



ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION (AALCO)

EXPLANATORY MEMORANDUM

**FIFTY-EIGHTH ANNUAL SESSION
DAR ES SALAAM, UNITED REPUBLIC OF TANZANIA
21 TO 25 OCTOBER 2019**

I. INTRODUCTION

The Provisional Agenda has been prepared following Rule 11(1) of the Statutory Rules. It may be recalled that until the Forty-First Annual Session of the AALCO, held in Abuja, Nigeria (2002), all the substantive items on the Organization's agenda were deliberated in the Annual Sessions and the Secretariat prepared reports on all the agenda items. However, before the Forty-Second Annual Session held in Seoul, Republic of Korea (2003), the Host Government of that Session proposed to the Secretary-General to divide all the items on the agenda into deliberated and non-deliberated items with a view to allocating more time for the exchange of views and experiences and intensive discussion on the deliberated items apart from discussion on organizational items. This approach was implemented for the first time during the Forty-Second Annual Session, held in Seoul (2003) and is being continuously followed since then.

Further, since the Forty-Ninth Annual Session held in Dar es Salaam, Tanzania (2010), the non-deliberated agenda items were being published in a single volume and the same were also placed for consideration of the Member States. During the past several years Member States have recommended austerity measures to be adopted by the Organization, including cutting down costs on its publications. In compliance with this observation, since the Fifty-Third Annual Session held in Tehran, Islamic Republic of Iran (2014) the Secretariat is not publishing the report on the non-deliberated agenda items.

Furthermore, since the Fifty-Fourth Annual Session held in Beijing, People's Republic of China (2015), sub-theme of the respective agenda for substantive matters has been introduced in an effort to have focused discussions among Member States.

At the forthcoming Fifty-Eighth Annual Session, to be held at Dar es Salam, Tanzania from 21 to 25 October 2019, apart from the consideration of items on Organizational matters, the deliberations would focus upon some of the important substantive items on AALCO's current agenda. These include: (i) "Items on the Agenda of the International Law Commission (ILC)"; (ii) "Law of the Sea (BBNJ)"; (iii) Violations of International Law in Palestine and Other Occupied Territories by Israel and Other International Legal Issues relating to the Question of

Palestine; (iv) Peaceful Settlement of Disputes; (v) International Law in Cyberspace; and (vi) International Trade and Investment.

The registration for the Session would begin on Sunday, 20 October (12 noon to 6.00 PM), and continue on Monday, 21 October 2019 before the Inaugural Session.

The decisions on matters of substantive character shall be adopted in the plenary meetings in the form of recommendations to be incorporated in a report for submission to the Member States. However, if a Member State is interested on having a resolution on a particular substantive matter, shall do so by proposing the same, as long as there is a consensus.

Resolutions shall be adopted on organizational and financial matters.

During the session, the following AALCO publications will be launched: (i) Yearbook of AALCO Volume XVI 2018; (ii) AALCO Journal of International Law 2017 & 2018; (iii) Newsletters Vol 11 (2) & Vol 12 (1); (iv) Special Study on “Violation of International Law in Palestine and Other Occupied Territories by Israel and the Legal Status of Jerusalem” and (v) The Verbatim record of the AALCO-ICRC Seminar on Autonomous Weapon Systems, Artificial Intelligence and Armed Conflict, held on 8 January 2019.

II. PROCEDURAL MATTERS

Chairing of the Session

Rule 3(1) of AALCO’s Statutory Rules provides that the President of the previous Session shall preside until the Member States elect a new President for the current Session. Accordingly, the President of the Fifty-Seventh Annual Session from Japan shall preside over the Inaugural Session and the First Meeting of the Delegations of AALCO Member States during the Fifty-Eighth Annual Session.

Composition of Delegations and Credentials

Rule 12(1) provides that at the Annual Session of the Organization, the Delegation of each Member State shall be composed of the Head of Delegation (Member), Alternate Members and Advisers.

Rule 12(2) provides that the official communication addressed to the Secretary- General shall serve the purpose of credentials for the delegations and observers. The communication shall be authenticated by a competent authority in the Ministry of Foreign Affairs or by the Diplomatic Missions of the concerned States. For the same purpose, an official communication from the relevant Organization addressed to the Secretary-General would serve as credentials for the Organizations in the UN system, inter-governmental organizations and other international institutions.

Adoption of Agenda

Rule 11(3) provides that the provisional agenda shall be placed before the Meeting of the Delegations of Member States for consideration. The Meeting may, at its discretion, delete any item included in the provisional agenda. A new item may be included on the proposal of one or more delegations, if the Meeting is of the opinion that the matter is one of urgency and there are sufficient reasons on account of which the item could not have been included in the provisional agenda. All decisions in this regard shall be taken by consensus. In the event that consensus cannot be reached after all efforts have been exhausted, a decision may be taken by two-third majority of those present and voting in secret ballot.

Rule 11(4) provides that the provisional agenda upon its approval by the Meeting of the Delegations of Member States shall be adopted as the agenda of the Session.

Admission of New Members

Rule 4 provides that the Organization may by a decision supported by a two-third majority of the Member States admit the participation of an Asian or African State, if such a State by written communication addressed to the Secretary-General of the Organization intimates its desire to participate in the Organization and its acceptance of the Statutes and the rules framed thereunder. Such decision may be taken by means of a resolution adopted in any of its sessions or by circulation if the period between the date of such application for admission and the next Session exceeds two months. In the latter case, the responses of the Participating States should be given within six weeks. If no response is received from any Participating State within the stipulated period, it shall be assumed that the concerned Participating State has no objection to the admission of the applicant State. The result will be communicated by the Secretary-General both to the Participating States and to the applicant State.

During this Annual Session, the Republic of Philippines, which has rejoined the Organization, on 27 July 2019 as the 48th Member State, will be ceremoniously welcomed.

Admission of Observers

The admission of Observers is governed by Rule 18, and will be taken up by the Meeting of Delegations of Member States. According to the Organization's present practice, there are three categories of observers, namely: (i) observers representing non-member Asian-African States; (ii) observers representing States other than those in the Asian-African region; and (iii) observers representing United Nations, its organs and specialized agencies, other inter-governmental organizations and other international institutions.

In addition to these three categories, in accordance with the decision taken at AALCO's Twenty-Second Annual Session held in Colombo, Sri Lanka (1981), Australia and New Zealand enjoy Permanent Observer Status.

Observer delegations have the right to attend all meetings, except those which are declared closed meetings and attended exclusively by Delegations of Member States, and do not have the right to vote.

Election of the President

Rule 3(1) provides that at each Annual Session, the Organization shall elect a President. It has been the practice that the President of the Organization is elected from among the dignitaries of the Member State hosting the Session.

Election of the Vice-President

Rule 3(3) concerning the election of the Vice-President provides that in the election of the President and Vice-President, regional representation will be taken into consideration to the extent possible. In accordance with the established practice, if the President is from the Asian region, the Vice-President may be elected, preferably from a Member State in the African region and vice versa.

III. ORGANIZATIONAL MATTERS

Report of the Secretary-General

Following Rule 20(7) of the Statutory Rules, the Secretary-General shall present an annual report to the Member States on the work of the Organization. The Report for the Fifty-Eighth Annual Session covers the activities of the Organization since its Fifty-Seventh Annual Session, including the substantive, organizational, financial and administrative matters.

Document: AALCO/58/DAR ES SALAAM/2019/ORG 1

Financial Report and Proposed Budget for the Year 2020

In accordance with Rule 24(4) of the Statutory Rules, the budgetary papers setting out the estimated expenditures likely to be incurred under appropriate budget heads and sub-heads for the year 2020, was presented during the 346th Meeting of the Liaison Officers, held on 13 December 2018. Further, the draft budget was discussed at the 347th Liaison Officers Meeting held on 7th February 2019. The budgetary proposals are now being submitted to Member States at the Fifty-Eighth Annual Session of AALCO for final approval.

Document: AALCO/58/DAR ES SALAAM/2018/ORG 2

Report on the AALCO's Regional Centres for Arbitration

A report on the activities of the AALCO's Regional Arbitration Centres located in Kuala Lumpur, Cairo, Lagos, Tehran and Nairobi respectively, is to be submitted for consideration at the Fifty-Eighth Annual Session.

Document: AALCO/58/DAR ES SALAAM/2019/ORG 3

IV. GENERAL DEBATE

At this Fifty-Eighth Annual Session, the Second General Meeting is meant for the General Statements to be delivered by the Hon'ble Ministers and Heads of the Delegations of Member States and Observers. It is recommended that general statements could focus on the overarching theme "Multilateralism and the International Legal Order (based on International Law)". *Heads of Delegations are requested to kindly consider limiting their speech to 10 minutes due to paucity of time, so that the general statements could finish within the stipulated time.* However, if they wish to give a longer statement, the same could be handed over to the Secretariat for reproduction in the Verbatim Record of the Session.

Submission of Statements

The Delegations wishing to make statements (General statements, and Statements on organizational and substantive matters) are kindly requested to read the statement at a reasonable speed and to hand over three copies of their statement well in advance to the Secretariat. This would enable the interpreters (Arabic and English) to provide quality interpretation and ensure that the impact of the statements of the delegations is equally clear in all languages. It would be highly appreciated if soft copies of the statements could also be made available to the Secretariat.

For the accurate and speedy preparation of the Verbatim Record of the Annual Session, it would be highly appreciated if the Arab member States could provide an English version of their General Statement during the Annual Session.

Venue of the Upcoming Annual Session (Fifty-Ninth)

According to sub-rule (1) of Rule 10 of the Statutory Rules, the regular Annual Session of the Organization shall, in accordance with Article 4 of the Revised Statutes of AALCO, be held once in a year and such meetings shall, to the extent possible, be held in one of the Member States by geographical rotation. Those member States interested in hosting the next Annual Session are encouraged to inform the Secretariat at the earliest.

V. SUBSTANTIVE MATTERS: The following six topics shall be discussed during the Fifty-Eighth Annual Session, Namely:

1. International Law Commission

For this Annual Session, the Secretariat has prepared the document "Report on Matters relating to the Work of the International Law Commission at its Seventy-First Session." In accordance with Article 1 (d) of the AALCO's Statutes, the Organization is mandated to 'examine subjects that are under consideration by the International Law Commission (ILC or the Commission) and to forward the views of the Organization to the Commission; to consider the

reports of the Commission and to make recommendations thereon, wherever necessary to the Member States.”

Pursuant to this mandate, the Report of the Work of the International Law Commission at its Session is taken up for consideration at the AALCO’s Annual Sessions. In keeping with this long-standing practice, the Secretariat document for the Fifty-Eighth Session presents an overview of the ILC’s work during its Seventy-First Session.

The brief of the Secretariat for this year would provide a general overview of the progress of the work completed by the Commission at its Seventy-First Session (2019) on topics on its agenda i.e. immunity of State officials from foreign criminal jurisdiction, crimes against humanity, protection of the environment in relation to armed conflict, peremptory norms of general international law (*jus cogens*), succession of States in respect of State responsibility, and general principles of law.

Please note that the Seventy-First Session of the Commission was underway at the time of preparing the brief and the documents on the aforesaid topics are available only in part, and shall only be made available in the coming months of 2019. In light of this limitation every effort has been made by the Secretariat to include the latest information on the work of the Commission at its Seventy-First Session (2019), and should any new material come to light all efforts shall be made to place the same before the Member States in the form of additional documents.

Document: AALCO/58/DAR ES SALAAM/2019/SD/S1

2. The Law of the Sea

It may be recalled that the agenda item “The Law of the Sea” was taken up for consideration by the AALCO at the initiative of the Government of Indonesia in 1970. Since then it has been considered as one of the priority items at successive Annual Sessions of the Organization.

The pertinence of the suggested theme for the Fifty-Eighth Annual Session, i.e., conservation and sustainable use of BBNJ, shall be highlighted by noting down the spectrum of threats to marine resources and biodiversity from established and emerging human uses in the vast areas of the ocean beyond national jurisdiction (ABNJ). In the light of this, the quest of the international community to negotiate and draft an international legally binding instrument (ILBI) under the UNCLOS on the conservation and sustainable use of BBNJ shall be introduced.

After discerning the gaps in the UNCLOS to effectively address the theme, the milestones in the progress towards drafting the ILBI shall be discussed. The participation of AALCO Member States in the three sessions of the Intergovernmental Conference (two sessions have already been held, the third session is scheduled in August 2019), individually or as a part of coalition groups shall be noted and the emerging views discussed. An attempt shall be made to

adduce a detailed illustration of the positions taken by the Member States on the following issues:

- Indeterminacy vis-à-vis the principle applicable to Marine Genetic Resources (MGR's) of ABNJ;
- Capacity Building and Technology Transfer;
- Area based Management Tools (ABMT's), including Marine Protected Areas (MPA's) and
- Environmental Impact Assessments (EIA's).

The draft text of an agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction, released in June 2019 to “facilitate further progress in the negotiations”, shall be pursued.

Document: AALCO/58/DAR ES SALAAM/2019/SD/S2

3. Violations of International Law in Palestine and other Occupied Territories by Israel and other International Legal Issues Related to the Question of Palestine.

The item “Deportation of Palestinians in Violation of International Law particularly the Fourth Geneva Convention of 1949 and the Massive Immigration and Settlement of Jews in Occupied Territories” was taken up at the AALCO's Twenty-Seventh Session, held in Singapore (1988), at the initiative of the Government of the Islamic Republic of Iran.

More recently, in light of the grave violations of international law by the State of Israel in Gaza, the issue was deliberated at the Fifty-Fourth Annual Session held in Beijing, (2015) and AALCO/RES/54/S4 was passed which changed the title of the agenda item to “Violations of International Law in Palestine and Other Occupied Territories by Israel and other International Legal Issues related to the Question of Palestine.”

The present brief, after summarizing the deliberations on the topic at the Fifty-Seventh Annual Session (2018), focuses on the international affirmation as regards the legal status of Jerusalem in the context of the decision of the United States to shift its embassy in Israel to the city, as well as the recognition by some States of Israeli sovereignty over the Golan Heights.

In addition as stated above a Special Study on the topic “Palestine and Other Occupied territories by Israel and the legal Status of Jerusalem”, shall also be launched at the Session.

Document: AALCO/58/DAR ES SALAAM/2019/SD/S4

4. International Trade and Investment Law

International Trade and Investment Law has been a long- standing topic on the work programme of AALCO, as it deals with a number of matters of concern for the AALCO Member States. Although the two topics are comprised of related issues of International Economic Law, it would

be prudent to deal with the topics separately due to the different legal regimes that they are subject to.

The topic ‘WTO as a Framework Agreement and Code of Conduct for World Trade’ has continuously been on the agenda since the Thirty-Fourth Annual Session of AALCO (1995), held in Doha, Qatar and has been the subject of key deliberations at all subsequent annual sessions.

As directed, the Secretariat has since then, monitored all developments relating to the WTO and its agreements particularly the legal aspects of the dispute settlement mechanism. At the Fifty-Fifth Annual Session of AALCO (2016) held in New Delhi, India, the Secretariat was mandated 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. Pursuant to this mandate the Secretariat has regularly organized seminars, and capacity- building programs, most recently exclusively focused on WTO issues at the Institute of Malaysian and International Studies (IKMAS) in 2017.

The topic International Investment Law has been discussed at a number of Annual Sessions under the wider topic of Economic and Trade Law Matters, and was examined within the ambit of Regional Cooperation in the Context of the New International Economic Order (NIEO). As part of the avenues for regional cooperation on economic matters, a report on matters pertaining to bilateral investment treaties, investment guarantees and insurance, and petroleum export was placed before the Trade Law Sub-Committee at the Twenty-First Annual Session in Jakarta, Indonesia. At the session, investment protection and guarantees as well as settlement of investment disputes were discussed laying the groundwork for the Ministerial Meeting held in Kuala Lumpur, Malaysia later that year. The Ministerial Meeting decided to direct the Secretariat to prepare Models of Investment Agreements that contained the salient features of the popular investment agreements prevalent at the time, which was placed before the Trade Law Sub-Committee at the following Annual Session in Colombo, Sri Lanka (1981).

More recently, in the light of the renewed interest in reforming the Investment Protection Mechanisms and Bilateral Investment Treaties the AALCO Secretariat has been conducting workshops and capacity building programs. In 2016, the Secretariat organized a seminar titled ‘International Investment and WTO’ at its headquarters while in November 2018, a Seminar on ‘Reviewing Reforms to the International Investment Regime and to the Investor-State Dispute Settlement Mechanism: Perspectives from the Asian-African Regions’ was organized at Arusha, United Republic of Tanzania.

The Brief prepared by the Secretariat shall deal with the following sub-topics:-

- (a) **Mediation in Investment Disputes:** The topic comprises of a study of the benefits of the application of mediation to investment disputes saving time and costs for both parties to an investment dispute. Although the study recognizes that not all investment disputes are

capable of being mediated, the benefits that mediation has provided to disputes dealing with other subject matters can equally yield dividends in this field. The uniqueness of the solutions that mediation offers has been recognized as seminal in maintaining the crucial commercial relationship between the parties, which assumes utmost importance in investment disputes that usually concern long term commitments.

The signing of the United Nations Convention on International Settlement Agreements resulting from Mediation, 2019 ('the Singapore Convention') has also provided a regime for the cross-border enforcement of mediated settlements, providing further legal security to private investors looking to recover sums from host governments. The brief shall delve into all aspects of the application of mediation to investment disputes and how the same may be promoted bringing benefits to all stake holders. The major challenges to popularizing resort to meditation in the settlement of investment disputes shall also be addressed.

- (b) **Third Party Funding in ISDS Mechanisms:** Third Party Funding in ISDS is a recent phenomenon which is rapidly gaining popularity amongst claimants under various bilateral and regional investment agreements. As such, it purports to improve the dispute settlement system for investment treaty claims by promoting access to justice for investors who do not have the means to institute a claim against a foreign government. On the other hand, it raises a number of concerns for host States, primarily among them being the proliferation of claims against States some of which may be considered to be frivolous or susceptible to be employed for unfair bargaining with public authorities.

Concerns such as conflict of interests for arbitrators is also a major issue, currently being discussed at a number of national, regional and international forums. While the developed States such as the UK, Canada and the United States have been quick to recognize the utility of third party funding, they have also included certain safeguards in their domestic and international regulatory framework. In the Asian-African region, Singapore, Viet Nam and Hong Kong are some of the jurisdictions that have also followed suit and preferred instituting regulation in their legal framework over rejection of the practice.

The brief prepared by the secretariat provides a brief historical background of the growth of third party funding in investment arbitration and its treatment by arbitral tribunals applying existing treaties and principles to the practice. The brief also attempts to assess the state of regulation of third party funding in existing and model proposed treaties as well as in guidelines and other 'soft law' instruments about which there has been considerable enthusiasm by States, parties to the multitude of investment treaties. The various options for instituting effective regulation of third party funding is the major focus of the brief.

(c) WTO Reforms: WTO Reforms

The multilateral trading regime institutionalized in WTO was engendered to liberalize trade towards zero tariff. The dispute settlement mechanism of the WTO, often referred to as the “crown jewel” of the system, is presently facing unprecedented crisis. It is now plagued by political divisiveness and malaise; and the threat of return of a power-based world economic order, which allows big players to act unilaterally and use retaliation to get their way, looms large. This has called for deliberation on certain WTO reforms.

The state of play of WTO dispute settlement shall be discussed in the brief to decipher the sources of the current impasse. Suggested reforms, which include certain institutional reforms at the Appellate Body level as well as the Panel level, shall be explored, in order to recommend options- for the kind consideration of the AALCO Member States- that could be adopted to ensure that the system moves forward.

AALCO/58/DAR ES SALAAM/2019/SD/S13

5. International Law in Cyberspace

The topic ‘International law in Cyberspace’ was proposed by the People’s Republic of China, in accordance with the Statutory Rules of AALCO as an agenda item for the Fifty-Third Annual Session of AALCO held in Tehran, Iran in 2014 and was accepted by Consensus. The agenda item was subsequently deliberated in the Fifty-Fourth Annual Session held in Beijing, China in April 2015, during which Member States decided to establish an Open-Ended Working Group on International Law in Cyberspace to further discuss the matter through workshops and meetings in cooperation with Member States.

Three meetings of the AALCO Open-Ended Working Group have taken place so far wherein significant issues pertaining to the subject have been discussed. Prof. Zhixiong Huang of Wuhan University Law School of the People’s Republic of China is the Special Rapporteur on the subject.

The brief on International Law in Cyberspace will focus its attention on the following three topics:

- a. International Cooperation for Combating Cybercrime. This part would focus on specific issues relating to Member’s States response to the questionnaire.
- b. Challenging Issues of International Law in Cyberspace, including
 - the application of the Principle of Non-Interference in Cyberspace
 - Data Sovereignty, Transborder Data Flow and Data Security
 - Regulating Online Harmful Content
- c. Peaceful Use of Cyberspace

In addition, the response of the Member States preceding the Fourth Working Group Meeting will be part of the brief.

The Fourth Working Group Meeting on International Law in Cyberspace will be held from 2-4 September 2019, in Hangzhou, China. The Chairman of the Working Group will present his report during the plenary meeting, in which this topic will be discussed.

Document: AALCO/58/DAR ES SALAAM/2019/SD/S17

6. Peaceful Settlement of Disputes

The topic ‘Peaceful Settlement of Disputes’ was proposed by the Government of Japan as a Provisional Agenda of AALCO to be discussed in the Fifty-Seventh Annual Session of AALCO in Tokyo, Japan in 2018 in accordance with the Statutory Rules of AALCO. Pursuant to the proposal, the Secretariat prepared a Preliminary Study on the topic, highlighting the major aspects of the subject and giving a broad overview of the topic under international law. At the Fifty-Seventh Annual Session, Member States welcomed the Preliminary Study and proposed the continuation of deliberations in the next Annual Session.

In light of the same, the Secretariat will prepare a brief on the topic ‘Peaceful Settlement of Disputes’ for the Fifty-Eighth Annual Session that will focus on three specific aspects. *Firstly*, the role of international organizations in the peaceful settlement of disputes. This part will highlight the specific role international organizations (UN) have been playing in facilitating the peaceful settlement of disputes between States. *Secondly*, peaceful settlement of environment disputes. This part will focus on adjudication and peaceful settlement of environmental disputes with specific focus on landmark cases. *Lastly*, the prohibition on the use of force or threat of force, which would explain the international law framework for the peaceful settlement of disputes, with specific focus on the UN Charter and practice.

Document: AALCO/58/DAR ES SALAAM/2019/SD/S18.