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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

REPORT ON THE NON-DELIBERATED AGENDA ITEMS FOR THE FIFTY-FIRST ANNUAL SESSION OF AALCO

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THE STATUS AND TREATMENT OF REFUGEES
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THE STATUS AND TREATMENT OF REFUGEES

I. Introduction

1. The Asian-African Legal Consultative Organization (AALCO) has been concerned with the issues relating to the status and treatment of refugees ever since this topic was introduced in its agenda in 1964 at the behest of Arab Republic of Egypt. Within AALCO, this has been a keenly debated subject during its Annual Sessions, which has contributed immensely to the exploring and framing of policies that take into account the rights of refugees in the Member States. While working in pursuance of its mandate, AALCO has collaborated with the Office of the United Nations High Commissioner for Refugees (UNHCR), both formally as well as informally. This cooperation and mutual assistance was formalized by the Signing of the Memorandum of Understanding (MOU) between the two Organizations on 23rd May 2002. The MOU provides for the undertaking of joint study and envisages holding of seminars and workshops on topics of mutual interest and concern.

2. It is pertinent to remember here the distinguished record of contributions on the part of AALCO to the cause of the protection of refugees. This includes the adoption of the "Principles Concerning the Treatment of Refugees" in 1966 at its Eighth Annual Session, which are commonly known as *'Bangkok Principles'*. Further study improved upon these principles by adopting two addendum. The first which was adopted in 1970 at the Accra session, contained an elaboration of the *'right to return'* of any person who, because of foreign domination, external aggression or occupation, has left his habitual place of residence. Furthermore, in the year 1987, AALCO had adopted ***'****Burden Sharing Principles'* as an addendum to the Bangkok Principles of 1966. These principles have highlighted the growing trend towards finding durable solutions to the refugee problems and for international assistance to relive the burden of those faced with large scale influx of refugees. Burden and responsibility sharing arrangements, including resettlement, represent a significant component of durable solutions for displacement situations. These principles provide a legal framework, which while "recommendatory in nature" nevertheless forms guiding principles for state practices in the Asian-African region. They remain a term of reference and an expression of the region's concern for refugees.

3. Apart from the adoption of the 2001 Revised text of the Bangkok Principles, two other important initiatives of AALCO related to refugee protection needs to be mentioned here; the "Concept of Establishment of Safety Zones for Internally Displaced persons" and the preparation of the "Model Legislation of Refugees". As regards the concept of safety zone (an area within a Country to which Internally Displaced Persons (IDPs) and prospective refugees can flee to secure assistance and protection)**,** AALCO had adopted *"A Framework for the Establishment of a Safety Zone for Displaced Persons in Their Country of Origin"* in 1995. It incorporates some twenty principles that provide for; the aim of the establishment of safety zone; the conditions for establishment; the supervision and management of the zone; the duties of the Government and of the conflicting parties involved; and the rights and duties of the displaced persons.

4. Besides, the AALCO Secretariat was mandated by the Thirty-First Session that took place at Manila, Philippines in 1996, to prepare draft model legislation on refugees to assist Member States in enacting national laws on refugees. Accordingly, the Secretariat had

submitted **"***A Model Legislation on the Status and Treatment of Refugees"* to the Thirty-Fourth Annual Session held at Doha in 1995. The draft emphasized the need to provide for the rights and duties of refugees; rules for the determination of refugee status; mechanisms to address the refugee exodus etc.

5. It is also pertinent here to recall the special study that was undertaken by AALCO along with UNHCR on "*The Problem of Statelessness: An Overview from the African Asian and Middle Eastern Perspective*", which was released during the formers' Forty-Sixth Annual Session that took place at Cape Town, Republic of South Africa in 2007.

6. The AALCO Secretariat's Report for the current year focuses on the ongoing displacements due to conflicts and natural disasters that have recently occurred or are currently occurring and efforts made by the UNHCR and other agencies to ease them. In particular, conflicts arising in North Africa, in Ivory Coast, Syria and Sudan as well as the natural disasters in Asia and Eastern Africa have contributed to the homelessness of millions. Developing countries have the greatest burden to bear with respect to refugees particularly the Internally Displaced Persons ("IDP"), according to UNHCR Deputy High Commissioner for Refugees, Alexander Aleinikoff, as many as eighty percent of the world's displaced coming from and cared for in developing countries and the greatest objections coming from regions which do not bear a proportionate burden of acceptance and hosting refugees. With this in mind, the conditions affecting displacement and implementation of measures in these troubled regions merit a closer look.

II. Displacement Events in Africa

7. The year 2011 saw a large number of emergencies arising in Africa with armed conflict, persecution and natural disasters forcing growing numbers of people to flee their homes. These numbers of displaced persons can only be expected to increase if famine and violence persist in Somalia and tension mounts along the border between Sudan and South Sudan.

8. Ivory Coast has seen the internal displacement of an estimated half-million people with approximately 200,000 seeking refuge abroad, primarily in Ghana as the country recovers from its post-election crisis.

9. According to the UNHCR, an estimated quarter-million refugees have fled Somalia in 2011 due to the violence unfolding in the central and southern part of the country. This situation has been exacerbated by drought and famine. More than 900,000 Somali refugees have been registered by the UNHCR and it is estimated that more than one-third of the refugee population in sub-Saharan Africa is comprised of Somalian refugees. While this displacement of refugees into Kenya and Ethiopia has strained the ability of facilities in those countries to accommodate them, efforts are underway to meet these increased demands through the creation of new refugee camps. The UNHCR has also scaled up its presence along the border regions and in Mogadishu in order to protect and assist IDPs.

10. South Sudan's referendum on independence has been followed by armed conflict along its border with Sudan which has caused the displacement of large numbers of people in both countries. This has led to concerns of the loss of nationality of these displaced

individuals. The inter-tribal fighting and clashes between the Government and rebel movements also continues to displace people.

11. Meanwhile, Southern Africa, especially South Africa, has seen a growing influx of migrants from the conflict, drought and poverty elsewhere in Africa, particularly in the East and Horn of Africa. The Governments of some of these countries have responded by imposing increasingly stringent and restrictive measures while returning these migrants and refugees to their former countries of transit and denying access to asylum-seekers.

III. The UNHCR's Priorities in Africa

12. There is a strong likelihood for the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa coming into effect this year, providing an important new international legal framework for the protection of IDPs in Africa Also, as of October 2011, only eight countries in sub-Africa were party to the 1961 Convention on the Reduction of Statelessness while thirteen had signed and ratified the 1954 Convention on the Status of Stateless Persons. A primary goal of the UNHCR is to urge States to ratify the two conventions and assist them in identifying stateless and potentially stateless persons as well as formulating laws and policies to prevent and reduce and prevent statelessness.

13. The recent conflicts and displacement of people in sub-Saharan Africa has seen the rise of attempts to close borders and restrict entry. Another main priority of the UNHCR is to ensure that the principle of *non-refoulement* is respected, as is the access to territory for refugees and asylum-seekers by working with countries to keep borders open. To affect this, the UNHCR plans to promote the development of protection-sensitive regional and national migration policies in line with its 10-Point Plan of Action.

14. Sexual and gender-based violence remains a principal concern, and UNHCR's updated strategy to deal with such violence will guide its prevention and response efforts. Particular attention will be paid to the needs of displaced women and children and considerations of age, gender and diversity will be brought into consideration for programme activities. Key priorities with regard to the protection of children include registration and documentation of displaced children at birth; equal access to education, especially for girls; completion of Best Interest Determination (BID) for unaccompanied, separated and at-risk children; and reduction of malnutrition and mortality through the provision of greater access to health care, supplementary nutrition and therapeutic feeding.

15. Malnutrition and anaemia will also be given priority as will the improvement of standard of shelter, energy, water, sanitation and access to education. In Nairobi, Kenya, a pilot site for UNHCR's urban refugee policy, the Government has now assumed responsibility for the registration and documentation of asylum-seekers and refugees in urban areas. Refugees now also have access to city health clinics, with referrals for secondary and tertiary treatment possible to designated health clinics. UNHCR and UNDP also plan to implement a joint programme under the Transitional Solutions Initiative in support of self-reliance activities in the refugee camps in eastern Sudan. The goal is to transforming some of the camps into Sudanese villages and closing others.

16. Resettlement is a vital protection tool and is seen as a form of solidarity and responsibility-sharing by host Governments. The UNHCR will prioritize the resettlement of Somali refugees and Eritrean refugees in eastern Sudan. However, problems faced by the resettlement process include limited space, the absence of agreements on group settlement, growing stringency in security procedures and difficulties in gaining entry to asylum countries. The UNHCR is also focused on improving the coordination between Governments, the UN and NGO actors in order to provide better protection to refugees. All these actors are

17. It is estimated that the vast majority of IDPs in Uganda, up to about 95% of the 1.8 million displaced persons, have returned home following the cessation of violence in northern Uganda and this progress has been lead to the UNHCR handing over its activities and responsibilities to the Uganda Human Rights Commission. However, Uganda's refugee situation remains tricky due to the volatility prevalent in neighbouring states. With South Sudan establishing State structures, continuing violence in the Democratic Republic of Congo and the drought and food crisis in Somalia. As it stands, Uganda is host to over 150,000 refugees and asylum-seekers from these countries.

18. One immediate priority in Uganda is that concerning the cessation of refugee status of some categories of Rwandan refugees and their subsequent repatriation. With less than 1% of Rwandan refugees seeking repatriation or willing to repatriate, continued efforts must be made for their protection and assistance. The prospect of integration of the Rwandan refugees as well as Congolese refugees facing similar circumstances is also one that is sought to be explored.

IV. Refugee situations in Asia

19. An estimated 30% of the world's refugee population are hosted in Asia. There exists an unfortunate lack of normative frameworks for refugee protection in Asia which has led to the UNHCR working towards the implementation of a Regional Cooperation Framework. 2011 saw the Regional Conference on Refugee Protection and International Migration in Central Asia saw the adoption of the Almaty Declaration in thee 195 1951 Refugee Convention by Nauru in June, and the ratification of the 1954 Statelesness Convention by the Philippines and Turkmenistan in May and August respectively.

20. The Almaty Declaration is meant to form the basis for future cooperation and dialogue on the background, scale and reasons for mixed-migration movements in Central Asia, and appropriate follow-up. The UNHCR is helping countries in Central Asia to develop a regional action plan aimed at differentiated, but protection-sensitive border management, and asylum systems tailored to the realities of this region.

21. Among the largest refugee populations in the world are the ones associated with the Islamic Republic of Iran and Pakistan with 1.7 million Afghan refugees being hosted by Pakistan in addition to over 400,000 IDPs within Pakistan. Iran also finds itself host to approximately a million Afghan refugees. Additionally, Tajikistan finds itself to several thousand Afghan refugees. UNHCR's operation in Pakistan will focus on supporting the Government in implementing its Afghan Management and Repatriation Strategy. This includes prioritizing voluntary repatriation, expanding the Refugee-Affected and Hosting Areas (RAHA) programme, and putting in place effective mechanisms while exploring

alternative arrangements for those remaining in Pakistan. UNHCR will also continue to advocate for the Government's accession to the 1951 Refugee Convention and the development of its national legislation.

22. Continuing political, social and economic instability in Central Asia has led to large populations of IDPs, refugees and asylum seekers. In particular, ethnic violence in southern Kyrgyzstan has led to massive populations seeking refuge in Uzbekistan..

V. UNHCR's Priorities in Asia

23. One of the main priorities is the safeguarding of asylum space particularly in the context of mixed migration and urban settings. UNHCR's engagement in multilateral forums aims to foster more systematic and predictable responses to mixed migration, as well as to expand protection space in the Asia and the Pacific region. The Regional Cooperation Framework adopted at the Fourth Bali Process Ministerial Conference, held in March 2011, is one such example. The framework will be made operational through bilateral and multilateral arrangements with member States, and in cooperation with IOM.

24. Another priority is to find solutions for protracted refugee situations particularly involving Afghan refugees in Pakistan and Iran who have been living in a very protracted displacement situation. The voluntary repatriation of these refugees is a pressing need as well as developing alternative stay arrangements.

25. In Thailand, UNHCR will focus on consolidating its protection activities for camp-based refugees in the country and promote international protection standards for its urban refugee population. This will involve advocacy and continued engagement with stakeholders, including the Government, to bring about the policy changes that are needed to attain durable solutions and increase the protection space for refugees.

26. UNHCR will continue to work closely with the Government of Nepal, resettlement countries and IOM to seek durable solutions for refugees from Bhutan through the large-scale resettlement programme in the country. As of August 2011, the programme, which was launched four years ago, had reduced the camp population from some 108,000 refugees to some 63,000. In a parallel initiative, UNHCR is cooperating with the Government of Nepal and other stakeholders to consolidate refugee camps and introduce the Community-Based Development Programme in refugee-hosting and affected areas. UNHCR is also seeking other comprehensive solutions -- including possible voluntary repatriation to Bhutan -- for refugees in the country.

27. UNHCR also seeks to solve the problem of IDPs in a lasting manner, particularly those displaced in Pakistan and Kyrgyzstan. In Pakistan, UNHCR responded to the devastating floods of 2010 with relief assistance reaching an estimated 2 million people by the time the emergency phase of the response ended in early 2011. UNHCR also asted the Govt of Pakistan in drafting a national IDP policy. In Kyrgyzstan, UNHCR will continue to assist the IDPs and returnees in the south of the country through community development, re-establishment of the rule of law, livelihood and infrastructure projects. In the Philippines, UNHCR assumed leadership of the protection cluster for the IDP situation in the southern region of Mindanao in 2010. It has been working with the authorities to ensure that the needs

of the displaced and vulnerable populations are met through the implementation of a number of programmes including Quick Impact Projects (QIPs) in IDP returnee communities. In 2012, UNHCR is also planning to expand its geographical coverage through the "protection by presence" strategy.

28. In Sri Lanka, UNHCR has supported the Government's efforts in ensuring the voluntary return of more than 216,000 IDPs to their homes over the past two years. It has also supported their reintegration through monitoring, QIPs, the provision of non-food items and the construction of shelters. UNHCR will continue to advocate for durable solutions for the remaining IDPs, who were displaced during the earlier phases of the conflict, while reinforcing its support to the voluntary repatriation of refugees.

29. Massive efforts have also been taken to reduce and prevent statelessness through widespread registration excercises and identification of refugee populations and of stateless persons in Turkmenistan, Myanmar and Bangladesh.

VI. Comments and Observations of AALCO Secretariat

31. The 1951 UN Convention on the Status and Treatment of Refugees, consciously excludes persons who have not crossed an international border from UNHCR's competence and yet, nearly half the people assisted by UNHCR today are internally displaced. This important evolution rests in part on the restrictive and impractical nature of UNHCR's original Statute, which necessitated a mandate extension. Additionally, UNHCR's reorientation is a product of underlying post-Cold War political and international sociological factors, in particular the emergence of international humanitarianism, the erosion of the principle of absolute sovereignty, the emergence of “new wars”, and asylum fatigue. Undoubtedly, UNHCR's involvement with IDPs is debatable. Critics claim that it lacks a legal basis and that it ultimately undermines the institution of asylum. Proponents highlight that in many of today's complex emergencies it is impossible to distinguish between people who have crossed an international border and those who have not. In this context, UNHCR should act pragmatically based on humanitarian necessity, as opposed to rigid normative criteria[1].

32. Having said that, the UNHCR, as the primary agency of the United Nations designed to deal with the situation of refugees, has made significant contributions to the protection of refugees and supporting the international system of protection. It has played a central role in responding to the needs of refugees and other displaced peoples all over the world. In the past two decades or so, the international environment in which the UNHCR operates has changed dramatically as has the work it carries out. The number of “people of concern” to UNHCR has grown, so has the complexity of the problem of forced displacement.

33. The UNHCR has assisted not only traditional refugees but also a broad category of “persons of concern” which included Internally Displaced Persons, Returnees and other victims of conflict. As well as its mandate to protect and assist refugees, UNHCR also has another, lesser known mandate, to protect stateless persons and to prevent and reduce statelessness. It has also found itself operating in new circumstances, particularly in the midst

[1] David Lanz, Journal of Refugee Studies (2008), 21 (2) published by Oxford University Press

of violent conflict. Consequently, it has operated alongside UN peace keepers and other military forces. These changes illustrate the enhanced roles that both refugee crises and the UNHCR play in contemporary world politics.

34. The UNHCR's statutory mandate has been supplemented through General Assembly resolutions and EXCOM conclusions in a manner that ensures that UNHCR continues to play a key role in the growth and refinement of international refugee law. In addition, UNHCR's contribution to a second source of international law, customary international law relating to refugees, has become increasingly important.

35. Be that as it may, the international community's commitment to refugee protection is undeniably facing unprecedented pressures.

36. The task of UNHCR in persuading States to cooperate in the pursuit of refugee protection and durable solutions has been hampered by the fact that government's reaction to refugees have always been hostile. Refugees are also being perceived as a burden on local and national economies and have been blamed for increased pressures on social cohesion and national identity. This is something that needs to be challenged.

37. Another vital challenge facing the UNHCR pertains to the exclusionist measures that some Western States have put in place which result in severe undermining of the institution of asylum. Addressing this is of critical importance since the negative attitude adopted and negative measures taken by these States are directly related to the implementation of the 1951 Convention and Protocol.

38. The 1951 Convention has saved the life of millions of people over the years. We hope that it will continue to serve and strenghten the international protection regime through the reaffirmation and practical evolution of its principles. However, the fact that the 1951 Convention is inadequate for refugee protection because it is not flexible in the face of what are perceived to be the new refugees; those fleeing for example, from ethnic violence in Bosnia or Kosovo, also needs to be realized. This is because, the definition of refugee as contained in the 1951 Convention remains relatively narrow, covering only people fleeing *individual* persecution by their governments.

39. Apart from that, there are new trends in forced displacement which are challenging for us all. It may be remembered here that the 1951 Convention responded to displacement due to persecution and war. Today, there are many other drivers of displacement that include: population growth, urbanization, climate change, food insecurity, energy demand and others. As the 1951 Convention has aged, the landscape of international displacement and migration has become increasingly complex, begging questions as to the sufficiency of the definitions and protections provided in the Convention. The above mentioned challenges are only few, of the many critical issues that are in urgent need for creative solutions.

40. In the introduction to this paper all the accomplishments of AALCO in the area of refugee protection have been noted, however, it has been quite some time that AALCO had a joint seminar or workshop with the UNHCR. This idea could be further explored particularly in light of the new developments taking place in the displacement landscape, a Model Law on Refugees and Internally Displace Persons in the Asian-African region could be drawn up.

VII. ANNEX

SECRETARIAT'S DRAFT
AALCO/RES/DFT/51/S 3
22 JUNE 2012

THE STATUS AND TREATMENT OF REFUGEES
(Non-Deliberated)

The Asian-African Legal Consultative Organization at its Fifty-First Session,

Having considered the Secretariat Document No. AALCO/50/COLOMBO/2011/S 3;

Reaffirming the importance of the 1951 Convention relating to the Status of Refugees (the 1951 Convention) together with the 1967 Protocol thereto, as complemented by the Organization of African Unity Convention of 1969, as the cornerstone of the international system for the protection of refugees;

Commends the Office of the United Nations High Commissioner for Refugees (UNHCR) for the important contribution which it has made towards the protection of refugees and internally displaced persons, since the establishment of the UNHCR:

Deplores the widespread violations of the principle of non-refoulement and of the rights of refugees in many parts of the world.

1. **Acknowledges** the **desirability** of comprehensive approaches by the international community to the problems of refugees and displaced persons, including addressing root causes, strengthening emergency preparedness and response, providing effective protection and achieving durable solutions.

2. **Calls upon** all States that have not yet done so to ratify/accede to and to implement fully the 1951 Convention relating to the Status of refugees and the 1967 Protocol thereto and other relevant regional instrument as the case may be,

3. **Directs** the Secretariat to explore the possibility to jointly organize a seminar/workshop in collaboration with the UNHCR towards studying the feasibility of drafting a Model Law on Refugees and Internally Displaced Persons in the Asian-African region; and

4. **Decides** to place this item on the provisional agenda at its Fifty-Second Annual Session.

2. THE LEGAL PROTECTION OF MIGRANT WORKERS

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THE LEGAL PROTECTION OF MIGRANT WORKERS

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LEGAL PROTECTION OF MIGRANT WORKERS

(Non-Deliberated)

I. INTRODUCTION

1. The item entitled "Legal Protection of Migrant Workers" was included on the agenda of AALCO at the reference of the Government of Philippines during AALCO's Thirty-Fifth Annual Session held at Manila in 1996. Even since, it has been a subject of intense deliberations at various Annual Sessions of AALCO and occasionally in special meetings.

2. The resolution adopted at the Thirty-Sixth Session at Tehran in 1997 directed the AALCO Secretariat to study the utility of drafting a Model Legislation on the legal protection of migrant workers within the framework of the *1990 UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* [the ICMW, 1990], international labour Conventions and Recommendations along with the relevant resolutions of the UN General Assembly. This was in accordance with the established practice of AALCO to adopt legal instruments in the nature of principles, guidelines or model legislations to enable Member States to incorporate internationally recognized principles into their national legal systems.

3. The Member States of AALCO were urged to transmit to the AALCO Secretariat their national legislations if any, on the situation of migrant workers. Both the Government of Sri Lanka and the Government of Philippines responded by reiterating the immense significance of having a model law on the topic. Be that as it may, the year 2000 saw a fresh impetus being given to the topic when AALCO entered into a Cooperation Agreement with the International Organization for Migration [IOM].

4. Against this backdrop, Resolution SP/1 "Special Meeting on Some Legal Aspects of Migration" adopted on 24th June, 2001 at the Fortieth Annual Session of AALCO *inter alia* directed the Secretariat to explore the feasibility of drafting a "Model Agreement for Cooperation Among Member States on Issues Related to Migrant Workers" and requested the Secretary-General to consider the possibility of convening an open-ended working group for an in-depth consideration of these issues. Pursuant to that mandate, a *draft Model Agreement*[1] was prepared by the Secretariat in collaboration with IOM. Useful input was also received from the Office of the High Commissioner for Human Rights (OHCHR). This agreement, which has a Preamble and twenty articles, is yet to be adopted formally by the Member States.

[1] The complete name of which is: Draft Regional Model Cooperation Agreement Between States of Origin and States of Destination / Employment within AALCO Member States

5. The AALCO Secretariats Report for the last year focused on the issue of trafficking within a broader framework of migration. In the year before that, attention was bestowed on the unfolding issue of global economic meltdown and its impact on migration. In addition to these issues, whose effects are yet to be fully charted out and understood by the international community, another area of concern is the migration that is caused due to environmental reasons. The Report for this year focuses on the thematic debate on migration and development that took place in May 2011 at the UN General Assembly.

II. UNGA Thematic Debate on Migration and Development

6. It may be recalled that the first High-level Dialogue on International Migration and Development in 2006 established that international migration can contribute to development if supported by the right policies. Since 2006, Governments and the international community have been pursuing a variety of policies and programmes to maximise the development impacts of international migration, and to reduce its negative effects.

7. On 19 May, 2011, the United Nations General Assembly held an Informal Thematic Debate on Migration and Development, which aimed to contribute to the on-going dialogue on international migration and development, as well as to the process leading to the second High-level Dialogue on International Migration and Development, to be held by the UN General Assembly in 2013.

8. The United Nations Secretary-General Ban Ki-moon on Thursday opened the General Assembly's first-ever thematic debate on international migration and development with a strong call for an intelligent, cooperative approach, focused on the positive "to harness the unstoppable force of migration for the greater good". Organized by the President of the General Assembly Joseph Deiss (in accordance with resolution A/RES/63/225), the Thematic Debate aimed to examine and review the obstacles and benefits of migration policies and practices, in order to develop more effective ones that support migration's positive contributions to development. It featured two panel discussions: one devoted to the contribution of migrants to development; and another on improving international cooperation among all stakeholders on migration and development.

9. Opening the Thematic Debate, Joseph Deiss highlighted that – since the first High-level Dialogue on International Migration and Development in 2006 – countries have made progress in developing strategies and policies that support migration's positive contribution to development, including through better collaboration and dialogue; the creation of various funds, facilities and programmes; strengthened ties with Diaspora networks; and the fallen costs for remittances to be sent home.

10. In his opening remarks, UN Secretary-General Ban Ki-moon urged participants not to be misled by the often false assumptions that exist around migration. "Often the debate over migration devolves to loss: migrants overstretch social safety nets, some say. Others worry that

they will overwhelm education systems and take away jobs. But statistics show that the economic contribution of migrant workers far outweighs any costs." He continued by noting that migrants are generally willing to do the so-called "3D" jobs – jobs that are dirty, dangerous and difficult. Besides, he remarked that migrant workers are not always what we imagine – they are not always low-wage, poorly educated labourers. "It is easy to see the negatives but it is much more difficult to appreciate the positives. And yet those positives ultimately overshadow the negatives."

11. While chairing the panel discussion on "the contributions of migrants to development" William Lacy Swing, Director General of the International Organization for Migration (IOM), emphasized that "migration is humanities' oldest action against poverty – the powerful manifestation of an individual's desire for development, dignity and a decent life." He welcomed the growing acknowledgement, on the part of governments and on the part of international organizations that skilled and unskilled migrant labour is desirable and needed to recover from the economic crisis and encourage economic growth. More importantly, he underscored that large scale migration is both inevitable and unavoidable. However, if managed intelligently and humanely, large scale migration is desirable and necessary.

12. During the panel discussion on improving international cooperation, Thetis Mangahas, Senior Migration Specialist and Deputy Director of the ILO Regional Office for Asia and the Pacific, reiterated the positive contributions of migrants, in terms of service provisions, economic development, and remittances, but warned for the lack of progress to protect migrant workers from labour exploitation and abuse. Admitting that it is not an easy task to develop the right policy and legislative responses, as policy constraints differ for both source and destination countries, she did emphasize that all countries should strengthen their institutional capacity and unity of purpose to meet difficult labour migration challenges. Moreover, source and destination countries should seek shared values on which to base future bilateral, regional and multilateral cooperation in the field of migration. Cooperation is a key element, as is the inclusion of all stakeholders (including migrant workers, social partners (employers and trade unions) and civil society) in the formulation and implementation of migration policies, she concluded.

13. Pedro Serrano, Acting Head of the Delegation of the European Union to the United Nations, delivered a statement on behalf of the European Union, which underlined the need for increased dialogue and cooperation among countries. He explained that migration cannot be addressed by one country alone, not even by a group of countries gathered in a regional framework - it has to be discussed far wider than that - with all the countries concerned. He also noted that the EU welcomes an evolving and focused (informal) dialogue at the global level as it could contribute to improved sharing of good practices, a more consolidated evidence-base and more constructive partnerships between countries and across regions. Marcelo Cesa of the Permanent Mission of Argentina delivered a statement on behalf of the Group of 77 and China. The statement called upon all Member States to renew the political will to address the challenges and opportunities of international migration, both regular and irregular, in a balanced manner and to promote respect for and protection of human rights in the development and implementation of policies regarding migration.

A. Panel I: The Contribution of Migrants to Development

14. The informal thematic debate's first panel, chaired by William Lacy Swing, Director-General of the International Organization for Migration (IOM), featured expert presentations by: John Connell, Professor of Human Geography, University of Sydney; Maria Fernanda Espinosa, Minister of Natural and Cultural Heritage of Ecuador and that country's former Permanent Representative to the United Nations; Abdelhamid El Jamri, Chairperson of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, and Member of the Council for the Moroccan Community Abroad; Chukwu-Emeka Chikezie, Co-Founder, African Foundation for Development (AFFORD); Göran Hultin, Chief Executive Officer, Caden Corporation, and Contributor to the Talent Mobility Project, World Economic Forum.

15. Opening the discussion, Mr. Swing said the panel's objective was very straightforward: to share best practices and lessons learned regarding migrants' contributions to development and to identify ways to leverage those contributions to promote development and foster human growth in both origin and destination countries.

16. We find ourselves, not only with a world on the move, but we find it moving amid a rising public wave of anti-migrant sentiment – in parliaments, at the community level, and in the media," he said. The result of that trend was that the overwhelming positive contributions by the overwhelming number of migrants was often overlooked. He believed that migration was "the world's oldest poverty reduction strategy", and must be respected and nurtured as such. Indeed, after the Second World War, migration had been largely responsible for building up the post-war economies of the "new world". In recent years, it had also contributed to building the economies and social fabric of European and other countries.

17. Yet, when Governments waxed nostalgic about being "migrant nations", they were all too often talking about those migrants of yesteryear, and not the ones that were arriving on their shores in such large numbers today, he continued. That new generation of migrants faced, not only mounting xenophobia, but isolationist policies that made it ever more difficult for them to live and work abroad. But, Mr. Swing said: "Migration is inevitable, unavoidable and necessary; and if intelligently and humanely managed, desirable."

18. Focusing his comments on health impacts, Professor Connel said migration was a response to uneven development – low wages and lack of employment opportunities, as well as limited access to technology, among other social factors – and increased population movements had both positive and negative effects on national health-care systems. Severe staff and skill shortages in the health systems of many countries fostered active recruitment of health workers from abroad. For countries of origin, that outflow of health professionals put a strain on health-care wards and reduced health-care options. For destination countries, incoming migrants filled

gaps in health-care worker employment. At the same time, those leaving home to provide care abroad could be subjected to low wages and poor working conditions.

19. So, he said, while it was necessary for all countries to train adequate numbers of national health-care workers – "understandably easier said than done for many" – the International Labour Organization (ILO) had adopted several important codes to address the myriad and complex challenges surrounding the issue. Those codes tended to work best when they were backed up by Government and bilateral policies or agreements. In addition, migrant support groups and information networks had helped migrants to understand their entitlements, their rights and their responsibilities and benefit, not just from living and working abroad, but from playing a full part in the societies of their destination countries.

20. In her remarks, Ms. Espinosa shared some of Ecuador's experiences in the area of migration, which, she said, had characterized her country's existence for much of the past 40 years. Ecuador had witnessed two major waves of migration: one, in the late 1970s, as a result of drought that had gripped the country; and another, in the late 1990s, sparked by the meltdown of major financial institutions. In the wake of those incidents, the country had begun to witness the benefits of the huge remittances from Ecuadorians that had moved abroad.

21. The Government had also institutionalized the principle of "good living" to address a range of social issues, including the needs of Ecuadorians living abroad, she noted. The migration policies it adopted aimed to bolster migrants' links to their families and cultural traditions, and simultaneously promote the rights of foreigners in Ecuador. They also strengthened education and other support measures to generate conditions for Ecuadorians to remain at home. Another major priority was to promote equitable political participation.

21. Next, Mr. El Jamri said that, while he was pleased with the Assembly's decision to hold today's important debate, he was also concerned that all recent discussions on migration were "informal". He believed that the international community was ready to "begin a second phase", wherein the issue was not only elevated to the appropriate level on the global development agenda, but was backed up by concrete legislation and other policies that protected migrants and better managed — and acknowledged — the contributions they made to the world as a whole.

22. On migration and entrepreneurship, Mr. Chikezie said remittances enhanced job and wealth creation, built stronger private sectors, and bolstered economic growth. Remittances and economic growth were also part of migrants' strategies to return home. Diaspora entrepreneurs faced serious obstacles, including lack of information; lack of access to affordable capital; lack of social capital; maladapted skills; and clash of values.

23. The final panellist, Mr. Hultin said migration was a necessity for sustaining economic growth and development. The World Economic Forum's research had revealed that even against the backdrop of the global financial crisis, skills shortages were affecting every region of the world. In a pre-crisis manpower survey, about 41 per cent of some 40,000 employers interviewed reported that they were having trouble finding skilled workers.

24. In the ensuing discussion, many speakers from affluent countries highlighted their Governments' efforts to address the complexities of migration, while delegates from countries of origin voiced serious concern about a sharp increase in incidents of discrimination and exploitation of migrants. The representative of Argentina, speaking on behalf of the "Group of 77" developing countries and China, said that destination countries must refrain from enacting discriminatory legislative or administrative provisions, or those that were detrimental to family reunification or hampered transfer of remittances. Speakers from European nations highlighted, among other things, the need to keep dialogue and cooperation at the heart of the global migration and development agenda and to support partnerships with countries of origin and transit.

25. A representative of the NGO Committee on Migration said civic actors were concerned by the overemphasis on economic contributions of migrants. While such issues as remittances were undoubtedly important, more focus should be devoted to tackling the root causes of migration, such as human rights violations, imbalanced trade policies, deleterious agricultural subsides, and environmental degradation, which was likely to become the single most important driver of population movements over the next decade. He was also disturbed that, in an international forum like the United Nations, there had been very little mention of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. "The United Nations is a multilateral Organization and the Convention is an international treaty, after all," he said.

B Panel II: Improving International Cooperation on Migration and Development

26. The informal thematic debate's second panel, chaired by Khalid Koser, Academic Dean and Head, New Issues in Security Course, Geneva Centre for Security Policy, featured expert presentations by: Eduard Gnesa, Special Ambassador for International Cooperation on Migration Issues, Switzerland, speaking in his capacity as Head of Switzerland's Presidency of the Global Forum on Migration and Development; Saqr Ghobash, Minister of Labour, United Arab Emirates; Anthony Lake, Executive Director, United Nations Children's Fund (UNICEF), speaking in his capacity as Chair, Global Migration Group; Thetis Mangahas, Senior Migration Specialist and Deputy Regional Director, Policy and Programmes, Regional Office for Asia and the Pacific, International Labour Organization (ILO); and Rafael Fernandez de Castro, Founder and Chair, Department of International Studies, Istituto Tecnologico Autonomo de Mexico.

27. Opening the discussion, Mr. KOSER said the discussion would focus on concrete outcomes and best practices by global and regional cooperation mechanisms for migration and development; good models and lessons learned in the context of bilateral agreements aimed at facilitating migration and protecting migrants' rights; examples of development cooperation to support national efforts to integrate migration into development planning and projects; and good practices on the recognition of qualifications and certifications between countries of origin and countries of destination, in order to harness the socioeconomic contribution of migrants to development.

28. Speaking first, Mr. Ghobash said lowering the cost of moving abroad for work was the responsibility of both countries of origin and destination and "makes good management sense and helps to leverage the benefits of all involved". During a recent workshop on that theme in Dubai involving countries of origin from Asia and Gulf Cooperation Council States that employed many of their workers, participants had agreed that fixing recruitment flaws could generate positive outcomes for migrants, employers and Governments. Unilateral action by countries of origin and destination could be mutually beneficial; they could independently implement national strategies to ensure sustained development gains of contract labour migration.

29. Mr. Gnesa said the Global Forum had developed an interactive and team-based method of preparing its annual meeting and had formed teams on issues of common interest. That had helped foster and strengthen partnerships among countries and other stakeholders in various policy fields. The Global Forum was reaching out to policymakers and practitioners, organizing a series of smaller meetings focused on key themes such as lowering migration costs, global care workers, irregular migration and development, and testing tools for evidence-based policies. The Global Forum's new web-based Platform for Partnerships offered a window to showcase its achievements and Government practices of interest to policymakers.

30. Mr. Lake said some 214 million people, or 3 per cent of the world's population, lived outside their countries of origin. In 2010, officially recorded remittance flows to developing countries were $325 billion, far exceeding official aid flows. Migration could aid development and reduce poverty, but also create significant development challenges, such as the "brain drain" of skilled workers in countries of origin and exploitation and abuse among young migrants. To address that growing trend, earlier in the week, the Global Migration Group had hosted a symposium. It also had recently published a handbook on mainstreaming migration into development planning. Under the European Union-United Nations Joint Migration and Development Initiative, it had allocated €10 million to 54 local migration and development projects in 16 countries, and $80 million to implement 14 projects on youth, employment and migration as part of the Millennium Development Goals Achievement Fund. It was creating indicators to monitor and evaluate the impact of those projects.

31. Ms. Mangahas said some 25 million Asians were employed in foreign countries. More than 3 million left home in search of work abroad; an estimated 43 per cent of them migrated to neighbouring countries. Governments in China, Japan, the Philippines, Sri Lanka, Viet Nam and elsewhere in the Asia-Pacific region increasingly were making strong efforts to review national laws and policies on labour migration and migrants' rights. In 2007, 10 members of the Association of South-East Asian Nations (ASEAN) had endorsed a Declaration on the Protection and Promotion of the Rights of Migrant Workers, which called for, among other things, collaboration in data collection and the ability to access the services of each others' embassies in times of crisis and displacement.

32. Mr. Fernandez De Castro said that in the western hemisphere, the most pressing concern was not how to provide better medical services for migrants or how to make remittances more effective, but how to save migrants' lives, and prevent them from being kidnapped and sexually

abused. Of particular concern was the welfare of the some 400,000 to 500,000 Central Americans transiting Mexico annually en route to the United States. Three quarters of the 12 million undocumented workers in the United States were Mexicans or Central Americans.

33. In the ensuing discussion, Mr. Ghobas agreed with delegates' calls for bilateral dialogues to ensure that people on the ground benefited from migration policies. A more positive attitude was needed in that regard. But Mr. LAKE rejected the notion that the United Nations was standing in the way of such discussions or simply waiting to take action until the Assembly's 2013 High-level Dialogue on International Migration and Development.

34. In closing remarks, General Assembly President Joseph Deiss (Switzerland) said migration was a global governance issue that required the commitment of the international community to implement better migration policies.

35. It was not only a question of cooperation; it was a question of co-responsibility. Evidence was still lacking that migration was good for society. While it might be a winning proposition, citizens and voters in many countries were still not convinced. Governments must clarify their official messages and clearly state whether they were in favour of it or against it. He expressed that such clarifications would guide the Assembly's 2013 High-level Dialogue on International Migration and Development.

III. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

36. The globalized world is becoming more and more interdependent and international migration, along with movements of capital, goods and services, has become a driving force behind that increased integration. The number of international migrants, estimated in 2010 to number 214 million, is constantly increasing, and that trend has not been reversed by the economic and financial crisis. It is essential, in the four years that remain before the target date for achievement of the Millennium Development Goals in 2015, that migration should be made a positive force for development and benefit the various parties involved: not only the migrants themselves, of course, but their countries of origin and countries of destination.

37. Against that background, and since the first High-level Dialogue on International Migration and Development was held in 2006 and the call was made for international cooperation to be strengthened in order to maximize the positive effect of migration, several notable advances should be highlighted, including the following:

38. Collaboration between countries of origin and countries of destination has improved in many respects, particularly at the regional level. Procedures for consultation and dialogue have been put in place and free movement zones have been established. Various funds, facilities and multilateral programmes have been created with a view to promoting the development potential of international migration. A total of $240 million has been allocated for that purpose, testifying to the engagement of all donor countries with the question of migration within the framework of development.

39. Several countries of origin have reinforced ties with their nationals abroad in order to ensure that their rights are respected and that they are more actively involved in the development of their communities of origin. Programmes have been implemented with the aim of promoting the return to their countries of origin of skilled migrants, from whose expertise the country could benefit. In some cases, the cost to migrants of repatriating funds to their countries of origin has fallen, having a positive impact on the incomes of migrants and their families and improving their nutrition and access to health and education services.

40. Such welcome changes have been, to some extent, facilitated by the activities of the Global Forum on Migration and Development, instituted after the High-level Dialogue of 2006. However, work does not stop there. We must continue to implement the recommendations of the Forum, and intensify efforts to find balanced, coherent and global responses to the issue of international migration, in order to maximize the positive impacts.

41. As the debates at the UN General Assembly has revealed, international migration deserves continued attention from the international community , both because international cooperation is necessary to take advantage of the opportunities that international migration generates and because its impact is likely to increase in the future. As a global phenomenon international migration requires a global approach. By putting forth good practices and sharing innovative policies, programmes and projects, the thematic debate has set a useful basis for the in-depth consideration of these issues that are going to be the subject matter of the second High-Level Dialogue on International Migration and Development in 2013. Until then every effort should be made to continue the dialogue, strengthen partnerships, support capacity development, and safeguard the rights of migrants. It is the firm belief of AALCO that we are ill-afford to miss any opportunity to facilitate the contribution of international migration to improve human well-being and in particular to reduce poverty and contribute to the achievements of the Millennium Development Goals.

42. AALCO, committed as it is to developing a long-term and forward-looking perspective on international migration would continue to monitor closely the developments that are occurring in the field of migration law, particularly in relation to the ensuing High-Level Dialogue on Migration and Development that is scheduled to take place in 2013. It would continue to focus on the many facets of the migration-development nexus with a view to assist its Member States in highlight the future migration trends and their developmental impact for its Member States.

Annex- I

Participation of Asian-African States in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)

Entry into force : 1st July, 2003

Status: : Signatories 34, Parties: 45 [as of 26 -3 - 2012]

Signature	**Ratification/Accession**
Cameroon	**Bangladesh**
Indonesia	**Egypt**
Sierra Leone	**Ghana**
	Libya
	Nigeria
	Philippines
	Senegal
	Sri Lanka
	Syria
	Turkey
	Uganda

ANNEX II

SECRETARIAT'S DRAFT

AALCO/RES/DFT/51/S 5

22 June 2012

LEGAL PROTECTION OF MIGRANT WORKERS

(Non-Deliberated)

The Asian-African Legal Consultative Organization at its Forty-Ninth Session,

Having considered the Secretariat Document No. AALCO/51/ABHUJA/ 2012 /S 5;

Recognizing the obligation of all States to promote and protect basic human rights and fundamental freedoms for all migrants and their families regardless of their migratory condition as provided for in various international legal instruments including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW, 1990) ;

Acknowledging the important nexus between international migration and development and the need to deal with the challenges and opportunities that migration presents to countries of origin, transit and destination, and recognizing that migration brings benefits as well as challenges to the global community,

Acknowledging further the important contribution provided by migrants and migration to development, as well as the complex interrelationship between migration and development,

1. **Requests** all Member States, in conformity with their respective constitutional systems, to effectively promote and protect the human rights of all migrants, in conformity with the international legal instruments to which they are party;

2. **Encourages** Governments of countries of origin, countries of transit and countries of destination to increase cooperation on issues related to migration;

3. **Also encourages** Member States that have not yet done so to consider ratifying/acceding to the relevant international legal instruments on the situation of migrant workers, particularly the ICMW 1990; and
4. **Decides** to place this item on the provisional agenda of its Fifty-Second Annual Session.

3. ESTABLISHING COOPERATION AGAINST TRAFFICKING IN WOMEN AND CHILDREN

ESTABLISHING COOPERATION AGAINST TRAFFICKING IN WOMEN AND CHILDREN
(Non-Deliberated)

CONTENTS

ESTABLISHING COOPERATION AGAINST TRAFFICKING IN WOMEN AND CHILDREN

I. INTRODUCTION

A. Background

1. The Government of Republic of Indonesia proposed the topic "Establishing Cooperation against Trafficking in Women and Children" on the agenda of the AALCO at its Fortieth Annual Session held in New Delhi, in June 2001. Considering the relevance of this topic and impact of this problem on the countries in the Asian and African region, this topic was included in the agenda item of AALCO's Work Programme. The legal regime on this issue comprises of United Nations Convention against Transnational Organized Crime (TOC Convention) and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Trafficking in Persons Protocol) and were adopted in the year 2000. The Convention entered into force on 29 September 2003. The Convention has - 147 signatories and 160 State Parties to it and 44 AALCO Member States are either parties or signatories to it. The Trafficking in Persons Protocol came into force on 25 December 2003 and till date has 117 Signatories and 145 countries as parties to it and 34 Member States of AALCO are either parties or signatories to it.

2. At the Forty-Third Annual Session of AALCO, held in June 2004 in Bali, Republic of Indonesia, a resolution (RES/43/SP 1) adopted after in-depth and thought provoking presentations and discussions at the Special Meeting on the topic, reiterated inter alia, the request for Member States, who are not a party to the TOC Convention and its Trafficking in Persons Protocol, to consider becoming parties to them. It further requested Member States to transmit to the AALCO Secretariat their national legislations, if any, on this subject.[1] Also, the resolution directed the Secretary-General to develop, in cooperation with Member States, a Model Law for the criminalization of trafficking in persons as well as protection of victims of trafficking, before, during and after criminal proceedings, based on human rights approach with a view to developing a concrete action plan for a joint effort against trafficking in persons, especially women and children.[2]

3. As a preliminary initiative of fulfilling the mandate entrusted via the said resolution towards drafting a Model Law, the Secretariat studied the national legislations received from the Member States of AALCO in the light of the Trafficking in Persons Protocol, prepared an outline with a view to developing a concrete action plan for a joint effort against trafficking in persons, especially women and children. Accordingly an outline of the model law in the form of addendum was presented at the Forty-Forth Annual Session, for consideration of the Member States.

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[1] So far the Secretariat has received responses from the following Member States relating to their respective national legislations on the topic: **Tanzania, Sultanate of Oman, Singapore, People's Republic of China, Republic of Korea, Republic of Indonesia, Republic of Uganda, Philippines, Japan, Mauritius, Cyprus, Ghana, Qatar, United Arab Emirates, Sudan, Nepal, Lebanon, Myanmar, Syrian Arab Republic, Arab Republic of Egypt, Malaysia, Thailand and Kuwait.**

[2] Operative Para 9 of the Resolution (RES/43/SP1).

4. During the Forty-Fourth Annual Session of the AALCO in Nairobi, Kenya, in June-July 2005, delegations reiterated and emphasized on the urgent need for cooperation within the framework of the TOC Convention and the Trafficking in Persons Protocol. Most of the delegations affirmed the need for the model legislation on this issue. Thereafter, at the Forty-Fifth Annual Session of the AALCO at Headquarters, New Delhi, India in April 2006, the Secretariat presented a draft model legislation consisting of Preamble and five draft articles. The delegates from various Member States had an in-depth discussion on this topic. Further, at the Forty-Sixth Annual Session of AALCO at Cape Town, Republic of South Africa, in July 2007, the Secretariat, revised the draft model legislation and presented a set of Preamble and five draft articles. At the Forty-Seventh Annual Session, the Secretariat report had briefly traced the nexus between trafficking and international migration issues, and had requested its Member States for having safe migration laws and rules in its territory. The Secretariat report for the Forty-Eighth Annual Session highlighted Women's rights that are affected while being trafficked; the International legal instruments that cover their rights and the legal obligations of the States in ensuring their rights. A Special Half-day meeting was held on "Transnational Migration: Trafficking in Persons and Smuggling of Migrants" jointly by Government of Malaysia and AALCO. At the Forty-Ninth Annual Session of AALCO, the Secretariat brief covered the developments that occurred at various International Organizations in relation to this area of relevance. This topic was a non-deliberated item.

5. During the Session, a proposal was made to convene a **Workshop on "Trafficking in Persons, Smuggling of Migrants and International Cooperation"**. Subsequently a workshop on this topic was jointly organized by the AALCO and the Government of Malaysia in Putrajaya, Malaysia from 24 to 26 November 2010. It was attended by delegates from 16 Member States of AALCO, namely; India, Iraq, Islamic Republic of Iran, Japan, Kenya, Malaysia, Nigeria, Republic of Korea, Republic of Sudan, Singapore, South Africa, Sri Lanka, Thailand, United Arab Emirates, Union of Myanmar, and United Republic of Tanzania. The delegates from Australia (Non-member state of AALCO) and International Organization for Migration (IOM) also attended the Workshop. The Workshop was divided into three segments on Trafficking in Persons, Smuggling of Migrants and International Cooperation. The welcome address was delivered by Prof. Dr. Rahmat Mohamad, Secretary-General of AALCO and the keynote address was rendered by Hon'ble Datuk Idrus Harun, Solicitor-General of Malaysia. At the workshop, one of the suggestions that emerged was to address the issue of Mutual Legal Assistance in Criminal matters for both Asian and African regions.

B. DELIBERATIONS AT THE FIFTIETH ANNUAL SESSION OF AALCO (COLOMBO, DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, 2011)

6. At the Fiftieth Annual session of AALCO held in Colombo, Democratic Socialist Republic of Sri Lanka from 27 June to 1 July 2011, a **Half-Day Special Meeting on "Trafficking in Women/Children, Migrant Workers and Protection of Children"** was jointly organized by the Government of Sri Lanka, AALCO, International Organization for Migration (IOM) and United Nations Children's Fund (UNICEF). The meeting deliberated upon a wide range of issues pertaining to trafficking, its nexus with migration, effects of trafficking on women and children and child trafficking in Asia.

7. **Prof. Dr. Rahmat Mohamad, the Secretary-General** of AALCO delivered the introductory remarks wherein he stated that over the decades, smuggling of migrants and trafficking in human beings, especially women and children, remained a perennial challenge faced by the international community. He opined that in the fight against trafficking, the key challenges for countries around the world were to craft and implement sounder and more effective responses that produced meaningful results. Thus, a more sophisticated understanding of human trafficking was needed to improve the operational effectiveness of appropriate anti-trafficking laws, policies and practices which included: Prevention, Protection and Prosecution.

8. **Hon'ble Justice Shiranee Tilakawardane**, **Judge of the Supreme Court of Democratic Socialist Republic of Sri Lanka,** while delivering her key note address on "The Legal Framework on Human Trafficking", remarked that the overwhelming majority of those trafficked are women and children and that, it has become a highly attractive business for criminal groups all over the world. Addressing all the factors that contributed to human trafficking, she added, it would go a long way in making a significant dent on the trafficking of women and children.

9. **Mr. Richard Danziger, Chief of Mission, IOM, Democratic Socialist Republic of Sri Lanka,** in his presentation on "Combating Human Trafficking, the Exploitation and Abuse of Migrants: A Systemic Approach" stated that on those lines, a systemic approach to address the problem also required the engagement of all concerned parties, namely private sector, governments and civil society, all of which had a stake in the elimination of that phenomenon that harms business, society and state sovereignty. These stakeholders had key roles to play whether in developing and enforcing regulatory frameworks, monitoring supply chains and eliminating illicit trade components, or raising social awareness.

10. **Mr. Ron Pouwels, Regional Advisor-Child Protection, UNICEF Regional Office for South Asia**, while giving a brief account of the work of UNICEF in the area of child trafficking remarked that targeted anti-trafficking efforts have been undertaken in a number of Asian Countries that include: Bangladesh, Cambodia, People‟s Republic of China, India Indonesia, Lao PDR, Malaysia, Mongolia, Myanmar, Nepal, Pakistan, Philippines, Sri Lanka, Thailand and Vietnam. That included, he noted, the advocacy and the provision of technical support to various Governments to help them meet obligations arising from the Palermo Protocol and the UN Convention on the Rights of the Child.

11. The following AALCO Member states Thailand, United Republic of Tanzania, People's Republic of China, Ghana, Uganda, Arab Republic of Egypt, United Arab Emirates, State of Kuwait, Japan, Sultanate of Oman, Republic of Indonesia, India, Kenya, Bahrain, Bangladesh, Myanmar, Malaysia, Republic of Korea, Democratic People's Republic of Korea, Nepal, Nigeria, Kingdom of Saudi Arabia, Republic of Iraq and State of Qatar made their statements that support all the efforts to combat this menace. For the detailed report on the Half-Day Special Meeting on **"Trafficking in Women/Children, Migrant Workers and Protection of Children",** please refer to the verbatim Record of the Discussion of the Fiftieth Annual Session of AALCO (Colombo, Democratic Socialist Republic of Sri Lanka, 2011) accessible at website of AALCO www.aalco.int.

II. RECENT DEVELOPMENTS

A. Fourth Session of the Working Group on Trafficking in Persons held in Vienna from 10 to 12 October 2011 established by the Conference of the Parties to the United Nations Convention against Transnational Organized Crime (10 to 12 October 2011, Vienna, Austria)

12. In its decision 4/4, entitled "Trafficking in human beings", the Conference of the Parties to the United Nations Convention against Transnational Organized Crime[3] decided to establish an Open-ended interim working group, in accordance with article 32, paragraph 3, of the TOC Convention and rule 2, paragraph 2, of the rules of procedure for the Conference, to be chaired by a member of the bureau, to advise and assist the Conference in the implementation of its mandate with regard to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

13. In its decision 4/4, the Conference also decided that the Chair of the working group should submit a report on the activities of the working group to the Conference and that the Conference, at its sixth session, in 2012, would review and take a decision on the effectiveness and future of the working group.

14. The Working Group endorsed the following recommendations proposed by the Chair of the Working Group:

1. Trafficking in persons and smuggling of migrants should be recognized as different crimes that require distinct legal, operational and policy responses;
2. States parties should clearly define trafficking in persons in their national law and policy in order to enable the full and effective implementation of the Trafficking in Persons Protocol, including its provisions on criminalization and, in particular, to ensure that victims of that crime have access to justice, including the ability to seek restitution or compensation;
3. In accordance with article 6, paragraph 6, of the Trafficking in Persons Protocol, States parties should ensure that their domestic legal systems contain measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered;
4. In accordance with article 6, paragraph 2, of the Trafficking in Persons Protocol, States parties should ensure that information on relevant court and administrative proceedings is provided, in appropriate cases, to victims of trafficking in persons, and that access to compensation is provided to victims of trafficking in persons;
5. States parties should facilitate the provision of legal assistance and information regarding legal assistance to victims of trafficking in order to represent their interests in criminal investigations, including in order to obtain compensation;
6. At the beginning of a penal investigation, States parties should endeavour to integrate a section dedicated to property and the possibility of seizing and confiscating goods obtained by criminal means. States parties should also be vigilant to protect themselves against all forms of organized insolvency;

[3] The Report is available on: http://www.unodc.org/documents/treaties/organized_crime/2011_CTOC_COP_WG4/2011_CTOC_COP_WG4_8/CTOC_COP_WG4_2011_8_E.pdf

7. States parties should ensure that the immigration status of the victim, the return of the victim to his or her home country or the absence of the victim from the jurisdiction for other reasons does not prevent the payment of compensation;
8. States parties should consider means of ensuring the availability of compensation, independent of a criminal case and regardless of whether the offender can be identified, sentenced and punished;
9. In fulfilling the requirements of article 6, paragraph 6, of the Trafficking in Persons Protocol, States parties should adopt at least one of the following options offering the possibility of victims obtaining compensation:
    a) Provisions allowing victims to sue offenders or others for civil damages;
    b) Provisions allowing criminal courts to award criminal damages (that is, to order that compensation be paid by offenders to victims) or impose orders for compensation or restitution against persons convicted of offences;
    c) Provisions establishing dedicated funds or schemes whereby victims can claim compensation from the State for injuries or damages suffered as a result of a criminal offence;
10. States should consider that court-ordered and/or state-funded compensation may include payment for or towards:
    a) Costs of medical, physical, psychological or psychiatric treatment required by the victim;
    b) Costs of physical and occupational therapy or rehabilitation required by the victim;
    c) Lost income and wages due according to national law and regulations regarding wages;
    d) Legal fees and other costs or expenses incurred, including costs related to the participation of the victim in the criminal investigation and prosecution process;
    e) Payment for non-material damages resulting from moral, physical or psychological injury, emotional distress and pain and suffering of the victim as a result of the crime committed against him or her;
    f) Any other costs or losses incurred by the victim as a direct result of being trafficked, as reasonably assessed by the court or state-funded compensation scheme.

15. The report of the Open-Ended Meeting of the Working Group was adopted. The sixth session of the Conference of Parties to the TOC Convention is from 15 to 19 October 2012 in Vienna, Austria.

B. Fifty-sixth session of the Commission on the Status of Women (27 February to 9 March 2012, United Nations Headquarters, New York)

16. The Fifty-sixth session of the Commission on the Status of Women was held from 27 February to 9 March 2012 at the United Nations Headquarters, New York. The priority theme for the session was on "empowerment of rural women and their role in poverty and hunger eradication, development and current challenges". Various contributions of the rural women to the economy and their communities, and the challenges they were discussed. The review theme was on "Financing for gender equality and the empowerment of women", and the

emerging issue for the deliberations were on "Engaging young women and men, girls and boys, to advance gender equality".

17. The Special Rapporteur on "Violence against women, its causes and consequences" Ms. Rashida Manjoo, mentioned that the Thematic Report for the Year 2011 proposed a holistic approach which required amongst others: (i) treating rights as universal, interdependent and indivisible; (ii) situating violence on a continuum that spans interpersonal and structural violence; (iii) accounting for both individual and structural discrimination, including structural and institutional inequalities; and (iv) analyzing social and/or economic hierarchies among women, and, between women and men, ie., both intragender and inter-gender.

18. The report describes how the mandate has analysed violence against women in four main spheres: in the family; in the community; violence that is perpetrated or condoned by the State; and violence that occurs in the transnational sphere. It then analyses States obligations under international human rights law, to prevent and respond to all acts of violence against women. States due diligence responsibility comprises an obligation to: (i) prevent acts of violence against women, (ii) investigate and punish all acts of violence against women, (iii) protect women against acts of violence, and (iv) provide remedies including reparation to victims of violence against women. In that regard, it was essential that States efforts to comply with their due diligence obligation must address the structural causes that lead to violence against women. In doing so, states must decipher multiple forms of violence suffered by women and the different types of discrimination they encounter, in order to adopt multifaceted strategies to effectively prevent and combat this violence.

III. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

19. In accordance with the above mentioned initiatives taken by UN bodies, it is prescribed that States parties should clearly define trafficking in persons in their national law and policy in order to enable the full and effective implementation of the Trafficking in Persons Protocol, including its provisions on criminalization and, in particular, to ensure that victims of that crime have access to justice, including the ability to seek restitution or compensation. The key concepts like abuse of power plays an important role and State Parties may wish to cooperate in transmitting the details of the concept to the relevant authorities to ensure concerted efforts. It is also thereby recognised that beyond prevention obligation states must take measures like spreading awareness and educating the young generation about the adverse effects of being trafficked. A review of the implementation of the TOC Convention and its Trafficking in Persons Protocol is essential.

20. Gender equality and empowerment of women are significant processes in the way forward to combating the menace of trafficking in persons. Various steps have been taken by AALCO Member States to understand this issue and address the concerns of the vulnerable sections of the society. Most of the Member States of AALCO are either parties or signatories to the TOC Convention and its Trafficking in Persons Protocol, their efforts in terms of adhering to these instruments, is a manifest example of recognising this issue as a menace that needs to be addressed and dealt with effectively.

V. ANNEX

SECRETARIAT DRAFT
AALCO/RES/51/S 8
22 JUNE 2012

DRAFT RESOLUTION ON ESTABLSIHING COOPERATION AGAINST TRAFFICKING IN WOMEN AND CHILDREN
(Non-Deliberated)

The Asian-African Legal Consultative Organization at its Fifty-First Annual session,

Considering the Secretariat Document No. AALCO/51/ABUJA/2012/S 8;

Being Mindful of the increasing number of individuals being exploited through trafficking in persons especially women and children and smuggling of migrants, including from the Asian-African region;

Convinced of the need to eliminate all forms of trafficking in persons and smuggling of migrants and bearing in mind the overlapping nature between trafficking in persons and smugglings of migrants, which are flagrant violations of human rights;

Noting the continuing efforts of Member States in combating trafficking in persons and smuggling of migrants, and encouraging them to inform and update the AALCO Secretariat of pertinent developments in their respective States, in order to share experience amongst Member States;

Also noting the significance of gender equality as a necessary factor towards women empowerment and appreciates every effort taken by AALCO Member States to address this issue;

Acknowledging with appreciation that some Member States have submitted to the AALCO Secretariat their national legislations and other relevant information related to the topic, and urges other Member States to do the same:

1. **Encourages** the Member States which are not yet party to consider ratifying/acceding to the UN Convention against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, adopted in 2000;

2. **Directs** the Secretariat to follow and report on the developments in this regard, including the work undertaken by other fora;

3. **Mandates** the Secretary-General to constitute an open-ended Committee of Experts to conduct study on ways and means to enhance mutual legal

assistance in criminal matters among Member States for their further consideration;

4. **Decides** to place this item on the provisional agenda of the Fifty-Second Annual Session.

4. CHALLENGES IN COMBATING CORRUPTION: THE ROLE OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

AALCO/51/ABUJA/2012/ S 11
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CHALLENGES IN COMBATING CORRUPTION: THE ROLE OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

(Non-Deliberated)

CONTENTS

CHALLENGES IN COMBATING CORRUPTION: THE ROLE OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

I. Introduction

A. Background

1. The agenda item "An Effective International Legal Instrument Against Corruption" was introduced into the agenda of the Asian-African Legal Consultative Organization [AALCO] by the then Secretary-General of AALCO at its Forty-First Session held at Abuja, Nigeria in 2002. This introduction had coincided with the efforts of the United Nations General Assembly (UNGA) to adopt an international convention on corruption. In its Resolution 55/61 adopted in 2001, the General Assembly established an Ad Hoc Committee for the Negotiation of a Convention against Corruption. That resolution also outlined a preparatory process designed to ensure the widest possible involvement of Governments through intergovernmental bodies. It is important to note that the Ad Hoc Committee was an open-ended body and was consistently attended by a very high number of delegations from different countries.

2. It was at this stage that AALCO had joined itself with the workings of the Ad Hoc Committee with the aim of influencing the negotiation process by giving the common concerns of the Asian-African /States to it. AALCO's concerns were well in tune with the reality that corruption, though found in all countries, big and small, rich and poor, is a massive problem in developing societies. The Ad Hoc Committee held seven Sessions to successfully complete the negotiations and the United Nations Convention against Corruption [UNCAC or the Convention, hereinafter] was adopted through consensus by the General Assembly in October 2003.

3. The UNCAC, which came into force in 2005 and has got 156 State Parties[1] to it, is a powerful weapon in the armoury of the international community in its fight against corruption. The AALCO, convinced as it is, that corruption is no longer a local matter but a trans-national phenomenon that affects all societies and economies, and that a comprehensive and multi-disciplinary approach is required to prevent and combat corruption effectively, has been regularly deliberating on various aspects of the UNCAC during its Annual Sessions, with the objective of promoting the domestic implementation aspects of the UNCAC in its Member States. It has also been very vocal in promoting the cause of the UNCAC by adopting resolutions at its Annual Sessions encouraging its Member States to ratify the Convention. In pursuance of its work on corruption, AALCO has also produced two Special Studies on the subject. They are: *Combating Corruption: A Legal Analysis (2005)*; and *The Rights and Obligations under the United Nations Convention against Corruption (2006).*

[1] Of these 156 States, 37 are from the Member States of AALCO who have either ratified or acceded the UNCAC and 6 who have only signed it. See, Annex I, for the complete list of the names of the Countries of AALCO who have done so.

4. Be that as it may, it needs to be mentioned here that the UNCAC contains a mechanism for implementation, in the form of a *Conference of the State Parties* (CoSP) with a Secretariat that is 'charged to assist it in the performance of its functions. The First Session of the CoSP to the UN Convention against Corruption was held from December 11 to 14, 2006 at Amman, Jordan and the Second Session of the CoSP to the UNCAC was held in Nusa Dua, Bali, Indonesia, from 28 January to 1 February 2008. The Third Session of the CoSP to the UNCAC took place at Doha from 9 to 13 November 2009, with the specific agenda of creating a mechanism to review the implementation of the UN Convention against Corruption.

5. However, the issue of corruption was not discussed as a deliberated item at the 50th Annual Session of AALCO held at Colombo, Sri Lanka from 27 June to 1 July 2011. However, various member states reaffirmed their commitment to the battle against corruption during this session by reiterating the principles of and need for cooperation, particularly with regards to the return of assets and outlining some of the efforts taken by them to involve civil society and non-governmental bodies in combating corruption.

B Implementing Review Mechanism

6. It may be recalled that the Conference of the States Parties (CoSP) to the United Nations Convention against Corruption (UNCAC) was established by UNCAC Article 63 "to improve the capacity of and cooperation between States parties to achieve the objectives set forth in the Convention and to promote and review its implementation". The Sessions of the Conference are attended by governmental delegations, sometimes headed by government Ministers. Plenaries are open to civil society groups, as well as side meetings or special events, while governmental working sessions usually remain closed to civil society representatives. Since the entry into force of the UNCAC in December 2005, four Sessions of the Conference of States Parties have been held - in 2006, 2008, 2009 and 2011. The fourth Session of the UNCAC CoSP (CoSP 4) was held in Marrakesh, Morocco, from 24 to 28 October 2011.

7. In the remaining part of the Secretariat's report an attempt is made to look at the agendas that were dealt with at the fourth CoSP that was held at Marrakesh in Oct 2011 to highlight the discussions as well as to point out its outcome. The three areas that formed the thrust of deliberations at the 4th CoSP pertained to; Implementation Review Process, the Work of the Working Group on Asset Recovery, and Prevention.

II. Highlights of the Fourth CoSP to the UNCAC

8. In this part of the Report, an attempt is made to present the salient features of the fourth CoSP to the UNCAC that took place in Oct 2011 at Marrakesh. The three main areas that were deliberated at this Conference related to the following.

A. Work of the Implementation Review Group

9. It may be recalled that at the first CoSP, the Member States agreed that it was necessary to establish an appropriate mechanism to assist it in reviewing the implementation of the UNCAC. They had also established an open-ended intergovernmental expert working

group to make recommendations to the Conference at its second session on appropriate mechanisms or bodies for carrying out the implementation review. At its second session, Conference also tasked the Open-ended Intergovernmental Working Group on Review of the Implementation of the Convention with preparing terms of reference for a review mechanism for consideration, action and possible adoption by the Conference at its third session and called upon States parties and signatories to submit proposals for the terms of reference.

10. At its third session, held in Doha from 9 to 13 November 2009, the Conference adopted resolution 3/1, establishing the Mechanism for the Review of Implementation of the United Nations Convention against Corruption, in accordance with article 63, paragraph 7, of the Convention. The annex to resolution 3/1 contains the terms of reference of the Mechanism, the draft guidelines for governmental experts and the secretariat in the conduct of country reviews and the draft blueprint for country review reports. The Conference had also established the Implementation Review Group [IRG] as an open-ended intergovernmental group of States parties to operate under its authority and report to it (see sub-section IV.C of Annex I of resolution 3/1). The Implementation Review Group shall have an overview of the review process in order to identify challenges and good practices and to consider technical assistance requirements in order to ensure effective implementation of the Convention. On the basis of its deliberations, the Implementation Review Group shall submit recommendations and conclusions to the Conference for its consideration and approval. It shall furthermore be in charge of following up and continuing the work undertaken previously by the Open-ended Intergovernmental Working Group on Technical Assistance.

11. It may also be noted that the first session of the IRG took place at Vienna from 28th June to 2 July, 2010[2]. It had also convened a resumed first session later that year. The second session of IRG was held at Vienna from 30th may to 3rd June 2011[3] and a resumed second session was convened later that year. The continued resumed second session was held at Marrakesh in parallel with the fourth session of the Conference of the States Parties to the UNCAC. This was deemed necessary to permit the IRG to give full consideration, inter alia, to the thematic reports prepared by the Secretariat and to the results of its work for appropriate transmission of its conclusions and recommendations to the Conference at its fourth session, in accordance with its mandate. Accordingly, the continued resumed second session of the Implementation Review Group was held on Tuesday, 25 October 2011.

12. When considering this issue, the Conference had before it a draft resolution submitted by the Vice-President of the Conference and Chairman of the Implementation Review Group[4] as well as draft resolutions submitted by States parties[5]. Informal

[2] At this meeting it finalized the draft guidelines for governmental experts and the secretariat and the draft blueprint that had been endorsed by the Conference. It also adopted its resolution 1/1, on resource requirements for the functioning of the Mechanism for the biennium 2012-2013. A drawing of lots was carried out at the Group's first session, in accordance with the terms of reference, to select the States parties that would be under review in each year of the first review cycle, as well as the reviewing States parties for the first year.

[3] At this meeting, it drew lots for the reviewing States parties for the second year of the review cycle. The IRG also considered issues regarding the review process of the first year of operation of the Mechanism, including the timelines for review.

[4] (CAC/COSP/2011/L.4)

consultations were held from 25 to 28 October to consider the draft resolutions, and the outcomes of those consultations were submitted to the Conference for adoption .

13. Recognizing that the Review Mechanism had already produced tangible and useful results, speakers welcomed the thematic reports prepared by the secretariat. Speakers noted that, despite the relatively limited number of country reviews carried, despite the relatively limited number of country reviews carried out thus far, the reports highlighted issues in implementation deserving further attention, in particular challenges, lessons learned and expected results. They welcomed the thematic reports as a source of information for the strengthening of the implementation of the Convention and facilitation of the preparations for upcoming reviews. Speakers noted that relevant substantive data would emerge in due time as further reviews were concluded and looked forward to the inclusion in future thematic reports of additional information on implementation. One speaker made reference to the information presented by the secretariat on the progress of country reviews; such general information, while respecting the confidentiality of specific country reviews, was useful for States parties to understand the progress of the Review Mechanism.

14. Speakers reiterated the commitment of States parties to Conference resolution 3/1 and the guiding principles of the Review Mechanism, especially its intergovernmental, inclusive, non-intrusive and non-adversarial nature. Speakers reported on lessons learned in the first year of the Review Mechanism. While recognizing the usefulness of the self-assessment checklist, some speakers expressed the view that it could be further streamlined.

15. At its 10th meeting, on 28 October 2011, the Conference adopted a revised draft resolution entitled *"Mechanism for the Review of Implementation of the United Nations Convention against Corruption*[6]*"* submitted by the Vice-President of the Conference and Chair of the Implementation Review Group; subsequently, Argentina, Brazil, Chile, Costa Rica, Germany, Jordan, Mexico, the Philippines and South Africa became the sponsors of the revised draft resolution. At the same meeting, the Conference adopted a revised draft resolution entitled *"Convening of open-ended intergovernmental expert meetings to enhance international cooperation"*[7], sponsored by the Islamic Republic of Iran on behalf of the States Members of the United Nations that are members of the Group of 77 and China. Subsequently, Mexico joined in sponsoring the revised draft resolution.

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[5] (CAC/COSP/2011/L.11 and CAC/COSP/2011/L.3).

[6] (CAC/COSP/2011/L.4/Rev.1)

[7] (CAC/COSP/2011/L.6/Rev.2)

B. Progress in relation to the work of the Working group on Asset Recovery

16. While delivering his introductory remarks at the 4th CoSP on this issue, Gusti Agung Wesaka Puja (Indonesia), in his capacity as Vice-President of the Conference, highlighted that, while international cooperation had advanced, a great deal remained to be done to achieve the full implementation of chapter V of the Convention. Pursuant to the recommendation adopted by the Open-ended Intergovernmental Working Group on Asset Recovery at its fifth meeting, the Conference organized a panel discussion on the practical aspects of asset recovery, including challenges and good practices. Representatives of Canada, Egypt, France, Liechtenstein, Mexico and Nigeria were invited to participate in the panel in order to share their countries' recent experiences.

17. The representative of Egypt underscored, in the light of the "Arab spring", the urgent need to trace and recover assets looted by corrupt officials, with a view to returning those assets to the countries of origin, thus contributing to the welfare of the citizens of those countries. Some of the substantive and procedural difficulties faced in recovering assets were enumerated in note verbale dated 7 October 2011 from the Permanent Mission of Egypt to the United Nations (Vienna) addressed to the United Nations Office on Drugs and Crime, Corruption and Economic Crime Branch[8]. While highlighting some of the key obstacles that his country had encountered in its recent efforts to recover misappropriated assets, he stated that this included the need of requested States to receive detailed information on the location of stolen assets and, where appropriate, bank account details; the non-disclosure of information on the exact nature and location of assets already frozen; and the requirement for requesting States to prove a direct link between assets and individual offences[9]. Egypt as one of the State Parties that submitted proposals for the Working Group on Asset Recovery also recommended that a forum should be provided for discussions on practical aspect of asset recovery, including challenges and good practices, with a view to preparing for the conduct of such discussions at the Conference of the States Parties.

18. The representative of Nigeria expressed great concern that only a small proportion of looted assets were recovered and returned to the countries of origin. While he acknowledged that his country had had some positive experiences in cooperating with other jurisdictions, he expressed the view that requested States should be more responsive to requests and adopt a more proactive approach to asset recovery cases. He also called for coordinated and effective legal action against multinational corporations that had been found guilty of bribery of foreign public officials.

19. The representative of Mexico drew attention to his Government's efforts, as incoming chair of the G-20 Finance Ministers and Central Bank Governors, to promote the effective implementation of the Convention, in particular of chapter V, on asset recovery, as part of the G-20 Anti-Corruption Action Plan. He stressed the importance of complementing asset recovery efforts with a set of measures designed to prevent large-scale bribery and embezzlement. Such measures would strengthen accountability, transparency and integrity in

[8] CAC/COSP/2011/13

[9] CAC/COSP/2011/CRP.7

the management of public resources and public affairs, including by improving public procurement, budget transparency and income and asset declarations.

20. In the ensuing interactive discussion, several speakers identified practical challenges to the recovery of assets. Most participants expressed the view that the provisions of chapter V were not yet sufficiently appreciated or effectively implemented by States parties, as evidenced in particular by long delays in responding to requests, and that their implementation was hampered, inter alia, by the costs of asset recovery efforts, difficulties in coordination among the various stakeholders involved in asset recovery at the national level and lack of technical expertise and training opportunities.

21. Participants expressed their appreciation for the work of UNODC and the secretariat of the StAR Initiative in developing and disseminating knowledge, conducting analytical work, identifying good practices and lessons learned and conducting training, and welcomed the recent publication of the UNODC report *Estimating Illicit Financial Flows Resulting from Drug Trafficking and Other Transnational Organized Crimes.* Speakers stressed the importance of direct application of the Convention as a legal basis for international cooperation in criminal matters and highlighted good practices, such as the spontaneous disclosure of information and frequent informal consultations prior to the submission of formal requests for mutual legal assistance.

22. Finally, the Conference had adopted a revised draft resolution entitled *"International cooperation in asset recovery"* (CAC/COSP/2011/L.5/Rev.2), as orally amended, sponsored by the Islamic Republic of Iran on behalf of the States Members of the United Nations that are members of the Group of 77 and China; subsequently, France, Germany, Mexico and the Russian Federation joined in sponsoring the revised draft resolution.

C. Prevention

23. The discussions relating to Prevention was initiated by the Vice-President of the Conference Ion Galea of Romania, who recalled Chapter II of the Convention, covering the prevention of corruption in both the public and private spheres, as well as Conference resolution 3/2, on preventive measures. By that resolution the Conference had established the Open-ended Intergovernmental Working Group on the Prevention of Corruption, which had met in December 2010 and August 2011. He also referred to the proposal made by the Working Group at its second session that the Conference should discuss the adoption of a multi-year workplan for the period up to 2015, when the second cycle of the Review Mechanism commences.

24. Speakers commended the efforts made by the Working Group on the Prevention of Corruption and underlined the usefulness of sharing information, experiences and good practices among States, as well as the importance of providing technical assistance in order to assist States with the implementation of chapter II of the Convention.

25. Speakers also highlighted the importance of preventive measures in fostering a culture of integrity and transparency and of zero tolerance of corruption, as well as the need for the participation of, and cooperation among, all sectors of society, including civil society, in efforts to prevent corruption. Speakers underscored the key role that younger generations could play in developing a solid foundation for longer-term anti-corruption efforts. In that regard, the value of the incorporation of mandatory anti-corruption curricula into educational institutions at all levels, from elementary schools to universities, was emphasized. In

addition, the role of community-based organizations, including religious and civic groups, was considered essential. Speakers highlighted the close link between the prevention of corruption and its detection, investigation and prosecution. The importance of strengthening judicial integrity and of enhancing the prevention of corruption in the justice sector was also highlighted.

26. The active engagement of the private sector was considered critical for the implementation of effective preventive measures. Such engagement would include measures to enhance ethics, integrity and professionalism in the private sector, including through public-private partnerships.

27. Speakers stressed that measures must be taken to implement the provisions of chapter II of the Convention, prior to the review of implementation of that chapter, commencing in 2015. Speakers reported on a number of initiatives and good practices in the prevention of corruption, including: strengthening anti-corruption agencies and other related institutions; public-awareness campaigns, including on the occasion of International Anti-Corruption Day; corporate governance codes; the development of, and adherence to, a universal charter against corruption for the private sector and public-private integrity pacts; and methods for developing indicators to measure and monitor the implementation of public service codes of conduct.

28. At last, the Conference adopted a revised draft resolution entitled “Marrakech Declaration on the Prevention of Corruption” sponsored by the Islamic Republic of Iran, on behalf of the States Members of the United Nations that are members of the Group of 77 and China; subsequently, Australia, France, Mexico and the Russian Federation joined in sponsoring the revised draft resolution.

29. Besides these three issues that we have dealt with, another issue that was also dealt with at the Conference related to Chapter VI of the UN Convention against Corruption on **Technical Assistance and Information Exchange** that deals with the ways in which the States Parties assist each other in tackling corruption. Technical assistance is intended in particular to contribute to capacity development for prevention, criminalisation and mutual legal assistance in connection with asset recovery. Arts. 60 and 62 provide a framework for capacity development and technical assistance.

30. By virtue of its resolution 3/4, the Conference had decided that an expert panel should be organized during the discussion of the item on technical assistance in order to provide an opportunity for recipient countries and technical assistance providers, including international organizations and bilateral donors, to share experiences and good practices in the delivery of technical assistance. Representatives of Indonesia, Rwanda, the United Kingdom, OECD and UNDP were invited to participate in the panel.

31. The representative of Indonesia highlighted the importance of technical assistance for ensuring the full and effective implementation of the Convention. She reported that Indonesia and its development partners had moved towards a country led and country-based approach to technical assistance. In this context, it had proved crucial for Indonesia to develop its national anti-corruption strategy in accordance with the requirements of the Convention, allowing providers of technical assistance to align their support with national priorities. Speakers welcomed the launch of the International Anti-Corruption Academy as a training institution to support international capacity-building and knowledge sharing efforts.

III. Comments and Observations of the AALCO Secretariat

32. The United Nations Convention against Corruption (UNCAC) is the first global framework for world-wide anti-corruption efforts. It has been ratified by 156 countries. The ratification of the UNCAC represents an important milestone for its State Parties in their endeavour towards achieving better transparency and good governance. It will not only provide a renewed impetus and momentum for the anti-corruption efforts in their domestic societies , but it will also give out a clear signal to the international community that they are strongly committed to participating in the global fight against corruption.

33. We welcome the establishment of the review mechanism, where each State Party is reviewed by peers in good faith and mutual trust, a review mechanism, which assists States Parties in identifying gaps in their implementation which highlights good practices and needs for technical assistance and which further enables the Conference of the States Parties to acquire necessary knowledge of the measures taken by States Parties in implementing the Convention. We recognize that the reviews carried out during the first year of the first review cycle have taken longer to complete than envisaged. Nevertheless, it is a considerable achievement taking into account that many countries have no prior experience of this kind of review. We are confident that as we gain experience, future reviews will better respect timeline set.

34. In relation to the happenings at the 4th CoSP, one could find some positive developments. As regards the issue of prevention of corruption, there were some welcome developments during the conference in Marrakesh, namely a commitment on the prevention of corruption agreed by states and the strengthening of the stolen asset recovery framework, an issue that is particularly important to countries such as Egypt, Libya and Tunisia, and others that have alleged public money was siphoned off by corrupt elites and stashed overseas. Based on a resolution by the Government of Egypt (ultimately put forward by the G77 and China) there was indeed significant progress in the area of recovery of stolen assets, and AALCO is pleased with this outcome. However, effectiveness of these measures may be ultimately undermined by the absence of a civil society voice. The CoSP, which remains the strongest tool for facilitating implementation of the UNCAC as the global anticorruption instrument, should, in future, create an opportunity for more informal consultation between the Civil Society Organizations and the governments before the convening of the 5th CoSP in a couple of years.

35. AALCO would be keenly pursuing the developments that are due to take place in the coming years in relation to the UNCAC and the work of its Implementation Review Group with a view to highlight them to the Member States as regards areas where more effort is required for a state party to meet its obligations.

Annex I

Participation of the AALCO Member States in the UN Convention against Corruption

Status: Signatories 140, Parties 156 [as of 17 Nov. 2011[10]]

Ratification Status of African Countries:

Country	Signature	Ratification (R)/Accession (A)
Botswana		**A**
Cameroon		**R**
Egypt		**R**
Gambia	-----	**----**
Ghana		**R**
Kenya		**R**
Libya		**R**
Mauritius		**R**

[10] The information contained in this Chart has been accessed from the web site of the United Nations Office on Drugs and Crime: www. Unodc.org/unodc/ en/treaties/CAC/signatories/htm

Nigeria		**R**
Senegal		**R**
Sierra Leone		**R**
Somalia	**----**	**----**
South Africa		**R**
Sudan	**S**	
Tanzania		**R**
Uganda		**R**

Ratification Status of Asian Countries:

Country	**Signature**	**Ratification (R)/Accession (A)**
Bahrain		**R**
Bangladesh		**A**
Brunei		**R**
China P.R.		**R**
Cyprus		**R**
India		**R**
Indonesia		**R**
Iran		**R**
Iraq		**A**
Japan	**S**	
Jordon		**R**

Korea D.P.R	**----**	**----**
Korea Rep.of		**R**
Kuwait		**R**
Lebanon		**A**
Malaysia		**R**
Mongolia		**R**
Myanmar	**S**	
Nepal		**R**
Oman	**----**	**----**
Pakistan		**R**
Palestine	**----**	**----**
Qatar		**R**
Saudi Arabia	**S**	
Singapore		**R**
Sri Lanka		**R**
Syria	**S**	
Thailand		**R**
Turkey		**R**
U.A.E		**R**
Yemen		**R**

Annex-II

SECRETARIAT'S DRAFT
AALCO/RES/DFT/51/S 11
22 JUNE 2012

CHALLENGES IN COMBATING CORRUPTION: THE ROLE OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

(Non-Deliberated)

The Asian-African Legal Consultative Organization at its Fiftieth Session,

Having considered the Secretariat document contained in No. AALCO /51/ ABHUJA /2012/ S 11;

Deeply concerned about the impact of corruption on the political, social and economic stability and development of societies;

Bearing in mind that the prevention and combating of corruption is a common and shared responsibility of the international community, necessitating cooperation at the bilateral and multilateral levels;

Recalling resolution 3/1 adopted by the Conference of State Parties to the United Nations Convention Against Corruption [UNCAC] at its third meeting held in November 2009 at Doha, by which the Conference had established the Mechanism for the Review of Implementation of the United Nations Convention against Corruption and charged the Implementation Review Group with having an overview of the review process,

1. Welcomes the work undertaken by the Implementation Review Group and noting with appreciation the commitment of States Parties to the country review process in their capacities both as States parties under review and as reviewing States parties;

2. Encourages Member States of AALCO who have not done so to consider ratifying/acceding to the United Nations Convention against Corruption so as to strengthen the fight against corruption;

3. Decides to place this item on the provisional agenda at its Fifty-Second Annual Session.

5. REPORT ON THE WORK OF UNCITRAL AND OTHER INTERNATIONAL ORGANIZATIONS IN THE FIELD OF INTERNATIONAL TRADE LAW

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REPORT ON THE WORK OF THE UNCITRAL AND OTHER INTERNATIONAL ORGANIZATIONS IN THE FIELD OF INTERNATIONAL TRADE LAW
(Non-Deliberated)

CONTENTS

REPORT ON THE WORK OF UNCITRAL AND OTHER INTERNATIONAL ORGANIZATIONS IN THE FIELD OF INTERNATIONAL TRADE LAW

I. INTRODUCTION

A. BACKGROUND

1. The issues concerning International Trade Law were first included in the agenda of the Asian-African Legal Consultative Organization (AALCO) at the Third (Colombo) Session in 1960, pursuant to a reference made by the Government of India. At the Fourth Session, 1961 (Tokyo), the topic "Conflict of Laws relating to Sales and Purchases in Commercial Transactions between States or their Nationals" was considered by the Member States.

2. The United Nations Commission on International Trade Law (UNCITRAL), which was constituted by the United Nations General Assembly resolution No. 2205 (XXI), held it's First Session in New York in 1968 and the major items which were selected for study and consideration by the UNCITRAL included the topic of "International Sale of Goods". At the Second Session of the UNCITRAL in 1969, the representatives of Ghana and India suggested that the then Asian-African Legal Consultative Committee (AALCC) should revive its consideration of the subject of the International Sale of Goods so as to reflect the Asian-African view point in the work of the UNCITRAL.[1] Upon that request, the then AALCC considered it as priority item at the Eleventh Session held in Accra (Ghana) in 1970.

3. At its Eleventh Session (1970), the Organization also decided upon the establishment of a Standing Sub-Committee to deal with economic and trade law matters as a regular feature of its activities and official relations were established with the UNCITRAL in the year 1971, which have since resulted in fruitful and effective collaboration between the two Organizations in several areas of trade law. From then onwards, AALCO started considering the issues pertaining to international trade law and the international organizations dealing with such matters, viz., United Nations Conference on Trade and Development (UNCTAD), International Institute for the Unification of Private Law (UNIDROIT) and Hague Conference on Private International Law (HCCH).

4. Until 2003, the Organization considered the agenda entitled, "Progress Report concerning the Legislative Activities of the United Nations and other Organizations in the field of International Trade Law". At the Forty-Third (Bali) Session, 2004, the title had been changed to the "Report on the Work of UNCITRAL and other International Organizations in the Field of International Trade Law" so as to focus more upon the work of UNCITRAL.[2]

[1] AALCC Report of the Eleventh Session held in Accra (Ghana), 19-29 January 1970, p. 259.

[2] For the other agenda items on this topic, See, Table-III- Substantive Matters Considered at the AALCO Annual Sessions, in Fifty Years of AALCO: Commemorative Essays in International Law (New Delhi, 2007).

5. This report prepared by the AALCO Secretariat is intended to provide an overview of the work of UNCITRAL and other International Organizations engaged in the field of international trade law. The Organizations covered in the report are:

a) UNCITRAL (United Nations Commission on International Trade Law)
b) UNCTAD (United Nations Conference on Trade and Development)
c) UNIDROIT (International Institute for the Unification of Private Law)
d) HCCH (Hague Conference on Private International Law)

A. DELIBERATIONS AT THE FIFTIETH ANNUAL SESSION OF AALCO (COLOMBO, DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, 2011)

6. This agenda item was deliberated during the Fiftieth Annual Session of AALCO, held in Colombo, Democratic Socialist Republic of Sri Lanka, from 27 June to 1 July 2011. The Report of the Secretariat covered mainly three areas which were namely: i) the finalization and adoption of a revised version of the UNCITRAL Arbitration Rules, 2010, ii) the finalization and adoption of a draft supplement to the UNCITRAL legislative guide on security transactions with security rights in intellectual property, and iii) the finalization and adoption of part three of the UNCITRAL legislative guide on insolvency law on the treatment of enterprise groups in insolvency. The delegations from the following Member States made their comments; namely, Indonesia, People's Republic of China, Pakistan, Japan, Malaysia, State of Kuwait and Thailand.

II. REPORT ON THE WORK OF UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) AT ITS FORTY-FOURTH SESSION IN THE YEAR 2011

A. Introduction

7. The United Nations Commission on International Trade Law is the primary organ of the United Nations system to harmonize and develop progressive rules in the area of international trade law. A substantial part of the Commission's work is carried out in meetings of the Working Groups, while the Commission meets annually to review and adopt recommendations towards guiding the progress of work on the various topics on its agenda. The Commission is also mandated to submit an annual report to the General Assembly, as to the tasks accomplished at its sessions.

8. The forty-fourth session of the UNCITRAL was held in Vienna from 27 June 8 July 2011. The Commission had on its agenda, *inter alia*, the following topics for consideration:

i. Finalization and adoption of the UNCITRAL Model Law on Public Procurement,
ii. Finalization and adoption of judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency,
iii. Arbitration and conciliation,
iv. Online dispute resolution,

v. Insolvency law, and
vi. Security interests,

B. Finalization and adoption of the UNCITRAL Model Law on Public Procurement

1. Background

9. The Commission recalled its previous discussions on the UNCITRAL Model Law on Procurement of Goods, Construction and Services[3], 1994 and its decision to entrust the drafting of proposals for revision of the 1994 Model Law to Working Group I (Procurement).[4] The Commission noted that the Working Group had begun its work on the revision at its sixth session, held in Vienna from 30 August to 3 September 2004, and completed its work at its nineteenth session, held in Vienna from 1 to 5 November 2010. At its twentieth session, held in New York from 14 to 18 March 2011, the Working Group had commenced work on the preparation of a revised Guide to Enactment.[5]

10. The Commission had before it at the current session: (a) the draft revised text of the Model Law on Public Procurement resulting from the nineteenth session of the Working Group, with an accompanying note by the Secretariat; (b) a compilation of comments from Governments on that draft Model Law received by the Secretariat before the forty-fourth session of the Commission; (c) a working draft of the Guide to Enactment to accompany the draft Model Law; and (d) the reports on the nineteenth and twentieth sessions of the Working Group.

11. The Commission proceeded with the consideration of the draft Model Law. The Commission noted that the working draft of the Guide to Enactment was not to be considered during the session but was to be used only for reference to assist the Commission in consideration of the provisions of the draft Model Law. The Commission agreed to consider substantive issues first and drafting issues thereafter.

2. Consideration of the draft UNCITRAL Model Law on Public Procurement

12. The Commission authorized the Secretariat to prepare the final text of the Model Law by incorporating changes agreed to be made at the session to document A/CN.9/729 and its addenda, renumbering the articles as a result of the introduction of new article 15 bis, amending cross-references and making other necessary editorial changes throughout the Model Law.

13. While acknowledging the efforts made to prepare the revised Model Law, a view was expressed that some of its provisions focused excessively on the use of public procurement as a tool for promotion of international trade. According to that view, public procurement in many developing countries was used as a tool for building local capacities, developing local small and

[3] United Nations publication, Sales No. E.98.V.13.
[4] Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17 (A/59/17), paras. 81 and 82.
[5] For the reports of the Working Group on the work of its sixth to twentieth sessions, see A/CN.9/568, A/CN.9/575, A/CN.9/590, A/CN.9/595, A/CN.9/615, A/CN.9/623, A/CN.9/640, A/CN.9/648, A/CN.9/664, A/CN.9/668, /CN.9/672, A/CN.9/687, A/CN.9/690, A/CN.9/713 and A/CN.9/718, respectively.

medium-sized enterprises and implementing other socio-economic and environmental policies of States. The Commission was urged to take into account the social and economic realities of various countries in preparing the Guide and to avoid indicating that the text should be directly implemented into domestic legislation without amendment to take account of such matters.

14. The Commission at the Session adopted the UNCITRAL Model Law on Public Procurement. The UNCITRAL Model Law on Public Procurement consists of 69 articles and divided into 8 chapters. The chapters are as the following: (i) General provisions, (ii) Methods of procurement and their conditions for use; solicitation and notices of the procurement, (iii) open tendering, (iv) Procedures for restricted tendering, requests for quotations and requests for proposals without negotiation, (v) Procedures for two-stage tendering, requests for proposals with dialogue, requests for proposals with consecutive negotiations, competitive negotiations and single-source procurement, (vi) Electronic reverse auctions, (vii) Framework agreement procedures, and (viii) Challenge proceedings.

C. Finalization and adoption of judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency

1. Background

15. The Commission noted that Working Group V (Insolvency Law) had considered at its thirty-ninth session, held in Vienna from 6 to 10 December 2010, a draft text of the judicial materials on the Model Law[6], which responded to a mandate given to the Secretariat by the Commission and was developed in consultation with judges and insolvency experts[7]. The Commission further noted that the draft text had been considered at the Ninth Multinational Judicial Colloquium,[8] and that, pursuant to the Working Group's request,[9] it had been circulated to Governments for comment in February 2011.

16. The Commission had before it at the current session: (a) the draft revised text of the Model Law on Public Procurement resulting from the nineteenth session of the Working Group, with an accompanying note by the Secretariat[10]; (b) a compilation of comments from Governments on that draft Model Law received by the Secretariat before the forty-fourth session of the Commission;[11] (c) a working draft of the Guide to Enactment to accompany the draft Model Law[12] ;and (d) the reports on the nineteenth and twentieth sessions of the Working Group.[13]

2. Consideration at the Forty-Fourth Session (2011) of the Commission

[6] A/CN.9/WG.V/WP.97 and Add.1 and 2
[7] A/CN.9/715, paras. 110-116
[8] Held in Singapore on 12 and 13 March 2011
[9] A/CN.9/715, para. 116
[10] A/CN.9/729 and Add.1-8
[11] A/CN.9/730 and Add.1 and 2
[12] A/CN.9/731 and Add.1-9 and A/CN.9/WG.I/WP.77 and Add.1-9
[13] A/CN.9/713 and A/CN.9/718

17. The Commission proceeded with the consideration of the draft Model Law. The Commission noted that the working draft of the Guide to Enactment was not to be considered during the session but was to be used only for reference to assist the Commission in consideration of the provisions of the draft Model Law. The Commission agreed to consider substantive issues first and drafting issues thereafter.

18. The Commission had before it the revised version of the draft judicial materials[14], the comments from Governments[15] and the report of the thirty-ninth session of the Working Group[16]. The Commission heard an oral introduction to the draft text. The Commission expressed its appreciation for the draft judicial materials and emphasized their usefulness for practitioners and judges, as well as creditors and other stakeholders in insolvency proceedings, particularly in the context of the current financial crisis. In that regard, the judicial materials were viewed as very timely. The Commission also expressed its appreciation for the incorporation of the suggestions made by Governments following circulation of the draft judicial materials and agreed that the document should be entitled "The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective". The UNCITRAL Model Law on Cross-Border Insolvency was adopted.

D. Arbitration and Conciliation

1. Background

19. At its current session, the Commission had before it the reports of the Working Group on its fifty-third session, held in Vienna from 4 to 8 October 2010,[17] and on its fifty-fourth session, held in New York from 7 to 11 February 2011.[18] The Commission commended the Working Group for the progress made regarding the preparation of a legal standard on transparency in treaty-based investor-State arbitration and the Secretariat for the quality of the documentation prepared for the Working Group.

20. The Commission noted that the Working Group had considered matters of content, form and applicability of the legal standard on transparency to both future and existing investment treaties. It was confirmed that the question of applicability of the legal standard on transparency to existing investment treaties was part of the mandate of the Working Group and a question with great practical interest, taking account of the high number of treaties already concluded. The Commission also reiterated its commitment expressed at its forty-first session, in 2008, regarding the importance of ensuring transparency in investor-State arbitration.[19]

21. The Commission noted that the Working Group had discussed at its fifty-third session the

[14] A/CN.9/732 and Add.1-3
[15] A/CN.9/733 and Add.1
[16] A/CN.9/715
[17] A/CN.9/712
[18] A/CN.9/717
[19] Official Records of the General Assembly, Sixty-third Session, Supplement No. 17 and corrigendum (A/63/17 and Corr.1), para. 314.

matter of submissions by third parties (amicus curiae) in arbitral proceedings. In that context, the question of intervention in the arbitration by a non-disputing State party to the investment treaty was raised. At that session, the Working Group had agreed to seek guidance from the Commission on whether that topic could be dealt with by the Working Group in the context of its current work.[20] That agreement was reiterated by the Working Group at its fifty-fourth session.[21] It was explained that, at its fifty-third session, the Working Group had noted that two possible types of amicus curiae should be distinguished and perhaps considered differently. The first type could be any third party that would have an interest in contributing to the solution of the dispute. A second type could be another State party to the investment treaty at issue that was not a party to the dispute. It was noted that such a State often had important information to provide, such as information on travaux préparatoires, thus preventing one-sided treaty interpretation. It was also noted that an intervention by a non-disputing State party of which the investor was a national could raise issues of diplomatic protection and was to be given careful consideration.[22]

22. The Commission was informed that recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules, as revised in 2010,[23] were under preparation by the Secretariat in accordance with the decision of the Commission at its forty-third session, in 2010.[24] It was recalled that the purpose of such recommendations was to promote the use of the Rules and that arbitral institutions in all parts of the world would be more inclined to accept acting as appointing authorities if they had the benefit of such recommendations. Subject to the availability of resources, the Secretariat was requested to prepare draft recommendations for consideration by the Commission at a future session, preferably as early as 2012.

2. Consideration at the Forty-Fourth Session (2011) of the Commission

23. The Commission agreed that the 1996 UNCITRAL Notes on Organizing Arbitral Proceedings needed to be updated pursuant to the adoption of the UNCITRAL Arbitration Rules, as revised in 2010, and entrusted the Secretariat with the preparation of the revised Notes.

24. The Commission heard an oral report on progress regarding the preparation of a guide to enactment and use of the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006. The Commission requested the Secretariat to pursue its efforts towards the preparation of the guide. It was agreed that a more substantive presentation on progress made in the preparation of the guide should be made at a future session of the Commission.

25. The Commission heard a presentation by the secretariat of UNCTAD on the use of mediation in the context of investor-State dispute settlement. The work of UNCTAD on international investment law was said to pursue the overall objective of harnessing foreign investment as a tool for sustainable development. It was said that, in recent years, there had been

[20] A/CN.9/712, para. 103
[21] A/CN.9/717, para. 153
[22] A/CN.9/712, para. 49
[23] Ibid., Sixty-fifth Session, Supplement No. 17 (A/65/17), annex I.
[24] Ibid., para. 189.

an increasing interest in the possibility of using alternative methods for managing disputes effectively. Effective recourse to mediation or conciliation as part of investor-State dispute settlement mechanisms might improve the efficiency of dispute resolution and have several advantages, such as enhancing flexibility, consuming fewer resources and being favourable to the long-term working relationship between the parties, while simultaneously improving good governance and regulatory practices of States.[25] Overall, mediation/conciliation as an alternative approach to international arbitration under investment treaties was said to offer a promising alternative to the settlement of investment disputes through international arbitration; hence various actors should be encouraged to give such methods further consideration.

E. Online dispute resolution

1. Background

26. The Commission recalled its previous discussions of online dispute resolutions.[26] At its current session, the Commission noted that Working Group III (Online Dispute Resolution) had commenced its deliberations on the preparation of legal standards, in particular procedural rules on online dispute resolution for cross-border electronic transactions, at its twenty-second session, held in Vienna from 13 to 17 December 2010, and continued its work at its twenty-third session, held in New York from 23 to 27 May 2011. The Commission also noted that, in addition to the procedural rules, the Working Group had requested the Secretariat, subject to the availability of resources, to prepare documentation for its next session addressing the issues of guidelines for neutrals, guidelines for online dispute resolution providers, substantive legal principles for resolving disputes and a cross-border enforcement mechanism.

27. The Commission took note of a concern raised that, given that online dispute resolution was a somewhat novel subject for UNCITRAL and that it related at least in part to transactions involving consumers, the Working Group should adopt a prudent approach in its deliberations, bearing in mind the Commission's direction at its forty-third session that the Working Group's work should be carefully designed not to affect the rights of consumers.[27]

F. Insolvency law

28. The Commission recalled its previous discussions on activity undertaken by Working Group V (Insolvency Law) on the following two topics: (a) guidance on the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests and possible development of a model law or provisions on insolvency law addressing selected international issues, such as jurisdictions, access and recognition, in a manner that would not preclude the development of a convention; and (b)

[25] *Investor-State Disputes: Prevention and Alternatives to Arbitration*, United Nations publication, Sales No. E.10.II.D.11; available from www.unctad.org/en/docs/diaeia200911_en.pdf.
[26] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 338 and 341-343; and ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 252 and 257.
[27] Ibid. Sixty-fifth Session, Supplement No. 17 (A/65/17), para. 256.

responsibility and liability of directors and officers of an enterprise in insolvency and pre-insolvency cases. The Commission expressed its appreciation for the progress made by the Working Group as reflected in the report of its thirty-ninth session, held in Vienna from 6 to 10 December 2010,[28] and commended the Secretariat for the working papers and reports prepared for that session.

G. Security interests

1. Background

29. The Commission recalled its previous discussions on the preparation of a text on the registration of security rights in movable assets.[29] At its current session, the Commission had before it the reports of Working Group VI (Security Interests) on the work of its eighteenth session, held in Vienna from 8 to 12 November 2010, and nineteenth session, held in New York from 11 to 15 April 2011.[30] The Commission noted that, at its eighteenth session, the Working Group had adopted the working assumption that the text it had been entrusted to prepare would take the form of a guide on the implementation of a registry of notices with respect to security rights in movable assets. In addition, the Commission noted that, at that session, the Working Group had generally agreed that the text could include principles, guidelines, commentary and possibly recommendations with respect to registration regulations. Moreover, the Commission noted that the Working Group had agreed that the text should be consistent with the UNCITRAL Legislative Guide on Secured Transactions,[31] at the same time taking into account the approaches taken in modern security rights registration systems, both national and international.[32] The Commission also noted that, having agreed that the Secured Transactions Guide was consistent with the guiding principles of UNCITRAL texts on e-commerce, the Working Group considered certain issues arising from the use of electronic communications in security rights registries to ensure that, like the Secured Transactions Guide, the text on registration would also be consistent with those principles.[33]

30. The Commission also noted that, at the nineteenth session of the Working Group, differing views had been expressed as to the form and content of the text to be prepared. One view noted was that the text should be a stand-alone guide that would include an educational part introducing the secured transactions law recommended in the Secured Transactions Guide and a practical part that would include model regulations and commentary thereon. Another view noted was that the text should place more emphasis on model regulations and commentary thereon, which should provide States that had enacted the secured transactions law recommended in the Secured Transactions Guide with practical advice as to the issues to be addressed in the context of the establishment and operation of a general security rights registry.[34] The Commission also noted that differing views had also been expressed at that session of the

[28] A/CN.9/715
[29] Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17), paras. 265-268.
[30] A/CN.9/714 and A/CN.9/719, respectively.
[31] United Nations publication, Sales No. E.09.V.12.
[32] A/CN.9/714, para. 13.
[33] A/CN.9/714, paras. 34-47.
[34] A/CN.9/719, paras. 13-15

Working Group as to whether the regulations should be formulated as model regulations or as recommendations.[35] The Commission further noted that, at its nineteenth session, the Working Group had completed the first reading of the draft Security Rights Registry Guide and draft Model Regulations[36] and had requested the Secretariat to prepare a revised version reflecting the deliberations and decisions of the Working Group. [37]

2. Consideration at the Forty-Fourth Session (2011) of the Commission

31. The Commission expressed its appreciation to the Working Group for the significant progress achieved in its work and to the Secretariat for the efficient assistance provided to the Working Group. The significance of the work undertaken by Working Group VI was emphasized in particular in view of the efforts currently being undertaken by several States with a view to establishing a general security rights registry and the significant beneficial impact the operation of such a registry would have on the availability and cost of credit. With respect to the form and content of the text to be prepared, it was stated that, following the approach used with respect to the Secured Transactions Guide, the text should be formulated as a guide with commentary and recommendations rather than as a text with model regulations and commentary thereon. In that connection, it was noted that the next version of the text before the Working Group would be formulated in a way that would leave the matter open until the Working Group had made a decision. After discussion, the Commission agreed that, leaving aside the decision on the form and content of the text to be prepared for the Working Group, the mandate of the Working Group did not need to be modified and that, in any case, a final decision would be made by the Commission once the Working Group had completed its work and submitted the text to the Commission.

H. Date and Venue of the Forty-Fifth Session of the Commission

32. The forty-fifth session of the Commission is scheduled to be convened from 25 June to 13 July 2012 in New York.

III. REPORT ON THE WORK OF THE UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD)

33. This part of the Secretariat's report takes note of major developments of the United Nations Conference on Trade and Development (UNCTAD). The fifty-eighth annual session of the Trade and Development Board was held in Palais des Nations Geneva from 12 to 28 September 2011.

A. Fifty-Eighth Annual Session of Trade and Development Board (12-28 September 2011, Palais des Nations, Geneva)

[35] A/CN.9/719, para. 46
[36] A/CN.9/WG.VI/WP.46 and Add.1-3
[37] A/CN.9/719, para. 12

34. The fifty-eighth annual session of the Trade and Development Board [38] focused at their high-level segment on the global economic crisis and the necessary policy response. The other areas that were of importance to the countries from Asian and African regions were: (i) Economic development in Africa: Fostering industrial development in Africa in the new global environment (ii) Interdependence: Addressing trade and development challenges and opportunities after the global economic and financial crisis (iii) Evolution of the international trading system and of international trade from a development perspective (iv) Development strategies in a globalized world: A new role for the government and fiscal policy. (v) Investment for development: Implications of non-equity forms of transnational corporations' operations

35. A multitude of factors underpin the movements of short-term capital flows, whose volatility can have adverse effects on developing countries, especially in the wake of the global recession, and offset their potential benefits. UNCTAD's latest research examines the persistent inflows and their resilience aftershocks and emphasizes that nominal interest rates are persistently high in the countries receiving these flows compared to rates in the countries in whose currencies they are funded. Today, a new form of "Dutch disease" is at work, although this time currency overvaluation is provoked by international carry-trade rather than from commodity-export earnings. The effects are just the same, however: distorting exchange rates, and frustrating countries' efforts to develop their manufacturing industries and to diversify domestic production and exports. The high-level segment will address ways and means to ensure that capital flows to developing countries work in favour of sustained, strong and balanced growth.

1. Economic Development in Africa: Fostering Industrial Development in Africa in the New Global Environment

36. The Economic Development in Africa Report 2011: Fostering Industrial Development in Africa in the New Global Environment examines the status of industrial development in Africa with a focus on the identification of "stylized facts" associated with African manufacturing. It also provides an analysis of past attempts at promoting industrial development in the region and the lessons learned from these experiences. Furthermore, it offers policy recommendations on how to foster industrial development in Africa in the new global environment characterized by changing international trade rules, growing influence of industrial powers from the South, the internationalization of production and increasing concerns about climate change.

37. Deliberations by the Trade and Development Board under this agenda item will provide an opportunity to review past attempts at promoting industrial development in Africa and the lessons learned from these experiences. Deliberations will focus on the need for African countries to adopt a new strategic approach to industrial policy based on the following principles: (a) supporting as well as challenging entrepreneurs to perform; (b) building effective State–business relations; (c) recognizing the political feasibility of proposed actions; (d) focusing on lifting binding constraints; and (e) putting in place a mechanism for monitoring, evaluation and

[38] See Report of the Fifty-eighth session of the Trade and Development Board of the United Nations Conference on Trade and Development held at the Palais des Nations, Geneva, from 12 to 28 September 2011,, document no. TD/B/58/1.

accountability. Special attention will be given to the new global environment characterized by changing international trade rules, growing influence of industrial powers from the South, the internationalization of production and growing concerns about climate change.

2. Evolution of the International Trading System and of International Trade from a Development Perspective

38. The Trade and Development Board will review developments in the international trading system and international trade of particular relevance to developing countries. Trade remains an important engine of economic recovery, growth and development. The World Trade Organization (WTO) Doha Round of multilateral trade negotiations stands at a critical juncture. The objective of concluding the Round by the end of 2011 is unlikely to be met and WTO members now aim to agree instead on a package of limited developmental issues by December, particularly in favour of LDCs. The agricultural sector, a major source of income and jobs in many developing countries, has been at the heart of the development dimension of the Round. The search for post-crisis growth and development path, as well as recent recurrent food crises and heightened food security concerns, have led many countries to refocus their attention to agriculture as a central pillar of strategies for economic diversification, value addition and structural transformation, as well as for food security, poverty alleviation and employment creation. Against this backdrop, the Board will examine the role of the agricultural sector and agricultural trade in growth and development, and consider the contribution of the international trading system to agriculture-based development strategies.

3. Development Strategies in a Globalized World: A New Role for the Government and Fiscal Policy

39. Deliberations by the Trade and Development Board under this agenda item will focus on the effectiveness of the policies adopted to cope with the global economic and financial crisis and the economic reforms needed in order to support sustainable and inclusive growth.

4. Investment for Development: Implications of Non-Equity Forms of Transnational Corporations' Operations

40. Global value chains governed by transnational corporations (TNCs) have considerably evolved over the last decade. Not only has the international spread of production processes increased dramatically, there has also been a reconfiguration of ownership and control. This has led to the increasing importance of so-called "non-equity modes of TNC operations", in which TNCs exercise a level of control over economic activities and business entities in overseas markets without equity participation or ownership. Common non-equity forms are contract manufacturing, services outsourcing, contract farming, licensing and franchising. To ensure participation of developing economies in global value chains, it is no longer enough to focus only on attracting FDI and subsidiaries of TNCs. Policymakers must now consider a myriad of alternative forms of TNC engagement in their economies, each of which comes with its own set of development impacts and policy implications.

41. The session focused on how the promotion of non-equity modalities (NEMs) may be integrated into domestic industrial development strategies to make investment work for development.

IV. REPORT ON THE WORK OF THE INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT)

42. The Governing Council of UNIDROIT at its 90th session held in Rome from 9 to 11 May 2011, adopted the following Work Programme for the 2011-2013 triennium on legislative activities: (i) adoption of the third edition of the Principles of International Commercial Contracts; (ii) draft protocol to the Cape Town Convention on Matters specific to Space Assets; (iii) Netting of Financial Instruments; (iv) Principles and rules capable of enhancing trading in securities in emerging markets; (v) Third Party Liability for Global Navigation Satellite System (GNSS) Services; (vi) Preparation of a new Protocol to the Cape Town Convention on matters specific to agricultural, mining and construction equipment; (vii) Private law and development and; (viii) Proposal for a Model Law on the Protection of Cultural Property.

A. Principles of International Commercial Contracts

43. The Working Group for the preparation of a third edition of the UNIDROIT Principles of International Commercial Contracts held its fifth session in Rome from 24 to 28 May 2010, seized of a Memorandum by the Secretariat on the placement of the new draft chapters in the 2010 edition of the UNIDROIT Principles.[39] Further, at its 90th session the Governing Council of UNIDROIT adopted the third edition of the UNIDROIT Principles of International Commercial Contracts ("UNIDROIT Principles 2010"). The UNIDROIT Principles 2010 contain new provisions on restitution in case of failed contracts, illegality, conditions, and plurality of obligors and obligees, while with respect to the text of the 2004 edition the only significant changes made relate to the Comments to Article 1.4. The new edition of the UNIDROIT Principles consists of 211 Articles structured as follows:

- Preamble;
- Chapter 1: General provisions;
- Chapter 2: Section 1: Formation, Section 2: Authority of agents;
- Chapter 3: Section 1: General provisions, Section 2: Ground for avoidance, Section 3: Illegality;
- Chapter 4: Interpretation;
- Chapter 5: Section 1: Content, Section 2: Third Party Rights, Section 3: Conditions;
- Chapter 6: Section 1: Performance in general, Section 2: Hardship;
- Chapter 7: Section 1: Non-performance in general, Section 2: Right to performance, Section 3: Termination, Section 4: Damages;
- Chapter 8: Set-off;
- Chapter 9: Section 1: Assignment of rights, Section 2: Transfer of obligations, Section 3: Assignment of contracts;

[39] See UNIDROIT 2010 – Study L – Doc. 119.

- Chapter 10: Limitation periods;
- Chapter 11: Section 1: Plurality of obligors, Section 2: Plurality of obligees.

B. Draft Protocol to the Cape Town Convention on Matters specific to Space Assets (Space Assets Protocol, 2012)

44. The UNIDROIT Committee of governmental experts for the preparation of a draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets made significant progress during 2010 in building on the intersessional work 3 that had paved the way for its reconvening in December 2009: it was on this basis that the UNIDROIT Governing Council at its 89th session, authorized the holding of a fifth session of the Committee, with the idea that the Governing Council at its 90th session, should, in the light of the progress to be accomplished by the Committee at its fifth session, be in a position to decide as to the ripeness of the text of the preliminary draft Protocol to the Convention on International Interests on Matters specific to Space Assets for submission to a diplomatic Conference, for adoption.

45. At its 90th session, the UNIDROIT Governing Council decided to authorise the transmission of the text of what thus became the draft Space Protocol to a diplomatic Conference for adoption, which was held in Berlin, Germany from 27 February to 9 March 2012. 40 States and 10 International Organisations participated in the Diplomatic Conference. 25 States signed the 'Final Act'[40] at the closing ceremony of the diplomatic conference. The following Member States of AALCO signed the Final Act at the closing ceremony of the diplomatic Conference: People's Republic of China, Ghana, India, Iraq, Japan, Pakistan, the Republic of Korea, Saudi Arabia, Senegal, South Africa, and Turkey.

46. Work on the proposed Space Assets Protocol started over ten years ago. UNIDROIT states that "the draft Space Assets Protocol... represents the coordinated efforts of both Governments and the commercial space sector to render asset based financing more accessible to an industry that is presently searching for innovative ways to obtain start-up capital for space-based services. Such ventures are full of risk and uncertainty and, consequently, their financing is currently still prohibitively expensive. By introducing a uniform regime to govern the creation, perfection and enforcement of international interests in space assets, notably satellites, it is envisaged that the cost of financing will be reduced as a result of the increased level of transparency and predictability for financiers, thereby making financing more widely available to a greater number of players in the commercial space sector. Such an instrument will, in particular, help bring much needed financial resources to the new space community, namely those small start-up companies that have emerged as a result of the booming commercial space sector." The Protocol will create an international registry to record and determine priority (according to when registered) among creditor rights in space assets. It would include transponder leases, conditional sales agreements and security interests.

[40] For the text of the Space Assets Protocol, please visit this website: http://www.unidroit.org/english/workprogramme/study072/spaceprotocol/conference/documents/dcme-sp-43-e.pdf.

C. Private Law and Development

47. The Governing Council of UNIDROIT examined a document submitted by the Secretariat on "Private Law Aspects of Agricultural Financing" which was proposed as the first item to be examined of the larger project on "Private Law and Development". In the document the Secretariat submitted that UNIDROIT might have a contribution to make in areas of private law that might be involved in the broader discussion of FDI in the agricultural sector, such as, for instance, property law or financing and commercial law aspects that come into play in the negotiation and performance of FDI agreements in the agricultural sector. A great deal of work had been done in recent years by various international organisations to assist domestic legislators and policy-makers improve the legal framework for secured transactions. Similarly, much valuable work had been done on various aspects of private law that affected the structures and marketing strategies of enterprises operating in the rural sector, either by means of general advice, or in country-specific or regional programmes. There appeared, however, to be no international guidance document that presented the results of all of those instruments, studies and guidance documents, as they applied in particular to the private law aspects of transactions in the agricultural sector. The document suggested that the preparation of such an instrument, possibly in the form of a legislative guide, might provide a useful addition to the specific advice already available. The instrument should present various options available to countries from different legal traditions and discuss their relative advantages and disadvantages from the point of view of the overall objective of promoting investment in agricultural production and easing access to rural credit.

48. As a first step to that end, the Secretariat envisages organising, in cooperation with other international organisations, a colloquium in the first quarter of 2011 on the legal aspects of agricultural financing to canvass the international work done in the area and assess the need for, and desirability of, developing legislative guidance on selected areas of private law that might have an impact on the availability of financing for agricultural production. This proposal was endorsed by the Council, which decided to recommend the item Private Law Aspects of Agricultural Finance for inclusion in the Work Programme of the Institute.

D. Third Party Liability for Global Navigation Satellite System (GNSS) Services

49. Pursuant to the decision taken by the Governing Council at its 89th session of inviting the Secretariat to conduct informal consultations with the Governments and other Organisations concerned, with a view to ascertaining the scope and the feasibility of a possible international instrument on "Third party liability for Global Navigation Satellite Systems (GNSS) services", the UNIDROIT Secretariat held at the seat of the Institute on 22 October 2010 an Informal consultation meeting with the participation of representatives of the Governments of China, the Czech Republic, Germany, Italy, the Russian Federation, the United States of America, of the Commission of the European Union as well as of academics and members of the international space communities. The participants discussed in particular whether such an instrument might, following the example of most liability instruments, set a liability limit, that would also help the insurability of the activities, and cover aspects such as liability channelling, provision for supplementary compensation to guarantee satisfactory recovery of losses, and criteria for

identifying the competent jurisdiction. While expressing differing views on the topic, notably by reason of the legal and political complexities involved, the participants conveyed their general interest in continuing consultations.

V. REPORT ON THE WORK OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (HCCH)

50. The Council on General Affairs and Policy met from 5 to 7 April 2011 reviewed the work progress of the Hague Conference. The Council emphasised the importance of engaging all the Members in the work of the Conference, and recognised the value of open-ended Working Groups in achieving this objective. In future works, the Permanent Bureau would discuss on the following issues: accessing the content of foreign law and the need for the development of a global instrument in this area, desirability and feasibility of a protocol to the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, continuation of the Judgments Project, the application of certain private international law techniques to aspects of international migration, and private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements. The present report would highlight the developments in the following two areas, (i) Choice of Law in International Contracts, and (ii) Working Group on Mediation in the context of the Malta Process.

A. Choice of Law in International Contracts

51. The 2010 Council on General Affairs and Policy of the Conference encouraged the Permanent Bureau to carry out further work in drafting an instrument on choice of law in international contracts. This mandate, entrusted to the Permanent Bureau by the Council in 2009, confirmed the important preparatory work on promoting party autonomy carried out since 2006.

52. The Permanent Bureau continues its efforts to raise awareness for the future instrument and continues to analyse recent developments in comparative law on the law applicable to international contracts. Given their importance to the Project, these recent developments are being constantly monitored.

53. Further to the April 2009 decision of the Council, a Working Group was formed in order to facilitate the development of a draft non-binding Instrument. Following two meetings, one in January and the other in November 2010, it appears to be now established that the size and composition of the group are optimal. The 20 or so experts who participate represent a diversity of geographic, social and economic perspectives and represent the principal legal systems present at the international level. Given the sustained progress made by the Working Group, it is the view of the Permanent Bureau that this diversity helps to give the Project a truly international foundation and a concrete future influence

54. The final draft of the "Hague Principles in Choice of Law in International Contracts"[41]

[41] Text of the Hague Principles in Choice of Law in International Commercial Contracts, is accessible at http://www.hcch.net/upload/wop/gap12pd04e.pdf , Annex II of the Prel. Doc. No 4, "Choice of Law in International Contracts: Development Process of the Draft Instrument and Future Planning".

was adopted by the Working Group in June 2011, which contains 11 draft articles on scope of principles, freedom of choice, express and tacit choice, formal validity of choice of law, consent, autonomy, renvoi, scope of the chosen law, formal validity of the contract, assignment, and overriding mandatory rules and public policy.

B. Working Group on Mediation in the context of the Malta Process

55. Following the Conclusions and Recommendations of the 2009 Council on General Affairs and Policy of the Conference, the Working Party on Mediation in the context of the Malta Process was established to promote the development of mediation structures to help resolve cross-border disputes concerning custody of or contact with children, which involve State Parties to the 1980 Hague Child Abduction Convention, as well as non-State Parties.

56. The Permanent Bureau on behalf of the Working Party is pleased to submit to the Council on General Affairs and Policy, the Principles for the Establishment of Mediation Structures in the context of the Malta Process as well as an Explanatory Memorandum on the Principles.

57. The Principles call for the establishment of a Central Contact Point in each State facilitating the provision of information on available mediation services in the respective jurisdictions, on access to mediation and on other important related issues, such as relevant legal information. They further refer to certain standards regarding the identification of international mediation services by the Central Contact Points as well as certain standards regarding the mediation process and the mediated agreement. They also highlight the importance of rendering a mediated agreement, binding or enforceable, in all the legal systems concerned before its implementation.

C. Fourth Asia Pacific Conference of the Hague Conference on Private International Law (26-28 October 2011, Manila, Philippines)

58. The Fourth Asia Pacific Conference of the Hague Conference on Private International Law was convened from 26 to 28 October 2011 in Manila, Philippines. The Theme of the Conference was “The Work of the Hague Conference on Private International Law”. The Conference was attended by over 230 participants to discuss the relevance, implementation and practical operation of a number of important Conventions of the Hague Conference (the Conventions) within the Asia Pacific Region (the Region). The Manila Conference focused on the areas of family law and legal cooperation and litigation, with particular emphasis on the *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (Intercountry Adoption Convention) and the *Convention of 5 October1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* (Apostille Convention). It also considered private international law aspects of temporary and circular economic migration.

59. It recognized that the growing mobility of individuals, goods, services and investments, and the increasing use of information technology around the globe in the Region, have increased

cross-border transactions in the areas of family, civil and commercial law; and that the application of the Hague Conventions provide legal certainty and predictability, and protection of individual rights and legitimate commercial interests. The Conclusions and Recommendations of the Manila Conference were on the 1993 Intercountry Adoption Convention, 1961 Apostille Convention, the1965 Service Convention and 1970 Evidence Convention, the 1980 International Child Abduction Convention and 1996 International Child Protection Convention, the 2007 International Recovery of Child and Family Support Convention, the 2005 Choice of Court Convention and Ongoing Work on Recognition and Enforcement of Foreign Judgment, the 1980 Access to Justice Convention, the Hague Principles on the Choice of Law in International Commercial Contracts, and Technical Assistance. There was a proposal to establish the Asia Pacific Regional Office of the Hague Conference in Hong Kong, China was agreed upon by the Member States.

VI. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

60. During the Forty-fourth session, the Commission adopted the UNCITRAL Model Law on Public Procurement, which updates the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services. The Commission also adopted "The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective", a text designed to provide information and guidance for judges on cross-border related insolvency issues. As per the request put forth by the Commission to the UNCITRAL Secretariat explore the possibility of establishing a presence in regions or specific countries by, for example, having dedicated project staff in United Nations field offices, collaborating with such existing field offices or establishing Commission country offices with a view to facilitating the provision of technical assistance with respect to the use and adoption of Commission texts. In furtherance of which, Republic of Korea had expressed its willingness to generously contribute to this pilot project, the Commission approved the establishment of an "UNCITRAL Regional Centre for Asia and the Pacific" in the Republic of Korea. The UNCITRAL Model Law on Cross-Border Insolvency contributes significantly to the establishment of a harmonized legal framework for addressing cross-border insolvency and facilitating coordination and cooperation.

61. The UNCTAD's fifty-eighth session also was very encouraging as it dealt with specific topics of relevance to AALCO Member States especially, the topic on economic development in Africa. UNIDROIT's principles of International Commercial Contracts and adoption of the Space Assets Protocol was a very welcome approach in terms of increasing interests among Member States to address the issues that are very essential for economic development and sound financial base for many of the developing countries. Likewise, the HCCH's draft articles on Choice of Law in International Contracts are also important to be addressed and require adequate attention my Member States. It is very important that AALCO Member States closely participate in the negotiations and law-making in these Organizations because increasingly the convergence among private and public international law, influence of various domestic laws of member States are witnessed.

VII. ANNEX

SECRETARIAT'S DRAFT
AALCO/RES/51/SD 12
22 JUNE 2012

REPORT ON THE WORK OF THE UNCITRAL AND OTHER INTERNATIONAL ORGANIZATIONS IN THE FIELD OF INTERNATIONAL TRADE LAW
(*Non-Deliberated)*

The Asian-African Legal Consultative Organization at its Fifty-First Annual Session,

Considering the Secretariat Document No. AALCO/51/ABUJA/2012/SD 12,

Being aware of the Finalized version of the UNCITRAL Model Law on Public Procurement and UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspectives, at its forty-fourth session;

Welcoming the decision of the UNCITRAL to follow topics in the areas of settlement of commercial disputes, security interests and insolvency law and undertaking the work in the area of online dispute resolution;

Taking note of the adoption of UNIDROIT Principles on International Commercial Contracts and also the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets, 2012;

Also Welcoming the adoption of the "Hague Principles in Choice of Law in International Contracts";

1. **Expresses** its satisfaction for AALCO's continued cooperation with the various international organizations competent in the field of international trade law and hopes that this cooperation will be further enhanced in the future;

2. **Urges** Member States to consider adopting, ratifying or acceding to the instruments prepared by the UNCITRAL and other International Organizations; and

3 **Decides** to place this item on the provisional agenda of the Fifty-Second Session.

6. WTO AS A FRAMEWORK AGREEMENT AND CODE OF CONDUCT FOR THE WORLD TRADE

WTO AS A FRAMEWORK AGREEMENT AND CODE OF CONDUCT FOR THE WORLD TRADE

CONTENTS
(Non-Deliberated)

WTO AS A FRAMEWORK AGREEMENT AND CODE OF CONDUCT FOR THE WORLD TRADE

(Non-Deliberated)

I. Introduction

A. Background

1. At the Thirty-Fourth Session of the AALCO (1995) held at Doha, Qatar, the item "WTO as a Framework Agreement and Code of Conduct for the World Trade" was for the first time introduced in the Agenda of AALCO. This coincided with the Uruguay Round negotiations which were completed in 1994 and had culminated in the establishment of the World Trade Organization (WTO) in 1995. Thereafter, this item continued to remain on the agenda of the Organization and was deliberated upon during the subsequent sessions. At these sessions, the Secretariat was directed to monitor the development related to the WTO, particularly the relevant legal aspects of dispute settlement mechanism.

2. In fulfillment of this mandate, the Secretariat had been preparing reports and presenting it to the Member States for their consideration and deliberation. In furtherance of its work programme, the AALCO in cooperation with the Government of India also convened a two-day seminar on 'Certain Aspects of the functioning of the WTO Dispute Settlement Mechanism and other Allied Matters' at New Delhi (1998). Further, at the Forty-Second Session held in Seoul (2003), the Secretariat presented a Special Study on 'Special and Differential Treatment under WTO Agreements'.

3. The Report of the Secretariat prepared for the Fiftieth Annual Session held at Colombo, Sri Lanka, in 2011 gave an update with regard to some of the principal aspects of the Doha Development Round which has had a highly complex agenda. These issues included the Agricultural Negotiations, the Non Agricultural Market Access [NAMA] talks, the need to create an effective mechanism to address the difficulties faced by developing countries, and others. However, WTO was not a deliberated item during this Session. This year's Report on this issue seeks to focus on two things; firstly, it tries to ascertain the causes and contributing factors that led to the collapse of the Doha development round in its historical trajectory. Secondly, it also gives an overview of the highlights of the Eighth Ministerial Conference of WTO that took place from 15-17 December 2011 at Geneva. Finally it offers some general comments.

B Training programme on 'Trade and Development issues'

4. To explore the linkages that exist between international trade and its potential to deliver development to the developing country Members of the WTO, the Secretariat of AALCO had conducted a five-day Training Programme on the theme: "Trade and

Development Issues" from 21st -25th May, 2012 at the AALCO Headquarters, New Delhi. This was organized in cooperation with the Development Division of the WTO Headquarters, Geneva, and the Centre for WTO Studies, Indian Institute of Foreign Trade, New Delhi. This Programme explored at length the reasons for the failure of the Doha Development round and the concerns and resistance of the developing country Members of the WTO, particularly in relation to Agriculture, negotiations pertaining to Non-Agriculture Market Access (NAMA), South-South Cooperation in Trade and Development, Special and Differential treatments for the developing countries, development issues relating to the Trade related Intellectual Property Rights, and General Agreement on Trade in Services. This saw the participation of a large gathering that included Diplomats, Government Officials, Law Teachers, students and others.

II. Doha Development Agenda: A Historical Account

5. When the Developed world proposed another round of global trade talks in 2001 in Doha, Qatar, Developing countries agreed to negotiate only on condition that development was the centerpiece of the negotiations. The Doha round, which is thus commonly referred to as the 'Doha Development Round' (DDR), puts the needs and interests of the developing countries at the heart of its negotiations. The Doha Round was launched in November 2001 with the expectation that it would breathe new life into the global economy, which had been sent into a tailspin following the attacks of 11 September 2001, and strengthen the multilateral trading system to enable it to meet the challenges of the twenty-first century. A number of studies have indicated that a successful Round would boost global trade and enhance global welfare by several billions of dollars. The Doha negotiations, have been characterized by persistent differences between the United States, the European Union, and developing countries on major issues, such as agriculture, industrial tariffs and non-tariff barriers, services, and trade remedies.

The Cancun Ministerial

6. An important milepost in the Doha Development Agenda round was the 5th Ministerial Conference, which was held in Cancún, Mexico on September 10-14, 2003. The Cancún Ministerial ended without agreement on a framework to guide future negotiations, and this failure to advance the round resulted in a serious loss of momentum and brought into question whether the January 1, 2005 deadline would be met.

7. The Cancun Ministerial collapsed for several reasons. First, differences over the Singapore issues seemed irresolvable. The EU had retreated on some of its demands, but several developing countries refused any consideration of these issues at all. Second, it was questioned whether some countries had come to Cancun with a serious intention to negotiate. In the view of some observers, a few countries showed no flexibility in their positions and only repeated their demands rather than talk about trade-offs. Third, the wide difference between developing and developed countries across virtually all topics was a major obstacle. The U.S.-EU agricultural proposal and that of the Group of 21, for

example, show strikingly different approaches to special and differential treatment. Fourth, there was some criticism of procedure. Some claimed the agenda was too complicated. Also, Cancun Ministerial chairman, Mexico's Foreign Minister Luis Ernesto Derbez, was faulted for ending the meeting when he did, instead of trying to move the talks into areas where some progress could have been made.

The WTO Framework Agreement

8. The aftermath of Cancun was one of standstill and stocktaking. Negotiations were suspended for the remainder of 2003. However, in early 2004, then-U.S. Trade Representative (USTR) Robert Zoellick offered proposals on how to move the round forward. The USTR called for a focus on market access, including an elimination of agricultural export subsidies. He also said that the Singapore issues could progress by negotiating on trade facilitation, considering further action on government procurement, and possibly dropping investment and competition. This intervention was credited at the time with reviving interest in the negotiations, and negotiations resumed in March 2004.

9. On July 31, 2004, WTO members approved a Framework Agreement that includes major developments in the most contentious and crucial issue — agriculture. Because of the importance of agriculture to the Round, the Framework, which provides guidelines but not specific concessions, was regarded as a major achievement. With a broad agreement on agriculture and on other issues, negotiators were given a clearer direction for future discussions. However, the talks settled back into a driftless stalemate, where few but the most technical issues were resolved.

The Hong Kong Ministerial

10**.** The stalemate in 2005 increased the perceived importance of the 6th Ministerial in Hong Kong as potentially the last opportunity to settle key negotiating issues that could produce an agreement by 2007, the *de facto* deadline resulting from the expiration of U.S. trade promotion authority. Although a flurry of negotiations took place in the fall of 2005, WTO Director-General Pascal Lamy announced in November 2005 that a comprehensive agreement on modalities would not be forthcoming in Hong Kong, and that the talks would "take stock" of the negotiations and would try to reach agreements in negotiating sectors where convergence was reported. The final Ministerial Declaration of December 18, 2005, reflected areas of agreement in agriculture, industrial tariffs, and duty-free and tariff-free access for least developed countries (see sectoral negotiations section below for details). Generally, these convergences reflect a step beyond the July Framework Agreement, but fall short of full negotiating modalities.

11. Deadlines were established at Hong Kong for concluding negotiations by the end of 2006. These deadlines included an April 30, 2005 date to establish modalities for the agriculture and NAMA negotiations. Further deadlines set for July 31, 2006, include the submission of tariff schedules for agriculture and NAMA, the submission of revised services offers, the submission of a consolidated texts on rules and trade facilitation, and for recommendations to implement the "aid for trade" language in the Hong Kong

declaration. On April 21, 2006, WTO Director-General Pascal Lamy announced there was no consensus for agreement on modalities by the April 30 deadline.

12. Trade negotiators likewise failed to reach agreement at a high-level meeting in Geneva on June 30-July 1, 2006. It was agreed at those meetings, however, that Director-General Pascal Lamy would undertake a more proactive role as a catalyst "to conduct intensive and wide-ranging consultations" to achieve agricultural and industrial modalities.

Suspension

13. Despite the hortatory language of the Group of 8 [G-8] Ministerial Declaration, the talks were indefinitely suspended less than a week later by Director-General Lamy on July 24, 2006. Following the July 2006 suspension, several WTO country groups such as the Group of 20 [G-20] and the Cairns Group of agricultural exporters met to lay the groundwork to restart the negotiations. While these meeting did not yield any breakthrough, Lamy announced the talks were back in "full negotiating mode" on January 31, 2007. Key players in the talks such as the G-4 (United States, European Union, Brazil, India) conducted bilateral or group meetings to break the impasse in the first months of the year. In April 2007, G-6 negotiators (G-4 plus Australia and Japan) agreed to work towards concluding the round by the end of 2007. Subsequently, a G-4 summit in Potsdam, Germany collapsed in acrimony on June 21, 2007 over competing demands for higher cuts in developed country agricultural subsidies made by developing countries and developed country demands for greater cuts in industrial tariffs in developing countries. Despite this setback, the chairs of the agriculture and industrial market access (NAMA) negotiating groups put forth draft modalities texts on July.

III. The Doha Development Agenda: Critical Issues

14. Doha Round talks are overseen by the Trade Negotiations Committee (TNC) and its subsidiaries, which are usually regular Councils and Committees meeting in 'special session' or specially created negotiating groups. The Chairs of the nine negotiating bodies report to the TNC which is chaired by the WTO Director-General, which coordinates their work. The following are the main areas of negotiation found in the agenda of the Doha Development Agenda:

- Agriculture
- Cotton
- Services
- Market Access for non-agricultural products (NAMA)
- Trade Related Intellectual Property Rights (TRIPS)
    - TRIPS and Public Health –
    - TRIPS Non-violation and situation complaints
    - TRIPS, Biological Diversity and Traditional Knowledge

- WTO Rules: Subsidies
- WTO Rules: Regional Trade Agreements
- Dispute Settlement Understanding
- Trade and Environment
- Electronic Commerce
- Small economies
- Trade, debt and finance
- Trade and transfer of technology
- Technical cooperation and capacity building
- Least-developed countries
- Special and differential treatment
- Implementation-related issues and concerns
- Integrated Framework
- Commodity issues
- Coherence
- Aid for trade
- Implementation

    - GATT 1994 –
    - Sanitary and phytosanitary measures
    - -Technical barriers to trade -Customs valuation (GATT Article VII) –
    - Rules of origin –
    - Cross-cutting issues –
    - Outstanding implementation issues

Though important as all are, since it is impossible to deal with all the subjects forming part of the Doha Agenda, the Report of the Secretariat chooses to focus on some of the most important areas of negotiations that are highly important for the developing countries.

A Agriculture

15. Agriculture is at the very centre of the negotiations. And within this area, three issues – tariffs, domestic subsidies (domestic support) and export subsidies – have been taken up for intense negotiation. Little attention has been paid to another important subject in this sector: the non-tariff barriers (NTBs). The developed countries are on the defensive in the agriculture negotiations as they provide huge domestic subsidies to their agriculture sectors, in striking contrast to their loudly announced open-market and free-competition principles in production and trade. In defence, they have adopted an aggressive posture and asked for concessions from the developing countries to enable them to lower their agricultural subsidies.

16. Though both subsidies and tariffs are instruments of protection, subsidies, unlike tariffs, have never been an accepted form of protection in the multilateral framework,

particularly for the developed countries. [There was an exception for the developing countries in the Tokyo Round Code on Subsidies which says: "Signatories recognise that subsidies are an integral part of economic development programmes of developing countries … Accordingly, this Agreement shall not prevent developing country signatories from adopting measures and policies to assist their industries, including those in the export sector…"]

17. Subsidies have been tolerated, but never considered a right, unlike tariffs within bound levels. And yet, the major developed countries have been insisting on counter-concessions from the developing countries as a price for removing the unfair practice of subsidising their agriculture. The developing countries, now more informed about the subsidy measures of the developed countries and the consequent impact on their own agriculture, have generally remained firm in their demands. Naturally, the negotiations have been difficult and complex.

18. In the area of export subsidies that come in various forms in both the USA and the European Union, the July 2004 Framework decided to eliminate most of these direct payments and equivalent measures by "a credible end date." Following this decision, the Hong Kong Ministerial Declaration has decided that the "end date" will be the end of 2013, thus permitting the developed countries to continue with their export subsidies, though at reduced level, until then. While there may be some argument in support of the domestic subsidies in agriculture in the developed countries, there is absolutely no justification or rationale for them to pay export subsidies. Their subsidized exports put the survival of the farmers of the developing countries at grave risk. It is tragic that the practice will continue until the end of 2013.

19. Within the framework of the Hong Kong Ministerial Declaration, it is advisable for the developing countries to work out means of alleviating the danger. While prescribing this end date, the Hong Kong Ministerial Declaration lays down that a substantial part of the elimination of export subsidies should be "realised by the end of the first half of the implementation period."

20. Domestic subsidies in agriculture have been by far the most difficult issue in the WTO Doha negotiations. High domestic subsidies of the major developed countries put the developing countries' agriculture at a severe competitive disadvantage and even threaten its survival. At the same time, beneficiaries of these subsidies in the major developed countries, though comprising only a small percentage of the population, have high political leverage. Hence governments find it difficult to do away with the subsidies.

21. Here lies the root of the complexity in this issue. And the developed countries are naturally on the defensive in this area. A particular embarrassment they face is that the bulk of the subsidies goes to a small percentage of farmers and there is a heavy concentration of payments in a small number of crops.

22. While the rich farmers get huge financial support from the governments of the major developed countries, the farmers in the developing countries suffering from

multiple handicaps have to fight for their survival. The trend in the WTO negotiations, though positive, does not encourage confidence that the iniquity and unfairness will be eliminated or even substantially reduced. In the exercise of subsidy reduction, the attention has been rightly focused on reducing the total or overall trade-distorting domestic support (OTDS), rather than its individual components: the Amber Box subsidies, the Blue Box subsidies and the *de minimis* subsidies. Often the major developed countries have juggled their subsidy payments into these diverse boxes, a practice commonly called "box-shifting"; hence it will not effectively serve the purpose if only one or another of these boxes is tightened, leaving the others loose. The G20 (a coalition of developing countries with the active participation of many emerging economies) proposed final reduced annual OTDS levels of US$12 billon and 22 billion euros for the US and EU respectively.

23. There has been a trend towards convergence on this issue and yet there has been no agreement. The possible reason is that this area does not explain the highly publicised collapse of talks in critical times. Perhaps the failure has been more strategic than substantive in nature or perhaps there has been a serious hitch elsewhere, for example, in the area of industrial tariffs. The real problem, however, is that even with an agreement on any levels of OTDS within the range currently under consideration, the developing countries' farmers will still remain under grave risk because of two broad escape routes, the Green Box subsidies and concentration of subsidies on specific products.

B. Non-Agricultural Market Access

24. The negotiations in the area of industrial tariffs, more formally called "nonagricultural market access" (NAMA), are mainly on three issues: (i) reduction of industrial tariffs from the bound levels; (ii) increasing the binding coverage through commitments of binding on the current unbound levels of tariffs; and (iii) non-tariff barriers.

25. While considering the issues of tariff reduction and increasing the binding coverage, it is important to take into account the current structure of tariffs across the range of countries. The developed countries generally have full binding coverage. A large number of the developing countries have comparatively lower binding coverage and some of them have much lower binding coverage. Developed countries have generally low levels of tariffs, their average tariff being about 5 percent, though their tariffs on the products of export interest to the developing countries are high compared to their average tariff. The developing countries have generally high levels of tariffs, their average being 28-30 percent.

26. The Hong Kong Ministerial Declaration (paragraph 14) has decided to adopt a "Swiss formula" for tariff reduction. In this formula, the initial tariff and the final tariff are linked by a coefficient. A lower coefficient leads to greater reduction. All final tariffs will be lower than the coefficient; thus the coefficient acts as the ceiling for the tariff. An initial tariff equal to the coefficient will be halved upon reduction. For the same

coefficient, a higher initial tariff will be subjected to a comparatively higher percentage of reduction. The choice of coefficient in this formula is thus critical in determining the tariff ceiling and the extent of reduction in the tariff.

27. The Doha Ministerial Declaration (paragraph 16) lays down the principle that there will be less than full reciprocity from the developing countries in tariff reduction commitments. The Hong Kong Ministerial Declaration (paragraph 14) reiterates this principle.

28. The developing countries have made two major concessions in respect of industrial tariffs by accepting the Hong Kong Ministerial Declaration. Firstly, they have agreed to have reduction in each bound tariff. Never in the past had the developing countries undertaken such an obligation. Previously, their obligation was limited to reducing the average tariff, and they thus retained the option to spread the average over the entire range of products. Secondly, they have agreed to have full binding coverage. As explained above, their current partial binding coverage is part of the current rights and obligations. They have now given up this right.

29. In fact, the concessions from the developing countries started with the proposal of Argentina, Brazil and India (ABI) given in April 2005 and later endorsed by a number of other developing countries. They proposed the adoption of the Swiss formula with a coefficient that is dependent on the average tariff. Perhaps they thought their tariff reduction would be lower in this manner since their average tariff was high. However, only the adverse part of their proposal (tariff reduction by means of the Swiss formula) was accepted in Hong Kong, while the positive part (a coefficient dependent on the average tariff) was ignored.

Tariff reduction

30. The Chairman of the NAMA negotiating group has given a paper on 17 July 2007 (the Chairman's paper) proposing coefficients of 8-9 for the developed countries and 19-23 for the developing countries (paragraph 5). The NAMA 11, a group of developing countries that have come together on the subject of NAMA, has proposed that the differential between the coefficients for the developing countries and the developed countries should be at least 25. Some developed countries had earlier proposed coefficients of 10- 15 for the developing countries.

31. The assessment of the implication of these coefficients is complex as different countries will have different levels of reduction for different tariffs. There will thus be differentials as between the countries and also as between the products within a country. However, for the sake of some comparison, we may simplify the problem by calculating the impact of the formula on a tariff of a country which is near its average tariff level. The average tariff of the developed countries is about 5 percent and that of the developing countries
about 30 percent.

32. Similarly, there are basic problems of principle and reciprocity in the current proposals on the binding coverage. The exercise has centred around adding a number to the currently unbound tariff level as applied on a particular date. The applied tariff plus this number will become the presumed bound level of tariff and reduction will operate on that level. The Chairman's paper (paragraph 6) proposes a mark-up of 20 over the unbound tariff rate as applied on a specified date.

33. This proposal has missed out on the basic point that the unbound tariffs are a part of the current rights and obligations in the GATT/WTO framework, as explained earlier. A country can raise these tariffs to any level; thus, binding them at some level is itself already a major concession, as the country commits thereby not to raise these tariffs beyond the newly bound levels. It would appear that this right of the developing countries is being taken away in a rather light and casual manner. This needs serious consideration. Further, a mark-up of 20-30 to the applied rate is wholly inadequate, as these tariffs can be raised to any levels at present. Of course, the NAMA 11 has itself suggested a mark-up of 30, which is a huge concession, presumably in a spirit of cooperation and flexibility in the negotiations. But it is like giving up a major right in the GATT/WTO framework without a commensurate return. These suggestions need to be reconsidered.

34. It is necessary to give due weightage in the negotiations to the commitment of binding of the current unbound tariffs. There are two components in the concessions to be made by the developing countries in respect of their currently unbound tariffs: (i) binding their unbound tariffs; and (ii) reducing their bound tariffs. These two components should be combined to assess the developing countries' contribution in the negotiations. Then this combined concession should be matched with the concession of tariff reduction of the developed countries with due regard to the principle of less than full reciprocity. A simple mark-up of 20-30 points to the applicable tariffs, presuming them bound at those levels and then subjecting all these old and new bound levels to a reduction formula does not appear to be fair and balanced at all.

35. A totally new approach is needed on unbound tariffs. One way may be to evolve a "joint tariff indicator" that quantitatively combines four parameters: the current binding coverage, the average of the current bound tariffs, the percentage of unbound tariff lines and some notional figure for the possible average of the unbound tariffs (assuming they are raised at the discretion of the country to some realistic levels). This "joint tariff indicator" will represent the current rights of a country in respect of its tariffs. In the exercise of reduction, this indicator may be reduced by a stipulated percentage.

36. Thereafter, the reduced "joint tariff indicator" may be split by the country at its own discretion into a combination of its new binding coverage and new average bound tariff. If there is a rush to conclude the tariff negotiations and any such new approach appears impractical at this stage, it will be appropriate to leave the unbound levels as they are and tackle them sometime later.

Non-tariff barriers

37. The Doha Ministerial Declaration (paragraph 16) has included non-tariff barriers (NTBs) in the negotiating agenda. The July 2004 Framework (Annex B, paragraph 14) recognises NTBs as an integral part and important constituent of the negotiations. The Chairman's paper (paragraph 44) says that the negotiations on NTBs are not yet sufficiently advanced for modalities to be proposed. Thus the negotiations on this subject have lagged behind those on tariffs. NTBs are particularly important for the developing countries as their exports often get constrained by these barriers in the developed countries. The negotiations got bogged down initially in procedural technicalities. It took a long time to decide on the forum where the negotiations would take place. The progress has been slow. It is in the interest of the developing countries to insist on parity in the speed of negotiations between tariffs and NTBs. In any case, nothing on tariffs s should be considered as finally agreed until an agreement on NTBs is finalised.

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C. Services

38. The negotiations in this area are going on in multiple formats. There are bilateral negotiations on the basis of requests and offers among countries for specific commitments on market access and national treatment in specific services sectors. Certain sectors have been taken up in the plurilateral track where more than two countries negotiate jointly, mainly aimed at liberalization on the basis of some formula. In both these formats, the resulting obligations will be on the countries negotiating and agreeing, but the results can be availed of by all WTO Members based on the MFN principle (principle of non-discrimination). Besides, negotiations are also going on to work out rules on subsidies, safeguards and government procurement, disciplines on measures relating to qualification requirements and procedures, technical standards and licensing requirements as well as on the effective implementation of some important provisions relating to the developing countries in the WTO General Agreement on Trade in Services (GATS).

39. The negotiations are being conducted within the broad framework of a decision adopted on 28 March 2001, called "Guidelines and Procedures for the Negotiations on Trade in Services", which was later endorsed by the Doha Ministerial Declaration. The Hong Kong Ministerial Declaration (Annex C) has decided on some specifics of the process and even of the obligations. On the process, it has specified the adoption of the plurilateral track as complementary to the bilateral track, though it does not make the plurilateral track compulsory for a Member to join, as had been proposed by some developed countries. On obligations, it stipulates "commitments at existing levels of market access" in Mode 1 (supply of service by the service provider of a country to a consumer located in another country) and Mode 2 (supply of service in a country to a consumer coming from another country). In respect of Mode 3 (supply of service through commercial presence of a foreign firm), it stipulates "commitments on enhanced levels of foreign equity participation" and the "removal or substantial reduction of economic needs tests".

40. The information on commitments in the bilateral and plurilateral negotiations is restricted to the respective participants. Hence the progress of negotiations in these tracks cannot be assessed at this stage. The progress in the format covering rules, disciplines, etc. is slow. In the rush of the bilateral and plurilateral tracks for liberalisation in specific sectors, this third format appears to have been pushed into the background.

41. The major developed countries have spearheaded a special thrust on services in the GATT/WTO framework with the objective of opening up markets for their services sectors in the developing countries. They have persisted in their thrust with mutual coordination among themselves and great determination in negotiations, building from one advantage to another. Consequently, this area has seen a steady progress in its status within the GATT/ WTO framework, from its modest entry in 1982 as the subject of national studies and exchange of information among governments, to the formation of a Working Group in the GATT, and then to formal negotiations in 1986 (Punta del Este), which finally resulted in a services agreement (i.e., the GATS) in 1994 (Marrakesh). Now services forms a part of the comprehensive agenda of the Doha negotiations where the major developed countries are trying time and again to expand the scope of obligations and commitments of the developing countries.

42. The developing countries do, however, have a strong leverage of defence in the GATS. The agreement allows the countries to choose the sectors for liberalisation on their own. And the developing countries have the flexibility to liberalise fewer sectors and fewer transactions. As a large number of the developing countries do not have much supply capacity in the services sectors, they are not enthusiastic in the negotiations for liberalisation as they do not perceive much export prospect, particularly in the developed countries. And they are within their rights under the GATS not to proceed with liberalisation which may be inconsistent with their development interests.

43. The developed countries tried to change the architecture of the GATS during the negotiations in 2001 that resulted in the Guidelines mentioned earlier. The GATS has adopted what is called the “positive list” approach in liberalisation, in the sense that a country chooses the sectors for liberalisation, keeping to itself total flexibility of measures in respect of the remaining sectors. The developed countries tried to change this system to the “negative list” approach whereby all sectors, except those put in the list, would be covered by liberalisation. The developing countries resisted this effectively and the developed countries could not succeed in their attempts.

44. A somewhat similar attempt was made again by the developed countries in the Hong Kong Ministerial Conference in 2005. They proposed to change the rules on the negotiating format in order to make it compulsory for a developing country to engage in the negotiations for liberalisation in specific sectors. If agreed, it would have denied the developing countries the flexibility to choose on their own the sectors which they wish to liberalise for imports. Because of stiff resistance from the developing countries, this effort of the developed countries did not succeed.

45. Attempts at curtailing the flexibility and options of the developing countries had been made through other proposals advanced during the preparations for the Hong Kong Ministerial Conference as well. Several developed countries worked out proposals for establishing some minimum level of commitments for countries. The proposals envisaged various forms of benchmarking of commitments and minimum levels of commitments. For example, they called for fixing the minimum number of sub-sectors for commitments, the minimum percentages of sub-sectors to be covered by commitments, numerical indexing system for a country's commitments, etc. Clearly these proposals had been motivated by the objective of curtailing the flexibility of the developing countries in the current framework. The developing countries strongly opposed these proposals and they did not find a place in the Hong Kong Ministerial Declaration.

46. In this context, it is important that the developing countries protect their flexibility in liberalising fewer sectors and fewer transactions, as permitted in the GATS. This flexibility has come under repeated onslaughts in the past and more may be forthcoming. The developing countries' requests and offers in the bilateral format of the negotiations are already on the table. They should enter into and continue with the bilateral negotiations while fully guarding their permitted flexibility.

47. If a developing country is invited to join plurilateral negotiations on a particular sector, it should assess whether it has adequate export supply capacity in that sector. If it does, it may join the plurilateral group; otherwise, it may keep out of it. The Hong Kong Ministerial Declaration permits a country to keep out of a plurilateral negotiation, as the only obligation on the country is to "consider" the request for joining in the negotiation. It may consider the request and then decide not to join it and send the response accordingly.

48. A developing country may also use the plurilateral route to its own advantage if it has adequate supply capacity and possibility of export in some sectors or modes of supply. It should then join with some other developing countries with similar interest, prepare requests and give them to the countries where they perceive prospects for export. It should utilise the opportunity of possible give-and-take across various plurilateral groups. A developing country may also identify the policies and practices in other countries, particularly the major developed countries, which hamper its export of services to these countries, for example, the standards and criteria for qualification and experience for service providers in these countries. Several developing countries may have common interest in having these standards and criteria lowered without affecting the quality of service. They may join together, prepare specific requests and send them to the developed countries concerned, requesting them to join plurilateral negotiations on this matter.

IV. On the Eighth Ministerial Conference of WTO

49. It may be recalled here that the Ministerial Conference of the World Trade Organization is the organization's highest decision-making body and convenes every two years. The latest one was the 8th Ministerial Conference that was held at Geneva from

December 15-17, 2011. At the opening of this Ministerial Conference, the WTO Director General Pascal Lamy called on members to "stand up for the values of multilateralism," and for major players to "exercise leadership and to muster political courage to act together for greater trade opening and reform," and to "place the interests and needs of developing countries and, in particular, those of the poorest, at its heart. Hence, an issue of key concern for this 8th Ministerial was the future of the Doha Development Round which is now openly recognized as being deadlocked. This Conference offered a critical opportunity to generate fresh perspectives that could strengthen the multilateral trading system and bring momentum back to trade talks in ways that secure development friendly outcomes as desired by the developing countries.

50. As for the Doha Round, the last real chance of an agreement was the Geneva Mini-Ministerial meeting in July 2008. The provisional agreements reached at that stage in the key areas of Agriculture, Industrials (NAMA) and Services were reflected in the December 2008 draft modalities texts. Over those many years of negotiations and trade-offs, it was certainly possible to craft a Doha package that was both balanced and ambitious across all areas of the negotiations. The provisional agreement represented an important step in levelling the playing field.

51. Hence, the expectations from this Ministerial were indeed really low, especially with respect to breaking the impasse on the Doha Round of negotiations. Negotiations on the Doha Agenda are still awaiting conclusion – even after 10 years of being launched in 2001 – due to irreconcilable differences between the developing economies and the world's developed nations such as the USA, EU nations, Japan etc. It was expected that the trade ministers would now formally acknowledge that the Doha round is unlikely to yield any result anytime soon. Such a declaration indeed came about, as the Chairman's concluding statement at the end of the meeting acknowledged the fact that the single undertaking under the Doha round had for all practical purposes reached an impasse. At the same time, it urged member countries to explore different negotiating approaches while respecting the principles of transparency and inclusiveness.

52. WTO Director-General Pascal Lamy, who chairs the Trade Negotiations Committee, urged members to work pragmatically on the Doha Development Agenda (Doha Round) in the coming year: on identifying which issues might be settled more quickly and on how to deal with other issues that are more difficult to resolve. Since it was expected, the failure to break the Doha Round impasse did not disappoint any involved party or analyst.

Some other developments that took place during the 8th ministerial Conference include:

- The 2011 Ministerial reached a historic agreement on government procurement by Parties to the Plurilateral Government Procurement Agreement (GPA). The deal aims to achieve better disciplines for awarding government contracts. It is key sector of the economy and the agreement is believed to expand the market access coverage valued at between 80 to 100 billion dollars a year.

- There was also an agreement on streamlining the accession process for the least-developed countries.
- The Ministers adopted waiver to permit preferential treatment of LDC service suppliers.
- The WTO developed a new application that will allow users to access via one portal all trade policy information notified to the WTO by its members. Known as the Integrated Trade Intelligence Portal (I-TIP), the new application will encompass tariffs, non-tariff measures and related trade statistics.
- The WTO also admitted Russia — the only big economy that remained outside the WTO so far — and three smaller countries into the WTO. The three smaller countries now admitted to the WTO are Vanuatu, Samoa and Montenegro. With this, the total number of WTO member nations is now 157.
- The participating Ministers agreed on the value of the rules-based multilateral trading system and agree to strengthen it and make it more responsive to the needs of Members, especially in the current challenging global economic environment, in order to stimulate economic growth, employment and development.

V. Comments and Observations of the AALCO Secretariat

53. As noted already, the Doha round was meant to be a development round. This was reflected in the Doha Ministerial Declaration (2001) itself which had pointed out that:

> International trade can play a major role in the promotion of *economic development* and the *alleviation of poverty*. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The *majority* of WTO members are *developing countries*. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration[1].

54. As a development round, the DDA's main concern was to reduce or eliminate agricultural trade barriers, such as farm subsidies and farm tariffs, which rich countries had maintained after the launch of the WTO. The level of urgency in the international community at the DDA's inception enabled negotiators to nail down an ambitious deadline of January 1, 2005 as the date for completing the Doha Round. The Doha package also included other areas, such as industrial goods and services, plus a number of specific issues, such as anti-dumping and trade and environment.

55. As negotiations proceeded, however, the Round's original development goals could not match the tough business realities on the ground. Developed countries' governments simply lacked the political capital to bring the development cause to light without obtaining serious concessions from developing countries. This lack of political will in developed countries to accommodate developing countries' interests has been critical in derailing the process of negotiations.

[1] WTO, The Doha Ministerial Declaration of 14 November 2001, para. 2.

56. After the Cancún debacle which was triggered by the unwillingness of the developed world to curtail their agricultural subsidies, the Doha trade talks were largely deadlocked until the summer of 2004 when negotiators managed to work out the July 2004 Package. This Package was nothing but the modality of modalities. And the July 2004 Package failed to motivate WTO members to further narrow differences in their substantive positions. The revised plan for the Doha Round was to achieve some concrete approximation of the members' substantial differences on critical issues—such as the size of the reduction of farm subsidies and tariffs—by July 2005, and then to deliver a deal on the modalities in the upcoming Hong Kong Ministerial Conference in December 2005.

57. At the heart of the North-South clash in the Doha Round laid the domestic politics of rich countries which simply could not accommodate the cause of development on political terms. Hence, the main reason behind the failure of the talks so far has been that the major developed countries are aggressively pursuing the agenda of expanding their market access in the developing countries without being prepared to give to the latter much in return, as will be made clear in the later chapters. And the important development issues which were put on the agenda in the WTO Doha negotiations at the instance of the developing countries have been pushed into the background and almost forgotten. Amongst those, four are critical : (i) implementation issues; (ii) special and differential (S&D) treatment of the developing countries; (iii) debt and finance; and (iv) technology.

58. Be that as it may, the successful conclusion of Doha round is important for a number of reasons;

First, the agreement is expected to provide a cushion against future protectionism by consolidating the large amount of unilateral liberalisation that has taken place since the Uruguay round in the 1990s.

Second, the deal would bring in large-scale reforms in farm trade by binding subsidy levels in the developed world and eliminating export subsidies.

Third, it is estimated that the gains from the conclusion of the round are around $360 billion — if a deal is struck then it could be one of the most ambitious packages of trade liberalisation negotiated multilaterally.

Last and most importantly, the conclusion of the Doha round would protect the WTO and the multilateral trading system itself, which could be seriously damaged by the failure of a round, especially a round explicitly designed to integrate the emerging economies into the multilateral trading system.

59. The completion of the Doha Round alone, however, could never solve all the development problems that the WTO is facing. Yet, it is still an important step to fulfill

the ultimate goal of the WTO—sustainable development—especially in the wake of the global economic crisis. The credibility of the WTO to deal with the new challenges of this century relies considerably on the conclusion of the Doha Round in accordance with its original mandate. Hence, efforts to conclude the Doha Round must continue.

Annex I

WTO AS A FRAMEWORK AGREEMENT AND CODE OF CONDUCT FOR WORLD TRADE
(*Non-Deliberated)*

Secretariat Draft
AALCO/ RES/ 51/ S 13
22 JUNE 2012

The Asian-African Legal Consultative Organization at its Fifty-First Session,

Having considered the Secretariat Document No. AALCO/51/ABHUJA /2012/S 13;

Recognizing the importance and complexities of issues involved in the WTO Doha Development Agenda;

Hoping that the Doha Round of Negotiations would conclude successfully in the near future;

1. **Encourages** Member States to successfully complete negotiations mandated under the Doha Development Agenda, taking fully into consideration the special concerns of developing and least-developed country Members of WTO;

2. **Directs** the Secretariat to continue to monitor and report on the Doha Round of Negotiations, particularly the outcome of the review process concerning the WTO Dispute Settlement Understanding;

3. **Appreciates** the effort of the Centre for Research and Training (CRT) of AALCO in successfully organizing a Training Programme on 'Trade and Development Issues' from 21-25 May 2012, at AALCO Headquarters, New Delhi

4. **Requests** the Secretary-General in consultation with Member States, subject to the availability of necessary resources, to organize seminars or workshops to facilitate the exchange of views by Member States on issues currently under negotiation within the WTO and capacity building programs; and

5. **Decides** to place this item on the provisional agenda of its Fifty-Second Annual Session.

7. EXPRESSIONS OF FOLKLORE AND ITS INTERNATIONAL PROTECTION

EXPRESSIONS OF FOLKLORE AND ITS INTERNATIONAL PROTECTION
(Non-Deliberated)

CONTENTS

EXPRESSIONS OF FOLKLORE AND ITS INTERNATIONAL PROTECTION

I. INTRODUCTION

A. Background

1. Folklore has always been considered as part of the common heritage of the community without individual ownership, and there were no formal or informal laws in many developing countries, which specifically bestowed ownership rights of folklore on any community or group of persons, and prohibited its exploitation without their consent. This led to widespread exploitation of folklore inside and outside the State concerned.

2. The need for a strong legal mechanism for the protection of folklore has been a subject of discussion at the national and international levels since 1960s, and the two main international fora where most of the discussions were held, were the World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO). While WIPO is concerned with the intellectual property protection of folklore, UNESCO is concerned with the general protection. Apart from this, the African Intellectual Property Organization (OAPI), a regional organization reflects the collec tive thought of the like-minded States for the legal protection of creations of folklore.

3. The WIPO General Assembly, at its Twenty-Sixth Session, held in Geneva from September 26 to October 3, 2000, established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ("the Committee" or "IGC") in order to analyse *inter alia*, intellectual property issues that arise in the context of the protection of expressions of folklore[1].

4. The Secretary-General of AALCO realizing the extreme importance of the work undertaken by the WIPO IGC for the Asian and African countries, and the possible role that AALCO could play in formulating an international instrument, proposed to the AALCO Member States through an Explanatory Note dated 27 April 2004, to include the item "Expressions of Folklore and its International Protection" on the Agenda of the Forty-Third Annual Session of AALCO held in Bali (Republic of Indonesia) from 21-25 June 2004. This proposal was in line with Article 1 (b) of the AALCO's Statutes which provides for exchange of views and information on matters of common concern having legal implications. The AALCO Member States welcomed the proposal and the item was deliberated at the Forty-Fifth (2006), Forty-Sixth (2007) and Forty-Ninth (2010) Annual Sessions. At the Fiftieth Annual Session (2011), the Member States through a resolution directed the Secretary-General to follow-up the developments within the WIPO IGC on "Expressions of Folklore", and to present the views of the AALCO Member States to the IGC and decided to place this agenda at the next Session.

[1] WO/GA/26/6, paragraph 13, and WO/GA/26/10.

5. At the Fiftieth Annual Session held in Colombo, Democratic Socialist Republic of Sri Lanka from 27 June to 1 July 2011, this agenda item was deliberated upon and the following Member States made their interventions, namely; **Democratic Socialist Republic of Sri Lanka, Indonesia, Japan, Democratic People's Republic of Korea, Malaysia, Nepal, and Islamic Republic of Iran**.

6. As a follow-up to the mandate received from the Fiftieth Annual Session, this report provides an overview of the work of the WIPO Intergovernmental Committee (IGC) since its inception in 2001, focusing its attention on the discussions held in Intersessional Working Group on TCEs/EoF as well as the deliberations took place at the Fortieth General Assembly of WIPO and the Twentieth Session of the IGC and the documents circulated for the consideration of the Member States.

II. RECENT DEVELOPMENTS

A. WIPO INTERGOVERNMENTAL COMMITTEE (IGC) ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE

1. Background

7. The subject "expressions of folklore," was first initiated by WIPO in cooperation with UNESCO in early 1978. During that time, it was considered as a subject of traditional knowledge. Since then the work on expressions of folklore has progressed to a more advanced stage, than the work on traditional knowledge in general. Apart from the piecemeal amendments in the existing intellectual property regime (IPR) for the protection of folklore, the major achievement was the adoption in 1982 of the Model Provisions on the Protection of Expressions of Folklore.

8. The Model Provisions were the result of several joint meetings convened by the WIPO and UNESCO to study the draft model provisions. The outcome of the meeting was submitted to the Committee of Governmental Experts, convened by the WIPO and UNESCO at Geneva in 1982, which adopted the famous "Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions (Model Provisions)". The Model Provisions have attempted to achieve a balance between protection against abuses of expressions of folklore, on one hand and the freedom, and encouragement of folklore, on the other.

9. While the WIPO had been attempting to protect the "expressions of folklore" through piecemeal amendments in various international instruments, no comprehensive attempt was made to draft an international instrument for its protection. In this regard, WIPO and UNESCO met at Phuket, Thailand in April 1997 at the meeting of World Forum on the Protection of Folklore which was attended by more than 180 participants from approximately 50 countries. The major outcome of the meeting was the recognition of the need for preservation and conservation of folklore throughout the world, legal means of protection of expressions of

folklore within national regimes, economic repercussions of exploitation and international protection of expressions of folklore.

10. In 1999, WIPO and UNESCO conducted four Regional Consultations on the Protection of Expressions of Folklore, each of which adopted resolutions or recommendations with proposals for future work. The consultations recommended that WIPO should increase and intensify its work in the field of folklore protection and recommended the establishment within WIPO of a separate committee on folklore and traditional knowledge to facilitate future work. Recommendations for the legal protection of folklore focused on the development of a *sui generis* form of legal protection at the international level (Asia/Pacific, Arab, Latin American Countries Recommendations) and also considered the UNESCO-WIPO Model Provisions to be an adequate starting point and relevant groundwork for future work in this direction. The African countries recommended developing, in the shortest possible time, a broad consensus among States in favor of an international regime[2].

11. Following the recommendations of the regional consultations on folklore, the WIPO General Assembly, at its Twenty-Sixth Session, held in Geneva from 26 September to 3 October 2000, established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore on the following general terms:

12. The Intergovernmental Committee (IGC) constituted a forum in which discussions would proceed among Member States on the three primary themes which they identified during the consultation: intellectual property issues that arise in the context of: (i) access to genetic resources and benefit sharing; (ii) protection of traditional knowledge, whether or not associated with those resources; and (iii) the protection of expressions of folklore[3].

13. In September 2003, the WIPO General Assembly at its Thirtieth Session decided to extend the mandate of the WIPO IGC and the mandate requires the IGC to accelerate its work and to focus in particular on the international dimension of folklore protection[4]. Subsequently, at its Fortieth (20th Ordinary) Session in 2011, the WIPO General Assembly agreed to renew the mandate of IGC to continue its work and undertake text-based negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of folklore, genetic resources and traditional knowledge[5].

B. WIPO FORTIETH (20TH ORDINARY) GENERAL ASSEMBLY SESSION ON MATTERS CONCERNING THE INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE (IGC) (26 SEPTEMBER TO 5 OCTOBER 2011, GENEVA)

[2] See documents WIPO-UNESCO/FOLK/ASIA/99/1, page 4, paragraph 4; WIPOUNESCO/FOLK/ ARAB/99/1, paragraph II (b) 6; WIPO-UNESCO/FOLK/LAC/99/1, page 3. Matters Concerning Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore, WIPO General Assembly Twenty-Sixth (12th Extraordinary) Session Geneva, September 25 to October 3, 2000, WO/GA/26/6.
[3] WO/GA/26/6, paragraph 13, and WO/GA/26/10.
[4] WO/GA/20/8, paras. 94 and 95.
[5] WIPO/GRTKF/IC/15/REF-DECISION 28 dated 1st October 2009.

14. The WIPO General Assembly at its Thirty-Eighth (19th Ordinary) session in September 2009 agreed on the mandate for the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) for the 2010-2011 biennium.

15. At the Thirty-Ninth (20th Extraordinary) session of the WIPO General Assembly, which took place from 20 to 29 September 2010, the IGC reported on the sessions it had held since the adoption of the mandate for the 2010-2011 biennium (notably its 15th and 16th sessions, which took place in December 2009 and May 2011 respectively).

16. At its 19th session, the IGC agreed to recommend to the WIPO General Assembly the renewal of its mandate for the 2012-2013 biennium. The Secretariat provided additional information on the work conducted by the IGC during the 2010-2011 biennium, notably, four sessions of the IGC and three sessions of the IGC's Intersessional Working Groups (IWGs).

17. The following Delegations from AALCO Member States made their interventions, namely: **People's Republic of China, Democratic Socialist Republic of Sri Lanka, India, Sultanate of Oman, Japan, Indonesia, Arab Republic of Egypt, Islamic Republic of Iran, South Africa, Kenya, Nigeria, and Thailand**. The delegations appreciated the constructive progress on all three issues in the past two years. The Delegation was pleased to see that the text-based negotiations had been very fruitful. The Delegation believed that the renewal of the mandate and the continuation of text-based negotiations would positively promote the work of the IGC so as to achieve the expected objectives. Therefore, it endorsed the recommendation on future work, and expected that all delegations would continue to collaborate to achieve substantive results as soon as possible. The Delegation also supported the convening of a diplomatic conference in 2012 or 2013. It was opined that establishing new international norms was the only way to prevent the current situation of piracy and misappropriation of TCEs, TK and GRs at the international level. That was a long-pending aspiration of developing countries as well as those who valued IPRs. The Delegations also called upon the IGC to build upon new international developments, such as the Nagoya Protocol, and to develop new norms on the related issues, such as a mandatory disclosure requirement. While the negotiations in the IGC continued, the Delegation invited the Secretariat to provide technical assistance to countries in the area of formulating robust national protection systems, as well as for developing new methods for the commercialization of TK and TCEs for the benefit of their holders. That would improve the enabling environment of developing countries for their social and economic advancement.

18. One of the delegations believed that the contribution of indigenous and local communities were important to the work of the IGC. To that end, contributing to the Voluntary Fund is necessary. Given the fact that the Fund was almost depleted, the Delegation encouraged Member States to contribute to the Voluntary Fund. One of the delegations mentioned that their country had made efforts over the years to protect the rich culture of the people and, to that end, was a signatory to the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, adopted on August 9, 2010, at Swakopmund, Namibia, for the member States of ARIPO. In this regard, the Delegation continued to believe in the need to protect TK holders from the infringement of their rights through misappropriation, misuse and exploitation

beyond the traditional context. It was also suggested by a delegation that it was important for all to move on the basis of greater consensus and build up areas of common ground, while narrowing divergences. To that end, there had to be more active engagement by all Member States, more cross-regional dialogues and, most importantly, the needed political will.

C. CONSIDERATIONS OF ASPECTS OF EXPRESSIONS OF FOLKLORE AT THE TWENTIETH SESSION OF THE WIPO IGC

19. At the twentieth session of the WIPO IGC held from 14 to 22 February 2012 in Geneva, few topics discussed inter alia, are (i) Participation of Indigenous and Local Communities: Voluntary Contribution Fund, (ii) Draft Objectives and Principles Relating to Intellectual Property and Genetic Resources, (iii) Options for Future Work on Intellectual Property and Genetic Resources, (iv) Draft Study on the Participation of Observers in the Work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, (v) Disclosure of Origin or Source of Genetic Resources and Associated Traditional Knowledge in Patent Applications, (vi) Declaration of the Source of Genetic Resources and Traditional Knowledge in Patent Applications: Proposals by Switzerland, (vii) Proposal of the African Group on Genetic Resources and Future Work, and (viii) Additional Explanation from Japan regarding the Document WIPO/GRTKF/IC/9/13 on the Patent System and Genetic Resources.

1. Summary of the Deliberations and Decision adopted at the Twentieth Session of the WIPO IGC (14-22 February 2012)

20. At its Nineteenth Session the IGC requested that document on "The Protection of Traditional Knowledge: Draft Articles"[6] be transmitted as a working document to the Twentieth Session of the Committee. It further requested that Articles 1, 2, 3 and 6 of the document be replaced by the options for those articles, together with their associated comments and policy considerations, as presented to the Committee during the session by the facilitators on traditional knowledge. In addition, the "Policy Objectives" and "General Guiding Principles" appearing in document "The Protection of Traditional Knowledge: Revised Objectives and Principles"[7] should be added to that document, in the same manner that corresponding "Policy Objectives" and "General Guiding Principles" appear in document "The Protection of Traditional Cultural Expressions: Draft Articles".[8]

21. In that regard, the Draft Articles as proposed and revised are as the following:

THE PROTECTION OF TRADITIONAL KNOWLEDGE: DRAFT ARTICLES

POLICY OBJECTIVES (to be discussed at a later stage)

[6] WIPO/GRTKF/IC/19/5

[7] WIPO/GRTKF/IC/18/5

[8] Draft Report of the Nineteenth Session of the Committee (WIPO/GRTKF/IC/19/12 Prov. 2) See WIPO/GRTKF/IC/19/4

The protection of traditional knowledge should aim to:

Recognize value

(i) recognize the [holistic] nature of traditional knowledge and its intrinsic value, including its social, spiritual, [economic], intellectual, scientific, ecological, technological, [commercial], educational and cultural value, and acknowledge that traditional knowledge systems are frameworks of ongoing innovation and distinctive intellectual and creative life that are fundamentally important for indigenous and local communities and have equal scientific value as other knowledge systems;

Promote respect

(ii) promote respect for traditional knowledge systems; for the dignity, cultural integrity and intellectual and spiritual values of the traditional knowledge holders who conserve, develop and maintain those systems; for the contribution which traditional knowledge has made in sustaining the livelihoods and identities of traditional knowledge holders; and for the contribution which traditional knowledge holders have made to the [conservation of the environment] conservation and sustainable use of biodiversity, to food security and sustainable agriculture, and to the progress of science and technology;

Meet the [actual] rights and needs of holders of traditional knowledge

(iii) be guided by the aspirations and expectations expressed directly by traditional knowledge holders, respect their rights as holders and custodians of traditional knowledge, contribute to their welfare and economic, cultural and social benefit and [reward] recognize the value of the contribution made by them to their communities and to the progress of science and socially beneficial technology;

Promote conservation and preservation of traditional knowledge

(iv) promote and support the conservation and preservation of traditional knowledge by respecting, preserving, protecting and maintaining traditional knowledge systems and providing incentives to the custodians of those knowledge systems to maintain and safeguard their knowledge systems;

Empower holders of traditional knowledge and acknowledge the distinctive nature of traditional knowledge systems

(v) be undertaken in a manner that empowers traditional knowledge holders to protect their knowledge by fully acknowledging the distinctive nature of traditional knowledge systems and the need to tailor solutions that meet the distinctive nature of such systems, bearing in mind that such solutions should be balanced and equitable, should ensure that conventional intellectual property regimes operate in a manner supportive of the protection of traditional knowledge against misuse and misappropriation, and should effectively empower associated traditional knowledge holders to exercise due rights and authority over their own knowledge;

Support traditional knowledge systems

(vi) respect and facilitate the continuing customary use, development, exchange and transmission of traditional knowledge by and between traditional knowledge holders; and support and augment customary custodianship of knowledge and associated genetic resources, and promote the continued development of traditional knowledge systems;

Contribute to safeguarding traditional knowledge

(vii) while [recognizing the value of a vibrant public domain], contribute to the preservation and safeguarding of traditional knowledge and the appropriate balance of customary and other means for their development, preservation and transmission, and promote the conservation, maintenance, application and wider use of traditional knowledge, in accordance with relevant customary practices, norms, laws and understandings of traditional knowledge holders, for the primary and direct benefit of traditional knowledge holders in particular, and for the benefit of humanity in general on the basis of prior informed consent and the mutually agreed terms with the holders of that knowledge;

Repress [unfair and inequitable uses] misappropriation and misuse

(viii) repress the misappropriation of traditional knowledge and other unfair commercial and non commercial activities, recognizing the need to adapt approaches for the repression of misappropriation of traditional knowledge to national and local needs;

Respect for and cooperation with relevant international agreements and processes

(ix) take account of, and operate consistently with, other international and regional instruments and processes, in particular regimes that regulate access to and benefit sharing from genetic resources which are associated with that traditional knowledge;

Promote innovation and creativity

(x) encourage, reward and protect tradition based creativity and innovation and enhance the internal transmission of traditional knowledge within indigenous and [traditional] local communities, including, subject to the consent of the traditional knowledge holders, by integrating such knowledge into educational initiatives among the communities, for the benefit of the holders and custodians of traditional knowledge;

Ensure prior informed consent and exchanges based on mutually agreed terms

(xi) ensure the use of traditional knowledge with prior informed consent and exchanges based on mutually agreed terms, in coordination with existing international and national regimes governing access to genetic resources;

Promote equitable benefit sharing

(xii) promote the fair and equitable sharing and distribution of monetary and non monetary benefits arising from the use of traditional knowledge, in consistency with other applicable international regimes, the principle of prior informed consent and including through [fair and equitable compensation in special cases where the individual holder is not identifiable or the knowledge has been disclosed];

Promote community development and legitimate trading activities

(xiii) if so desired by the holders of traditional knowledge, promote the use of traditional knowledge for community based development, recognizing the rights of traditional and local communities over their knowledge; and promote the development of, and the expansion of marketing opportunities for, authentic products of traditional knowledge and associated community industries, where traditional knowledge holders seek such development and opportunities consistent with their right to freely pursue economic development;

Preclude the grant of improper IP rights to unauthorized parties

(xiv) curtail the grant or exercise of improper intellectual property rights over traditional knowledge and associated genetic resources, by requiring [the creation of digital libraries of publicly known traditional knowledge and associated genetic resources], [in particular, as a condition for the granting of patent rights, that patent applicants for inventions involving traditional knowledge and associated genetic resources disclose the source and country of origin of those resources, as well as evidence of prior informed consent and benefit sharing conditions have been complied with in the country of origin];

Enhance transparency and mutual confidence

(xv) enhance certainty, transparency, mutual respect and understanding in relations between traditional knowledge holders on the one hand, and academic, commercial, educational, governmental and other users of traditional knowledge on the other, including by promoting adherence to ethical codes of conduct and the principles of free and prior informed consent;

Complement protection of traditional cultural expressions

(xvi) operate consistently with protection of traditional cultural expressions and expressions of folklore, respecting that for many traditional communities their knowledge and cultural expressions form an indivisible part of their [holistic identity].]

(i) recognize the holistic nature of traditional knowledge, including its social, spiritual, economic, intellectual, educational and cultural importance;

(ii) promote respect for traditional knowledge systems; for the dignity, cultural integrity and intellectual and spiritual values of the traditional knowledge holders who conserve and maintain those systems;

(iii) meet the actual needs of holders of traditional knowledge;

(iv)promote conservation and preservation of traditional knowledge;

(v) support traditional knowledge systems;

(vi)repress unfair and inequitable uses of traditional knowledge;

(vii) operate consistently with relevant international agreements and processes;

(viii) promote the fair and equitable sharing of benefits arising from the use of traditional knowledge;

(ix)enhance transparency and mutual confidence in relations between traditional knowledge holders on the one hand, and academic, commercial, educational, governmental and other users of traditional knowledge on the other, including by promoting adherence to ethical codes of conduct and the principles of free and prior informed consent.

GENERAL GUIDING PRINCIPLES (to be discussed at a later stage)

These principles should be respected to ensure that the specific substantive provisions concerning protection are equitable, balanced, effective and consistent, and appropriately promote the objectives of protection:

(a) Principle of responsiveness to the [needs and expectations of] rights and needs identified by traditional knowledge holders

(b) Principle of recognition of rights

(c) Principle of effectiveness and accessibility of protection

(d) Principle of flexibility and comprehensiveness

(e) Principle of equity and benefit sharing

(f) Principle of consistency with existing legal systems governing access to associated genetic resources

(g) Principle of respect for and cooperation with other international and regional instruments and processes

(h) Principle of respect for customary use and transmission of traditional knowledge

(i) Principle of recognition of the specific characteristics of traditional knowledge

(j) Principle of providing assistance to address the needs of traditional knowledge holders

ARTICLE 1
SUBJECT MATTER OF PROTECTION
DEFINITION OF TRADITIONAL KNOWLEDGE

Option 1

1.1 For the purposes of this instrument, the term “traditional knowledge” refers to the know-how, skills, innovations, practices, teachings and learning, resulting from intellectual activity and developed within a traditional context.

Option 2

1.1 Traditional knowledge is knowledge that is dynamic and evolving, resulting from intellectual activities which is passed on from generation to generation and includes but is not limited to know-how, skills, innovations, practices, processes and learning and teaching, that subsist in codified, oral or other forms of knowledge systems. Traditional knowledge also includes knowledge that is associated with biodiversity, traditional lifestyles and natural resources.

CRITERIA FOR ELIGIBILITY

Option 1

1.2 Protection extends to traditional knowledge that is:

(a) the unique product of or is distinctively associated with beneficiaries as defined in Article 2;
(b) collectively generated, shared, preserved and transmitted from generation to generation; and
(c) integral to the cultural identity of beneficiaries as defined in Article 2;

Alternative

(d) not widely known or used outside the community of the beneficiaries as defined in Article 2, for a reasonable period of time with prior informed consent;

or

(d) not widely known or used outside the community of the beneficiaries as defined in Article 2, for a reasonable period of time;
(e) not in the public domain;
(f) not protected by an intellectual property right; and
(g) not the application of principles, rules, skills, know-how, practices, and learning normally and generally well-known.

Option 2

1.2 Protection under this instrument shall extend to traditional knowledge that is generated, preserved and transmitted from generation to generation and identified or associated or linked with the cultural identity of beneficiaries, as defined in Article 2.

ARTICLE 2
BENEFICIARIES OF PROTECTION

Option 1

Beneficiaries of protection of traditional knowledge, as defined in Article 1, are indigenous peoples/communities and local communities.

Option 2

Beneficiaries of protection of traditional knowledge, as defined in Article 1, may include:

(a) indigenous peoples/communities;
(b) local communities;

(c) traditional communities;
(d) families;
(e) nations;
(f) individuals within the categories listed above; and
(g) where traditional knowledge is not specifically attributable or confined to an indigenous peoples or local community, or it is not possible to identify the community that generated it, any national entity determined by domestic law.

ARTICLE 3
SCOPE OF PROTECTION

Option 1

3.1 Adequate and effective legal, policy or administrative measures should be provided, as appropriate and in accordance with national law, to:

(a) prevent the unauthorized disclosure, use or other exploitation of [secret] traditional knowledge;
(b) where traditional knowledge is knowingly used outside the traditional context:

(i) acknowledge the source of traditional knowledge and attribute its holders where known unless they decide otherwise;
(ii) encourage use of traditional knowledge in a manner that does not disrespect the cultural norms and practices of its holders.

(c) encourage traditional knowledge holders and users to establish mutually agreed terms addressing approval requirements and the sharing of benefits arising from commercial use of that traditional knowledge.

Optional addition

3.2 Beneficiaries, as defined in Article 2, should, according to national law, have the following exclusive rights:

(a) enjoy, control, utilize, maintain, develop, preserve and protect their traditional knowledge;
(b) authorize or deny the access and use of their traditional knowledge;
(c) have a fair and equitable share of benefits arising from the commercial use of their traditional knowledge based on mutually agreed terms;
(d) prevent misappropriation and misuse, including any acquisition, appropriation, utilization or practice of their traditional knowledge without the establishment of mutually agreed terms;
(e) prevent the use of traditional knowledge without acknowledgment and attribution of the origin of their traditional knowledge and its holders, where known; and
(f) ensure that the use of the traditional knowledge respects the cultural norms and practices of the holders.

Option 2

3.1 Member States shall ensure, that the beneficiaries, as defined in Article 2, have the following exclusive collective rights to:

(a) enjoy, utilize, maintain, develop, preserve, protect and exclusively control their traditional knowledge;
(b) authorize or deny the access and use of their traditional knowledge;
(c) have a fair and equitable share of benefits arising from the use of their traditional knowledge based on mutually agreed terms;
(d) prevent misappropriation and misuse, including any acquisition, appropriation, utilization or practice of their traditional knowledge without the prior and informed consent of the holders and the establishment of mutually agreed terms;
(e) require, in the application for intellectual property rights involving the use of their traditional knowledge, the mandatory disclosure of the identity of the traditional knowledge holders and the country of origin, as well as evidence of compliance with prior informed consent and benefit-sharing requirements in accordance with domestic law or requirements of the country of origin;
(f) prevent the use of traditional knowledge without acknowledging the source and origin of that traditional knowledge and its holders, where known;
(g) ensure that the use of the traditional knowledge respects the cultural norms and practices of the holders.

3.2 For the purposes of this instrument, the term "utilization" in relation to traditional knowledge shall refer to any of the following acts:

(a) Where the traditional knowledge is a product:
    (i) manufacturing, importing, offering for sale, selling, stocking or using the product beyond the traditional context; or
    (ii) being in possession of the product for the purposes of offering it for sale, selling it or using it beyond the traditional context.
(b) Where the traditional knowledge is a process:
    (i) making use of the process beyond the traditional context; or
    (ii) carrying out the acts referred to under sub-clause (a) with respect to a product that is a direct result of the use of the process; or
(c) When traditional knowledge is used for research and development leading to profit-making or commercial purposes.

3.3 Member States shall provide adequate and effective legal measures to:
(a) ensure the application of the aforementioned rights, taking into account applicable domestic law and customary practices;
(b) prevent the unauthorized disclosure, use or other exploitation of traditional knowledge;
(c) where traditional knowledge is knowingly used outside the traditional context:
    (i) acknowledge the source of traditional knowledge and attribute its holders where known unless they decide otherwise;
    (ii) encourage use of traditional knowledge in a manner that does not disrespect the cultural norms and practices of its holders;

(iii) encourage, where the traditional knowledge is secret or is not widely known, traditional knowledge holders and users to establish mutually agreed terms addressing approval requirements and the sharing of benefits arising from commercial use of that traditional knowledge.

ARTICLE 4
SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS

4.1 States should / Member States [Contracting Parties shall [undertake to]] adopt, [[as appropriate and] in accordance with their legal systems], the measures necessary to ensure the application of this instrument.

[*Option 1*

4.2 Member States shall [/should] ensure that enforcement procedures are available under their laws against the [willful or negligent] infringement of the protection provided to traditional knowledge under this instrument sufficient to constitute a deterrent to further infringements.

Option 2

4.2 Contracting Parties undertake to implement the mechanism.

Accessible, appropriate and adequate criminal, civil and administrative enforcement procedures and dispute resolution mechanisms, border measures, sanctions and remedies, shall [should] be available in cases of breach of the protection of the traditional knowledge so as to permit effective action against any act of infringement [misappropriation or misuse] of traditional knowledge, including expeditious remedies which would constitute a deterrent to further infringement [misappropriation or misuse].

4.3. These procedures should be accessible, effective, fair, equitable, adequate [appropriate] and not burdensome for holders of traditional knowledge. [They should also provide safeguards for legitimate third party interests and the public interests.]

4.4 Where a dispute arises between beneficiaries or between beneficiaries and users of a traditional knowledge the parties may agree to [each party may [shall] be entitled] to refer the issue to an [independent] alternative dispute resolution mechanism recognized by international, regional or national law that is most suited to the holders of traditional knowledge. The dispute resolution mechanism between beneficiaries and users should be assigned to national law when beneficiaries and users are from one country.

4.5 To promote relevant measures for the carrying-out of cultural expertise, that take into consideration customary laws, protocols and community procedures for the purposes of dispute settlement.

Option 3

4.1 Appropriate legal, policy and/or administrative measures should be provided to ensure the application of this instrument, including measures to prevent willful or negligent harm to the

economic and/or moral interests of the beneficiaries sufficient to constitute a deterrent. Where appropriate, sanctions and remedies should reflect the sanctions and remedies that indigenous people and local communities would use.

4.2 The means of redress for safeguarding the protection granted by this instrument should be governed by the legislation of the country where the protection is claimed.

4.3 Where a dispute arises between beneficiaries or between beneficiaries and users of a traditional knowledge each party shall be entitled to refer the issue to an [independent] alternative dispute resolution mechanism recognized by international, regional or national law.]

ARTICLE 5
ADMINISTRATION OF RIGHTS

The establishment of a national or regional authority or authorities under this article is without prejudice to the national law and the right of traditional knowledge owners to administer their rights according to their customary protocols, understandings, laws and practices.

In the case that the Member State decides thus that they should establish this authority:

5.1 A Member State [contracting party] shall [may] free, prior and informed consent of [, in consultation with] the owners [holders] of traditional knowledge in accordance with its national law, may establish or appoint an appropriate national or regional competent authority or authorities. The functions may include, but need not be limited to, the following:

Alternative

Where so requested by traditional knowledge holders a competent authority (regional, national or local) may to the extent authorized by the holders:

(a) disseminate [disseminating] information and promoting practices about traditional knowledge and its protection under protection of its beneficiaries;

(b) ascertaining whether free, prior informed consent has been obtained;

Alternatives

(b) providing advice to traditional knowledge holders and users on the establishment of mutually agreed terms.

(b) applying the rules and procedures of the national legislation regarding prior and informed consent and to the fair and equitable sharing of benefits.

[(c) supervising fair and equitable benefit-sharing; and]

(d) assist [assisting], where possible and appropriate, the owners [holders] of traditional knowledge in the use, practice [exercise] and enforcement of their rights over their traditional knowledge.

(e) determine whether an act pertaining to traditional knowledge constitutes an infringement or another act of unfair competition in relation to that knowledge.

5.2 Where traditional knowledge fulfills the criteria under Article 1, and is not specifically attributable to or confined to a community, the authority may, with the consultation and approval of the traditional knowledge owners [holders] where possible, administer the rights of that traditional knowledge.

5.3 The identity of the [competent] national or regional authority or authorities shall [/should] be communicated to the World Intellectual Property Organization.

5.4 [The establishment of a national or regional authority or authorities under this article is without prejudice to the national law and the right of traditional knowledge owners [holders] to administer their rights according to their customary protocols, understandings, laws and practices.]

5.5 The established authority shall include authorities originating from indigenous peoples so that they form part of that authority

ARTICLE 6
EXCEPTIONS AND LIMITATIONS

Option 1

6.1 Measures for the protection of traditional knowledge should not restrict, according to domestic/national law, the generation, customary use, transmission, exchange and development of traditional knowledge by the beneficiaries, within and among communities in the traditional and customary context.

6.2 Limitations on protection should extend only to the utilization of traditional knowledge taking place outside the membership of the beneficiary community or outside traditional or cultural context.

6.3 Member States may adopt appropriate limitations or exceptions under domestic/national law, provided that the use of traditional knowledge:

Alternative

6.3 Member States may adopt appropriate limitations or exceptions under domestic/national law, with the prior and informed consent of the beneficiaries, provided that the use of traditional knowledge:

(a) acknowledges the beneficiaries, where possible;
(b) is not offensive or derogatory to the beneficiaries; and
(c) is compatible with fair practice.

Alternative

(a) does not conflict with the normal utilization of the traditional knowledge by the beneficiaries; and
(b) does not unreasonably prejudice the legitimate interests of the beneficiaries.

6.4 Regardless of whether such acts are already permitted under Article 6.2 or not, the following shall be permitted:

(a) the use of traditional knowledge in archives, libraries, museums or cultural institutions for non-commercial cultural heritage purposes, including for preservation, display, research and presentation should be permitted; and

(b) the creation of an original work of authorship inspired by traditional knowledge.

6.5 There shall be no right to exclude others from using knowledge that:

(a) has been independently created;
(b) derived from sources other than the beneficiary; or
(c) is known outside of the beneficiaries' community.

6.6 [Secret and sacred traditional knowledge should not be subjected to exceptions and limitations.]

Option 2

6.1 Measures for the protection of traditional knowledge should not restrict the generation, customary use, transmission, exchange and development of traditional knowledge by the beneficiaries, within and among communities in the traditional and customary context [consistent with national/domestic laws of the Member States].

6.2 Limitations on protection shall extend only to the utilization of traditional knowledge taking place outside the membership of the beneficiary community or outside traditional or cultural context.

6.3 Member States may adopt appropriate limitations or exceptions under domestic/national law, provided that the use of traditional knowledge:

Alternative

6.3 Member States may adopt appropriate limitations or exceptions under domestic/national law, with the prior and informed consent of the beneficiaries, provided that the use of traditional knowledge:

(a) acknowledges the beneficiaries, where possible;
(b) is not offensive or derogatory to the beneficiaries; and
(c) is compatible with fair practice.

Alternative

(a) does not conflict with the normal utilization of the traditional knowledge by the beneficiaries; and
(b) does not unreasonably prejudice the legitimate interests of the beneficiaries.

6.4 [Secret and sacred traditional knowledge shall not be subjected to exceptions and limitations.]

ARTICLE 7
TERM OF PROTECTION

[*Option 1*

Protection of traditional knowledge shall [should] last as long as the traditional knowledge fulfills the criteria of eligibility for protection according to Article 1.]

[*Option 2*

Duration of protection of traditional knowledge varies based upon the characteristics and value of traditional knowledge.]

ARTICLE 8
FORMALITIES

Option 1

8.1 The protection of traditional knowledge should [shall] not be subject to any formality.

Option 2

8.1 The protection of traditional knowledge requires some formalities.

[8.2 In the interests of transparency, certainty and the conservation of traditional knowledge, relevant national authorities may [should/shall] maintain registers or other records of traditional knowledge.]

ARTICLE 9
TRANSITIONAL MEASURES

9.1 These provisions apply to all traditional knowledge which, at the moment of the provisions coming into force, fulfills the criteria set out in Article 1.

Option 1

9.2 The state should ensure the necessary measures to secure the rights [acknowledged by national [or] domestic law,] already acquired by third parties in accordance with its national law and its international legal obligations.

Option 2

9.2 Continuing acts in respect of traditional knowledge that had commenced prior to the coming into force of these provisions and which would not be permitted or which would be otherwise regulated by these provisions, should be brought into conformity with these provisions within a reasonable period of time after they entry into force [, subject to respect for rights previously acquired by third parties in good faith].]

ARTICLE 10
CONSISTENCY WITH THE GENERAL LEGAL FRAMEWORK

Option 1

[10.1 Protection under this instrument shall take account of, and operate consistently with, other international [and regional and national] instruments [and processes] [, in particular the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity].]

Option 2

[10.1 [Protection under this instrument should leave intact] and should in no way affect the rights or the protection provided for in international legal instruments [, in particular the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity].]

[10.2 Nothing in this instrument may be construed as diminishing or extinguishing the rights that indigenous peoples or local communities [or nations] / beneficiaries have now or may acquire in the future.]

Alternative

10.2 In accordance with Article 45 of the United Nations Declaration on the Rights of Indigenous Peoples, nothing in this instrument may be construed as diminishing or extinguishing the rights that indigenous peoples have now or may acquire in the future.

ARTICLE 11
NATIONAL TREATMENT AND OTHER MEANS OF RECOGNIZING FOREIGN RIGHTS AND INTERESTS

[The rights and benefits arising from the protection of traditional knowledge under national/domestic measures or laws that give effect to these international provisions should be available to all eligible beneficiaries who are nationals or residents of a Member State [prescribed country] as defined by international obligations or undertakings. Eligible foreign beneficiaries should enjoy the same rights and benefits as enjoyed by beneficiaries who are nationals of the country of protection, as well as the rights and benefits specifically granted by these international provisions.]

National treatment as to all domestic law or national treatment as to laws specifically identified to fulfill these principles; or

Reciprocity; or

An appropriate means of recognizing foreign rights holders.

ARTICLE 12
TRANS-BOUNDARY COOPERATION

In instances where traditional knowledge is located in territories of different States / Member States [contracting Parties], those States / Member States [contracting Parties] should [shall] co-operate by taking measures that are supportive of and do not run counter to the objectives of this instrument. This cooperation should [shall] be done with the participation [and consent] / [and prior informed consent] of the traditional knowledge owners [holders].

Parties shall consider the need for modalities of a global mutual benefit sharing mechanism to address the fair and equitable sharing of benefits derived from the use of traditional knowledge that occurs in transboundary situations for which it is not possible to grant or obtain prior informed consent.

III. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

22. For every country, folklore is the root of the nation's cultural tradition; for mankind, it is the rich and varied but non-regenerative resources as well as the incomparably valuable heritage of human society. The Asian-African countries which are the owners of major resources are still to find a best possible model to protect the Expressions of Folklore (EoF) both at national, regional and international level. In the asymmetrical situation prevailing at present between the developing and the developed countries, the Member States should utilize all available options, whether inside or outside the Intellectual Property system, preventive or defensive, national or international, to seek the objective of effective protection of expressions of folklore.

23. The WIPO Intergovernmental Committee as an international forum was successful in drafting Provisions for the Protection of Expressions of folklore. Although these provisions are in the draft stage, they present a comprehensive framework for a future Convention. It is a welcoming trend that WIPO General Assembly had decided to renew its mandate by extending the period of IGC in September 2011 to next biennium 2012-2013, to continue with text based negotiations aimed at creating a legal mechanism to protect the Expressions of Folklore. Under the previous mandate, the IGC was to submit the texts of the international legal instrument to the WIPO General Assembly in September 2011. The Assembly would then decide on convening a Diplomatic Conference, in 2013.

24. As the IGC is moving forward finalizing the draft articles in the text based negotiations to protect the expressions of folklore (EoF), the issues would be discussed by the Inter-sessional Working Groups (IWGs) established for that purpose. It was decided that the three subjects, Expressions of Folklore, Traditional Knowledge and Genetic Resources would be treated on an equal footing and the each subject would be allocated an equal amount of time for discussion. In this regard, the AALCO Secretariat urges the Member States to utilize fully the IWG meeting on EoF, in order to bring out an effective legal instrument to protect the EoF in the Asian and African region. In order to protect the interests in developing the international instrument(s) on TK, TCEs and GRs, it was essential that an active participation from the developing countries, indigenous and local communities must be given priority.

IV. ANNEX

SECRETARIAT DRAFT
AALCO/RES/51/S 14
22 JUNE 2011

EXPRESSIONS OF FOLKLORE AND ITS INTERNATIONAL PROTECTION
(*Non-Deliberated)*

The Asian-African Legal Consultative Organization at its Fifty-First Annual Session,

Considering the Secretariat Document No. AALCO/51/ABUJA/2012/S 14;

Recognizing the importance of protection of the 'Expressions of Folklore' for the Asian-African countries;

Welcoming the World Intellectual Property Organization (WIPO) General Assembly initiative in establishing an Intergovernmental Committee (IGC) with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of Expressions of Folklore (EoF);

Also welcoming the work done by the Intersessional Working Group 1 in developing a legal instrument to protect the EoF:

1. **Expresses** the hope that the WIPO IGC would be able to reach agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of EoF.

2. **Requests** the Secretary-General to organize an Expert Meeting in cooperation with WIPO or with any other Member State(s), to facilitate the exchange of views by Member States on the issues relevant to the protection of EoF.

3. **Encourages** Member States to actively participate in the future work of the agenda item at all the WIPO meetings.

4. **Directs** the Secretariat to follow up the developments within the WIPO IGC on 'Expressions of Folklore', and to present the views of the AALCO Member States to the IGC, and

5. **Decides** to place the item on the provisional agenda of the Fifty-Second Annual Session.