizing the unprecedented effects of the COVID-19 Pandemic and calling for intensified international cooperation to contain, mitigate, and defeat the virus;
5. CONSIDERING the ongoing work of the United Nations Commission on International Trade Law (UNCITRAL) Working Group III in addressing the possible reform of investor-state dispute settlement (ISDS);
6. ALSO CONSIDERING the potential for disputes arising between investors and states under investment treaties in relation to the measures taken by African governments to respond to the COVID-19 Pandemic, as highlighted by a number of organizations including the United Nations Conference on Trade and Development (UNCTAD) and the African Development Bank (AfDB);

7. NOTING that as the COVID-19 Pandemic increasingly spreads across Africa and governments continue to take preventive measures to protect public health, such as through lockdowns, curfews, social distancing, restrictions of movement across borders, and supporting their economies, such as fiscal and financial support for companies and employees;
8. CONCERNED that the high costs associated with ISDS could further exacerbate a situation of limited government financial resources and undermine member states' efforts to control and treat COVID-19 Pandemic, and to address its negative impacts on their economies;
9. COGNIZANT of the need to ensure that public budgets are directed toward responding to the COVID-19 Pandemic and revitalizing African economies during and following the recovery phases;
10. RECOGNIZING therefore that governments' efforts to curb the spread of the virus and to revitalize the economy need to be accompanied by measures to minimize the risk of ISDS claims arising from COVID-19 Pandemic related measures;
11. EMPHASIZING the need of our governments to act, and to continue to act, to protect the health and lives of our citizens and the effective management of the economy in accordance with international law;
12. CONFIDENT that African Governments' treaty partners will act in solidarity to engage in a productive dialogue to ensure that ISDS claims do not undermine the Member States' efforts to address the far-reaching impacts of the COVID-19 Pandemic.

HEREBY:

- i) Invite Member States to explore all available options under international law to mitigate against the risk of COVID-19 Pandemic related ISDS claims, considering the interaction between pandemics and international investment law.
- ii) Commit to work towards the adoption of a set of guidelines for African governments to minimize the challenges of ISDS and to address and reform existing investment treaties.
- iii) Request Member States to consider renegotiating their investment treaties by integrating provisions better suited to exceptional situations in accordance with new trends at the regional and international levels.
- iv) Invite Member States to explore all possibilities for mitigating the risks of ISDS, including a mutual temporary suspension of ISDS provisions in investment treaties in relation to COVID-19 Pandemic government measures.

- v) Call upon African Union to consider incorporating relevant issues raised in this declaration within the Investment Protocol to the AfCFTA and other relevant negotiations.
- vi) Requests the African Union Commission to provide support to Member States in the on-going negotiations within different organisations that are working towards the development of legal instruments to address the risks of ISDS for COVID-19 Pandemic related measures and other global health threats in accordance with international law.

Adopted virtually on 24th November 2020.